

European Commission

# **EU Competition Law**

## **Rules Applicable to Antitrust Enforcement**

### **Volume 2: Sector specific rules**

**Situation as at 1st December 2011**

**COMPETITION HANDBOOKS**

Brussels, 2011

# EU Competition law

## Rules applicable to Antitrust Enforcement – Sector specific rules

Situation as at 1st December 2011

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## **A. AGRICULTURE**



▼B▼M1**COUNCIL REGULATION (EC) No 1184/2006****of 24 July 2006****applying certain rules of competition to the production of and trade in certain agricultural products**▼B

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 36 and 37 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>.

Whereas:

- (1) The content of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products <sup>(2)</sup> has been amended <sup>(3)</sup>. In the interests of clarity and rationality the said Regulation should be codified.
- (2) By virtue of Article 36 of the Treaty one of the matters to be decided under the common agricultural policy is whether the rules on competition laid down in the Treaty are to apply to the production of, and trade in, agricultural products. Accordingly, the provisions of this Regulation should be supplemented in the light of developments in that policy.
- (3) The rules on competition relating to the agreements, decisions and practices referred to in Article 81 of the Treaty and to the abuse of dominant positions are to be applied to the production of, and trade in, agricultural products, in so far as their application does not impede the functioning of national organisations of agricultural markets or jeopardise attainment of the objectives of the common agricultural policy.
- (4) Special attention is warranted in the case of farmers' organisations the particular objective of which is the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardises attainment of the objectives of Article 33 of the Treaty.
- (5) In order both to avoid compromising the development of a common agricultural policy and to ensure certainty in the law and non-discriminatory treatment of the undertakings concerned, the Commission should have sole power, subject to review by the Court of Justice, to determine whether the conditions provided for in the two preceding recitals are fulfilled as regards the agreements, decisions and practices referred to in Article 81 of the Treaty.

<sup>(1)</sup> Opinion of the European Parliament of 27 April 2006 (not yet published in the Official Journal).

<sup>(2)</sup> OJ 30, 20.4.1962, p. 993/62. Regulation as amended by Regulation No 49 (OJ 53, 1.7.1962, p. 1571/62).

<sup>(3)</sup> See Annex I.

**▼B**

- (6) In order to implement, as part of the development of the common agricultural policy, the rules on aid for production of, or trade in, agricultural products, the Commission should be in a position to draw up a list of existing, new or proposed types of aid, to make appropriate observations to the Member States and to propose suitable measures to them,

HAS ADOPTED THIS REGULATION:

**▼M3***Article 1*

This Regulation shall lay down the rules to be applied as regards the applicability of Articles 81 to 86 and certain provisions of Article 88 of the Treaty in relation to production of, or trade in, the products listed in Annex I to the Treaty with the exception of the products covered by Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) <sup>(1)</sup>.

**▼M1***Article 1a*

Articles 81 to 86 of the Treaty and provisions made for their implementation shall, subject to Article 2 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty which relate to the production of, or trade in, the products referred to in Article 1.

**▼B***Article 2***▼M1**

1. Article 81(1) of the Treaty shall not apply to those agreements, decisions and practices referred to in Article 1a of this Regulation which form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 33 of the Treaty.

**▼B**

In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers should be heard, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

The Commission shall so determine either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.

3. The publication shall state the names of the parties and the main content of the decision. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

<sup>(1)</sup> OJ L 299, 16.11.2007, p. 1.



**▼M1***Article 3*

Article 88(1) and of the first sentence of Article 88(3) of the Treaty shall apply to aid granted for the production of, or trade in, the products referred to in Article 1.

**▼B***Article 4*

Regulation No 26 shall be repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

*Article 5*

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

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

**▼B**

*ANNEX I*

**Repealed Regulation with its amendment**

Council Regulation No 26	(OJ 30, 20.4.1962, p. 993/62)
Council Regulation No 49	(OJ 53, 1.7.1962, p. 1571/62) Only Article 1(1)(g)

**▼B***ANNEX II***Correlation table**

Regulation No 26	This Regulation
Article 1	Article 1
Article 2(1)	Article 2(1)
Article 2(2)	Article 2(2), first subparagraph
Article 2(3)	Article 2(2), second subparagraph
Article 2(4)	Article 2(3)
Article 3	
Article 4	Article 3
	Article 4
Article 5	Article 5
	Annex I
	Annex II

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► **B** **COUNCIL REGULATION (EC) No 1234/2007**  
**of 22 October 2007**  
**establishing a common organisation of agricultural markets and on specific provisions for certain**  
**agricultural products (Single CMO Regulation)**  
(OJ L 299, 16.11.2007, p. 1)

Amended by:

		Official Journal		
		No	page	date
► <b><u>M1</u></b>	Council Regulation (EC) No 247/2008 of 17 March 2008	L 76	1	19.3.2008
► <b><u>M2</u></b>	Council Regulation (EC) No 248/2008 of 17 March 2008	L 76	6	19.3.2008
► <b><u>M3</u></b>	Council Regulation (EC) No 361/2008 of 14 April 2008	L 121	1	7.5.2008
► <b><u>M4</u></b>	Council Regulation (EC) No 470/2008 of 26 May 2008	L 140	1	30.5.2008
► <b><u>M5</u></b>	Commission Regulation (EC) No 510/2008 of 6 June 2008	L 149	61	7.6.2008
► <b><u>M6</u></b>	Council Regulation (EC) No 13/2009 of 18 December 2008	L 5	1	9.1.2009
► <b><u>M7</u></b>	Council Regulation (EC) No 72/2009 of 19 January 2009	L 30	1	31.1.2009
► <b><u>M8</u></b>	Commission Regulation (EC) No 183/2009 of 6 March 2009	L 63	9	7.3.2009
► <b><u>M9</u></b>	Commission Regulation (EC) No 435/2009 of 26 May 2009	L 128	12	27.5.2009
► <b><u>M10</u></b>	Council Regulation (EC) No 491/2009 of 25 May 2009	L 154	1	17.6.2009
► <b><u>M11</u></b>	Council Regulation (EC) No 1047/2009 of 19 October 2009	L 290	1	6.11.2009
► <b><u>M12</u></b>	Council Regulation (EC) No 1140/2009 of 20 November 2009	L 312	4	27.11.2009
► <b><u>M13</u></b>	Commission Regulation (EU) No 513/2010 of 15 June 2010	L 150	40	16.6.2010
► <b><u>M14</u></b>	Regulation (EU) No 1234/2010 of the European Parliament and of the Council of 15 December 2010	L 346	11	30.12.2010

Corrected by:

- **C1** Corrigendum, OJ L 26, 30.1.2009, p. 6 (361/2008)
- **C2** Corrigendum, OJ L 230, 2.9.2009, p. 6 (72/2009)
- **C3** Corrigendum, OJ L 220, 21.8.2010, p. 76 (72/2009)



**COUNCIL REGULATION (EC) No 1234/2007**

**of 22 October 2007**

**establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 36 and 37 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

Whereas:

- (1) The operation and development of the common market for agricultural products should be accompanied by the establishment of a common agricultural policy (hereinafter CAP) to include, in particular, a common organisation of agricultural markets (hereinafter CMO) which may, according to Article 34 of the Treaty, take various forms depending on the product.
- (2) Since the introduction of a CAP, the Council has adopted 21 CMOs for each product or group of products, each governed by a separate Council basic regulation:
  - Council Regulation (EEC) No 234/68 of 27 February 1968 on the establishment of a common organisation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage <sup>(2)</sup>,
  - Council Regulation (EEC) No 827/68 of 28 June 1968 on the common organisation of the market in certain products listed in Annex II to the Treaty <sup>(3)</sup>,
  - Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat <sup>(4)</sup>,
  - Council Regulation (EEC) No 2771/75 of 29 October 1975 on the common organisation of the market in eggs <sup>(5)</sup>,
  - Council Regulation (EEC) No 2777/75 of 29 October 1975 on the common organisation of the market in poultrymeat <sup>(6)</sup>,

<sup>(1)</sup> Opinion of 24 May 2007 (not yet published in the Official Journal).

<sup>(2)</sup> OJ L 55, 2.3.1968, p. 1. Regulation as last amended by Regulation (EC) No 806/2003 (OJ L 122, 16.5.2003, p. 1).

<sup>(3)</sup> OJ L 151, 30.6.1968, p. 16. Regulation as last amended by Regulation (EC) No 865/2004 (OJ L 161, 30.4.2004, p. 97).

<sup>(4)</sup> OJ L 282, 1.11.1975, p. 1. Regulation as last amended by Regulation (EC) No 1913/2005 (OJ L 307, 25.11.2005, p. 2).

<sup>(5)</sup> OJ L 282, 1.11.1975, p. 49. Regulation as last amended by Regulation (EC) No 679/2006 (OJ L 119, 4.5.2006, p. 1).

<sup>(6)</sup> OJ L 282, 1.11.1975, p. 77. Regulation as last amended by Regulation (EC) No 679/2006.

**▼B**

- Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organisation of the market in raw tobacco <sup>(1)</sup>,
- Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas <sup>(2)</sup>,
- Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables <sup>(3)</sup>,
- Council Regulation (EC) No 2201/96 of 28 October 1996 on the common organisation of the markets in processed fruit and vegetable products <sup>(4)</sup>,
- Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal <sup>(5)</sup>,
- Council Regulation (EC) No 1255/1999 of 17 May 1999 on the common organisation of the market in milk and milk products <sup>(6)</sup>,
- Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine <sup>(7)</sup>,
- Council Regulation (EC) No 1673/2000 of 27 July 2000 on the common organisation of the markets in flax and hemp grown for fibre <sup>(8)</sup>,
- Council Regulation (EC) No 2529/2001 of 19 December 2001 on the common organisation of the market in sheepmeat and goatmeat <sup>(9)</sup>,
- Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals <sup>(10)</sup>,
- Council Regulation (EC) No 1785/2003 of 29 September 2003 on the common organisation of the market in rice <sup>(11)</sup>,

<sup>(1)</sup> OJ L 215, 30.7.1992, p. 70. Regulation as last amended by Regulation (EC) No 1679/2005 (OJ L 271, 15.10.2005, p. 1).

<sup>(2)</sup> OJ L 47, 25.2.1993, p. 1. Regulation as last amended by Regulation (EC) No 2013/2006 (OJ L 384, 29.12.2006, p. 13).

<sup>(3)</sup> OJ L 297, 21.11.1996, p. 1. Regulation as last amended by Regulation (EC) No 1182/2007 (OJ L 273, 17.10.2007, p. 1).

<sup>(4)</sup> OJ L 297, 21.11.1996, p. 29. Regulation as last amended by Regulation (EC) No 1182/2007.

<sup>(5)</sup> OJ L 160, 26.6.1999, p. 21. Regulation as last amended by Regulation (EC) No 1913/2005.

<sup>(6)</sup> OJ L 160, 26.6.1999, p. 48. Regulation as last amended by Regulation (EC) No 1152/2007 (OJ L 258, 4.10.2007, p. 3).

<sup>(7)</sup> OJ L 179, 14.7.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

<sup>(8)</sup> OJ L 193, 29.7.2000, p. 16. Regulation as last amended by Regulation (EC) No 953/2006 (OJ L 175, 29.6.2006, p. 1).

<sup>(9)</sup> OJ L 341, 22.12.2001, p. 3. Regulation as last amended by Regulation (EC) No 1913/2005.

<sup>(10)</sup> OJ L 270, 21.10.2003, p. 78. Regulation as last amended by Regulation (EC) No 735/2007 (OJ L 169, 29.6.2007, p. 6).

<sup>(11)</sup> OJ L 270, 21.10.2003, p. 96. Regulation as last amended by Regulation (EC) No 797/2006 (OJ L 144, 31.5.2006, p. 1).

**▼B**

- Council Regulation (EC) No 1786/2003 of 29 September 2003 on the common organisation of the market in dried fodder <sup>(1)</sup>,
  - Council Regulation (EC) No 865/2004 of 29 April 2004 on the common organisation of the market in olive oil and table olives <sup>(2)</sup>,
  - Council Regulation (EC) No 1947/2005 of 23 November 2005 on the common organisation of the market in seeds <sup>(3)</sup>,
  - Council Regulation (EC) No 1952/2005 of 23 November 2005 concerning the common organisation of the market in hops <sup>(4)</sup>,
  - Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector <sup>(5)</sup>.
- (3) In addition, the Council has adopted three regulations with specific rules for certain products without, however, setting up a CMO for these products:
- Council Regulation (EC) No 670/2003 of 8 April 2003 laying down specific measures concerning the market in ethyl alcohol of agricultural origin <sup>(6)</sup>,
  - Council Regulation (EC) No 797/2004 of 26 April 2004 on measures improving general conditions for the production and marketing of apiculture products <sup>(7)</sup>,
  - Council Regulation (EC) No 1544/2006 of 5 October 2006 laying down special measures to encourage silkworm rearing <sup>(8)</sup>.
- (4) The abovementioned Regulations (hereinafter basic regulations) are often accompanied by a collateral set of further Council regulations. Most of the basic regulations follow the same structure and have numerous provisions in common. This is the case in particular with regard to the rules on trade with third countries and the general provisions, but also, to a certain extent for the rules related to the internal market. The basic regulations often contain different solutions to identical or similar problems.
- (5) The Community has, for some time, been pursuing the aim of simplifying the regulatory environment of the CAP. Accordingly, a horizontal legal framework for all direct payments was established amalgamating an array of support systems into a single payment scheme by the adoption of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common

<sup>(1)</sup> OJ L 270, 21.10.2003, p. 114. Regulation as last amended by Regulation (EC) No 456/2006 (OJ L 82, 21.3.2006, p. 1).

<sup>(2)</sup> OJ L 161, 30.4.2004, p. 97, corrected by OJ L 206, 9.6.2004, p. 37.

<sup>(3)</sup> OJ L 312, 29.11.2005, p. 3. Regulation as amended by Regulation (EC) No 1247/2007 (OJ L 282, 26.10.2007, p. 1).

<sup>(4)</sup> OJ L 314, 30.11.2005, p. 1.

<sup>(5)</sup> OJ L 58, 28.2.2006, p. 1. Regulation as last amended by Regulation (EC) No 1260/2007 (OJ L 283, 27.10.2007, p. 1).

<sup>(6)</sup> OJ L 97, 15.4.2003, p. 6.

<sup>(7)</sup> OJ L 125, 28.4.2004, p. 1.

<sup>(8)</sup> OJ L 286, 17.10.2006, p. 1.

**▼B**

rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers<sup>(1)</sup>. This approach should also be applied to the basic regulations. In this context the rules contained therein should be amalgamated into a single legal framework and sectoral approaches be replaced by horizontal ones where this is possible.

- (6) In the light of the aforementioned considerations, the basic Regulations should be repealed and replaced by one single Regulation.
  
- (7) Simplification should not lead to calling into question the policy decisions that have been taken over the years in the CAP. This Regulation should, therefore, essentially be an act of technical simplification. It should not, therefore, repeal or change existing instruments unless they have become obsolete, redundant or should not, by their very nature, be dealt with at Council level, nor should it provide for new instruments or measures.
  
- (8) Against this background, this Regulation should not include those parts of CMOs which are subject to policy reforms. This is the case with regard to most parts of the fruit and vegetables, processed fruit and vegetables and the wine sectors. The provisions contained in the respective Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1493/1999 should, therefore, be incorporated into this Regulation only to the extent that they are not themselves subject to any policy reforms. The substantive provisions of these CMOs should only be incorporated once the respective reforms have been enacted.
  
- (9) The CMOs for cereals, rice, sugar, dried fodder, seeds, olive oil and table olives, flax and hemp, bananas, milk and milk products, and silkworms provide for marketing years mainly adapted to the biological production cycles of each of these products. The marketing years as they have been fixed in these sectors should, therefore, be incorporated into this Regulation.
  
- (10) In order to stabilise the markets and to ensure a fair standard of living for the agricultural community, a differentiated system of price support for the different sectors has been developed, in parallel to the introduction of direct support schemes, taking account of the different needs in each of these sectors on the one hand and the interdependence between different sectors on the other. These measures take the form of public intervention or the payment of aid for the private storage of products of the cereals, rice, sugar, olive oil and table olives, beef and veal, milk and milk products, pigmeat and sheepmeat and goatmeat sectors. Given the objectives of the present Regulation, there is, therefore, a need to maintain price support measures where they are foreseen in the instruments as they were developed in the past, without making any substantial changes as compared to the previous legal situation.

<sup>(1)</sup> OJ L 270, 21.10.2003, p. 1. Regulation as last amended by Commission Regulation (EC) No 552/2007 (OJ L 131, 23.5.2007, p. 10).



**▼B**

- (11) For the sake of clarity and transparency, the provisions governing these measures should be made subject to a common structure, whilst maintaining the policy pursued in each sector. For that purpose it is appropriate to distinguish between reference prices and intervention prices.
- (12) The CMOs for cereals, beef and veal and milk and milk products contained provisions according to which the Council, acting in accordance with the procedure laid down in Article 37(2) of the Treaty, may change the price levels. Given the sensitivity of the price systems it should be made clear that the possibility under Article 37(2) to change price levels exists with regard to all sectors covered by this Regulation.
- (13) Moreover, the CMO for sugar provided for the possibility of reviewing the standard qualities of sugar, as further defined in Regulation (EC) No 318/2006, to take account, in particular, of commercial requirements and developments in technical analysis. That Regulation therefore provided for the power of the Commission to amend the relevant Annex. There is a particular need to maintain that possibility in order to enable the Commission to take swift action if necessary.
- (14) To ensure reliable information on Community market prices for sugar, the price reporting system as provided for in the CMO for sugar should be incorporated into this Regulation, on the basis of which market price levels for white sugar should be determined.
- (15) To prevent the system of intervention in respect of cereals, rice, butter and skimmed milk powder from becoming an outlet in itself the possibility to provide for the opening of public intervention only during certain periods of the year should be maintained. In respect of beef and veal products, pigmeat and butter, the opening and closing of public intervention should be dependent on market price levels during a certain period. As regards maize, rice and sugar, the limitation of the quantities up to which buying-in under public intervention can be carried out, should be maintained. With regard to butter and skimmed milk powder, the power of the Commission needs to be maintained to suspend the normal buying-in once a certain quantity is reached or to replace it by buying-in under a tender procedure.
- (16) The price level at which buying-in under public intervention should be carried out was, in the past, decreased in the CMOs for cereals, rice and beef and veal and fixed along with the introduction of direct support schemes in these sectors. Aid under those schemes on the one hand and intervention prices on the other are, therefore, closely linked. For the products of the milk and milk products sector, that price level was fixed in order to promote consumption of the products concerned and improve their competitiveness. In the rice and sugar sectors, the prices were fixed in order to contribute to stabilising the market in instances where the market price in a given marketing year falls below the reference price fixed for the following marketing year. These policy decisions of the Council still remain valid.

**▼B**

- (17) As in previous CMOs, this Regulation should provide for the possibility of disposal of products bought into public intervention. Such measures should be taken in a way that avoids market disturbances and that ensures equal access to the goods and equal treatment of purchasers.
- (18) Due to its intervention stocks of various agricultural products, the Community has the potential means to make a significant contribution towards the well-being of its most deprived citizens. It is in the Community interest to exploit this potential on a durable basis until the stocks have been run down to a normal level by introducing appropriate measures. In the light of these considerations, Council Regulation (EEC) No 3730/87 of 10 December 1987 laying down the general rules for the supply of food from intervention stocks to designated organisations for distribution to the most deprived persons in the Community <sup>(1)</sup> has, so far, provided for the distribution of food by charitable organisations. This important social measure, which can be of considerable value to the most deprived persons, should be maintained and incorporated into the framework of this Regulation.
- (19) In order to contribute to balancing the milk market and to stabilising market prices, the CMO for milk and milk products has provided for the granting of aid for private storage in respect of cream, certain butter products and certain cheese products. Moreover, the Commission has been empowered to decide to grant aid for private storage of certain other cheese products as well as for white sugar, certain kinds of olive oil and of certain beef and veal products, skimmed milk powder, pigmeat and sheepmeat and goatmeat. Given the purpose of this Regulation, these measures should be maintained.
- (20) Council Regulation (EC) No 1183/2006 of 24 July 2006 concerning the Community scale for the classification of carcasses of adult bovine animals <sup>(2)</sup>, Council Regulation (EEC) No 1186/90 of 7 May 1990 extending the scope of the Community scale for the classification of carcasses of adult bovine animals <sup>(3)</sup>, Council Regulation (EEC) No 3220/84 of 13 November 1984 determining the Community scale for grading pig carcasses <sup>(4)</sup> and Council Regulation (EEC) No 2137/92 of 23 July 1992 concerning the Community scale for the classification of carcasses of ovine animals and determining the Community standard quality of fresh or chilled sheep carcasses <sup>(5)</sup> provide for Community scales for the classification of carcasses in the beef and veal, pigmeat and sheepmeat and goatmeat sectors. These schemes are essential for the purposes of price recording and for the application of the intervention arrangements in those sectors. Moreover, they pursue the

<sup>(1)</sup> OJ L 352, 15.12.1987, p. 1. Regulation as amended by Regulation (EC) No 2535/95 (OJ L 260, 31.10.1995, p. 3).

<sup>(2)</sup> OJ L 214, 4.8.2006, p. 1.

<sup>(3)</sup> OJ L 119, 11.5.1990, p. 32. Regulation as amended by the 1994 Act of Accession.

<sup>(4)</sup> OJ L 301, 20.11.1984, p. 1. Regulation as last amended by Regulation (EC) No 3513/93 (OJ L 320, 22.12.1993, p. 5).

<sup>(5)</sup> OJ L 214, 30.7.1992, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006.

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objective of improving market transparency. Such carcass classification schemes should be maintained. It is therefore appropriate to incorporate their essential elements into this Regulation, whilst empowering the Commission to regulate certain issues of a rather technical character through implementing rules.

- (21) Restrictions to free circulation resulting from the application of measures intended to combat the spread of animal diseases could cause difficulties on the market in certain products in one or more Member States. Experience shows that serious market disturbances such as a significant drop in consumption or in prices may be attributed to a loss in consumer confidence due to public health or animal health risks.
- (22) The exceptional market support measures in order to remedy such situations provided for in the respective CMOs for beef and veal, milk and milk products, pigmeat, sheepmeat and goatmeat, eggs and poultrymeat should, therefore, be incorporated into this Regulation under the same conditions as they have applied so far. Such exceptional market support measures should be taken by the Commission and should be directly related to or consequent upon health and veterinary measures adopted in order to combat the spread of disease. They should be taken at the request of Member States in order to avoid serious disruption on the markets concerned.
- (23) The possibility for the Commission to adopt special intervention measures where this proves to be necessary in order to react efficiently and effectively against threats of market disturbances in the cereals sector and in order to prevent large-scale application of public intervention in certain regions of the Community in the rice sector or to make up for paddy rice shortages following natural disasters, as they have been provided for in the CMOs for cereals and rice respectively should be maintained in this Regulation.
- (24) A minimum price should be fixed for quota beet corresponding to a standard quality which should be defined, in order to ensure a fair standard of living for the Community growers of sugar beet and sugar cane.
- (25) Specific instruments are needed to ensure a fair balance of rights and obligations between sugar undertakings and sugar beet growers. Therefore, the standard provisions governing the inter-professional agreements previously contained in the CMO for sugar should be maintained.
- (26) The diversity of natural, economic and technical situations makes it difficult to provide for uniform purchase terms for sugar beet throughout the Community. Agreements within the trade already exist between associations of sugar beet growers and sugar undertakings. Therefore, framework provisions should define only the minimum guarantees required by both sugar beet growers and the sugar industry to ensure a smooth functioning of the sugar market with the possibility to derogate from some rules in the context of an agreement within the trade. More detailed terms have

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previously been provided in the CMO for sugar in Annex II to Regulation (EC) No 318/2006. Given the highly technical character of these terms, it is more appropriate to deal with these questions at Commission level.

- (27) The production charge provided for under the CMO for sugar to contribute to the financing of the expenditure occurring under that CMO should be incorporated in this Regulation.
- (28) To maintain the structural balance of the markets in sugar at a price level close to the reference price, the possibility for the Commission to decide to withdraw sugar from the market for as long as it takes for the market to rebalance should be maintained.
- (29) The CMOs for live plants, beef and veal, pigmeat, sheepmeat and goatmeat, eggs and poultrymeat provided for the possibility of adopting certain measures to facilitate the adjustment of supply to market requirements. Such measures may contribute to stabilising the markets and to ensuring a fair standard of living for the agricultural community concerned. Given the objectives of this Regulation, that possibility should be maintained. According to those provisions, the Council may adopt the general rules concerning such measures in accordance with the procedure laid down in Article 37 of the Treaty. The aims to be pursued by such measures are clearly circumscribed and delimit the nature of the measures that may be adopted. Therefore, the adoption of additional general rules by the Council in those sectors is not necessary and should no longer be provided for.
- (30) In the sugar and in the milk and milk products sectors the quantitative limitation of production as set out in Regulations (EC) No 318/2006 and Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector <sup>(1)</sup> has been an essential market policy instrument for many years. The reasons which in the past led the Community to adopt production quota systems in both sectors remain valid.
- (31) Whereas the sugar quota system was provided for in the CMO for sugar, the corresponding system in the dairy sector has so far been regulated in a legal act separate from the CMO for milk and milk products, namely Regulation (EC) No 1788/2003. Given the crucial importance of these schemes and the objectives of this Regulation, it is appropriate to incorporate the relevant provisions for both sectors in this Regulation without making any substantial changes to the schemes and their modes of operation as compared to the previous legal situation.
- (32) The sugar quota scheme under this Regulation should therefore reflect the arrangements set out in Regulation (EC) No 318/2006 and, in particular, maintain the legal status of the quotas in so far as, according to the case-law of the Court of Justice, the system

<sup>(1)</sup> OJ L 270, 21.10.2003, p. 123. Regulation as last amended by Commission Regulation (EC) No 1186/2007 (OJ L 265, 11.10.2007, p. 22).

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of quotas constitutes a mechanism for regulating the market in the sugar sector aiming to ensure the attainment of public interest objectives.

- (33) This Regulation should, therefore, also enable the Commission to adjust the quotas to a sustainable level after the termination, in 2010, of the restructuring fund established by Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community <sup>(1)</sup>.
- (34) In the light of the need to allow for a certain amount of national flexibility in relation to the structural adjustment of the processing industry and of beet and cane growing during the period in which the quotas are to be applied, the possibility for Member States to be allowed to alter the quotas of undertakings within certain limits whilst not restricting the operation of the restructuring fund as an instrument should be maintained.
- (35) The CMO for sugar provided that, in order to avoid that surplus sugar distorts the sugar market, the Commission should be enabled, according to certain criteria, to provide for carrying forward the surplus sugar, isoglucose or inulin syrup to be treated as quota production of the following marketing year. Moreover, if, for certain quantities, the applicable conditions are not met, it also provided for a levy on the surplus in order to avoid the accumulation of these quantities threatening the market situation. These provisions should be maintained.
- (36) The main purpose of the milk quota system of reducing the imbalance between supply and demand on the respective market and the resulting structural surpluses, thereby achieving a better market equilibrium, still prevails. The application of a levy to quantities of milk collected or sold for direct consumption above a certain guarantee threshold should, therefore, be maintained. In line with the purpose of this Regulation, there is, to a certain extent, a need in particular for terminological harmonisation between the sugar and milk-quota schemes, whilst fully preserving their legal *status quo*. It therefore seems appropriate to harmonise the terminology in the milk sector with that in the sugar sector. The terms 'national reference quantity' and 'individual reference quantity' in Regulation (EC) No 1788/2003 should, therefore, be replaced by the terms 'national quota' and 'individual quota' whilst retaining the legal notion that is being defined.
- (37) In substance, the milk quota scheme in this Regulation should be shaped according to Regulation (EC) No 1788/2003. In particular, the distinction between deliveries and direct sales should be maintained and the scheme should be applied on the basis of individual representative fat contents and a national reference fat content. Farmers should be authorised under certain conditions to temporarily transfer their individual quota. Moreover the principle should be maintained that when a farm is sold, leased or transferred by inheritance, the corresponding quota is transferred to the purchaser, tenant or heir together with the relevant land, while the exceptions to the principle that quotas are tied to farms in order to continue the restructuring of milk

<sup>(1)</sup> OJ L 58, 28.2.2006, p. 42. Regulation as last amended by Regulation (EC) No 1261/2007 (OJ L 283, 27.10.2007, p. 8).

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production and improve the environment should be maintained. In line with the various types of transfer of quotas and using objective criteria, the provisions authorising Member States to place part of the transferred quantities in the national reserve should also be maintained.

- (38) The surplus levy should be set at a dissuasive level and be payable by the Member States as soon as the national quota is exceeded. The Member State should then divide the burden of payment among the producers who have contributed to the overrun. Those producers should be liable vis-à-vis the Member State for payment of their contribution to the levy due by virtue of the fact of having overrun their available quantity. Member States should pay to the European Agricultural Guarantee Fund (EAGF) the levy corresponding to the overrun of their national quota, reduced by a flat-rate amount of 1 % in order to take account of cases of bankruptcy or the definitive inability of certain producers to make their contribution to the payment of the levy due.
- (39) Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy<sup>(1)</sup> qualifies the proceeds flowing from the application of the additional levy in the dairy sector as 'assigned revenue' which has to be paid to the Community budget and, in the event of reuse, has to be used exclusively to finance expenditure under the EAGF or the European Agricultural Fund for Rural Development (EAFRD). Article 22 of Regulation (EC) No 1788/2003 according to which levy proceeds are considered as intervention to stabilise agricultural markets and are to be applied to financing expenditure in the milk sector, has therefore become obsolete and should not be incorporated in this Regulation.
- (40) Various CMOs have provided for different kinds of aid schemes.
- (41) The CMOs for dried fodder and for flax and hemp provided for processing aids for these sectors as a means to govern the internal market in respect of the sectors concerned. These provisions should be maintained.
- (42) In view of the special market situation for cereals and potato starch the CMO for cereals contained provisions which allowed the granting of a production refund if that proves necessary. The production refund should be of such a nature that the basic products used by the industry concerned can be made available to it at a lower price than that resulting from the application of the common prices. The CMO for sugar established the possibility of the granting of a production refund in cases where, with regard to the manufacturing of certain industrial, chemical or pharmaceutical products the need arises to take measures aimed at making available certain sugar products. These provisions should be maintained.

<sup>(1)</sup> OJ L 209, 11.8.2005, p. 1. Regulation as last amended by Regulation (EC) No 378/2007 (OJ L 95, 5.4.2007, p. 1).

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- (43) To contribute to balancing the milk market and to stabilise the market prices for milk and milk products, measures are needed to increase the possibility of disposing of milk products. The CMO for milk and milk products therefore provided for the grant of aids for the marketing of certain milk products with a view to specific uses and destinations. Moreover, that CMO provided that, in order to stimulate the consumption of milk by young people, the Community should defray a part of the expenditure occasioned by granting aid for the supply of milk to pupils in schools. These provisions should be maintained.
- (44) Community finance, consisting of the percentage of direct aid that Member States are allowed to withhold in accordance with Article 110i(4) of Regulation (EC) No 1782/2003, is required to encourage approved operator organisations to draw up work programmes for the purpose of improving the production quality of olive oil and table olives. In that context, the CMO for olive oil and table olives provided for Community support to be allocated in accordance with the priorities given to the activities undertaken within the work programmes in question. These provisions should be maintained.
- (45) A Community tobacco fund financed by certain deductions from aid schemes in that sector was established under Regulation (EEC) No 2075/92 with a view to carrying out various measures in respect of that sector. The year 2007 is the last in which deductions from the aid scheme provided for in Chapter 10c of Title IV of Regulation (EC) No 1782/2003 would be made available to the Community Tobacco Fund. Whilst the financing of the fund will expire prior to the entry into force of this Regulation, Article 13 of Regulation (EEC) No 2075/92 should nevertheless be maintained to serve as a legal basis for the multiannual programmes that may be financed by the Community Tobacco Fund.
- (46) Beekeeping, being a sector of agriculture, is characterised by the diversity of production conditions and yields and the dispersion and variety of economic operators, both at the production and marketing stages. Moreover, in view of the spread of varroasis in several Member States in recent years and the problems which that disease causes for honey production, action by the Community continues to be necessary as varroasis cannot be completely eradicated and is to be treated with approved products. Given such circumstances and in order to improve the production and marketing of apiculture products in the Community, national programmes should be drawn up every three years, comprising technical assistance, control of varroasis, rationalisation of transhumance, management of the restocking of hives in the Community, and cooperation on research programmes on beekeeping and apiculture products with a view to improving the general conditions for the production and marketing of apiculture products. Those national programmes should be partly financed by the Community.

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- (47) Regulation (EC) No 1544/2006 replaced all national silkworm aids by a Community aid scheme for silkworm rearing which takes the form of a fixed sum per box of silkworm eggs used.
- (48) As the policy considerations which led to the introduction of the abovementioned aid schemes for beekeeping and silkworm rearing still persist, these aid schemes should be incorporated in the framework of this Regulation.
- (49) The application of standards for the marketing of agricultural products can contribute to improving the economic conditions for the production and marketing as well as the quality of such products. The application of such standards is therefore in the interest of producers, traders and consumers. Accordingly, within the CMOs for bananas, olive oil and table olives, live plants, eggs and poultrymeat, marketing standards were put in place which relate, in particular, to quality, grading, weight, sizing, packaging, wrapping, storage, transport, presentation, origin and labelling. It is appropriate to maintain that approach under this Regulation.
- (50) Under the CMOs for olive oil and table olives and for bananas the Commission has, so far, been entrusted with the adoption of the provisions on marketing standards. Given their detailed technical character and the need to constantly improve their effectiveness and to adapt them to evolving trade practices, it is appropriate to extend this approach to the live plants sectors while specifying the criteria to be taken into account by the Commission in setting out the relevant rules. Moreover, special measures, in particular up-to-date methods of analysis and other measures to determine the characteristics of the standards concerned, may need to be adopted to avoid abuses as regards the quality and authenticity of the products presented to consumers and the important disturbances on the markets such abuses may entail.
- (51) Several legal instruments have been put in place to regulate the marketing and designation of milk, milk products and fats. They pursue the objective of improving the position of milk and milk products on the market on the one hand and ensuring a fair competition between spreadable fats of milk and non-milk origin on the other, both to the benefit of producers and consumers. The rules contained in Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing milk and milk products<sup>(1)</sup> are aimed at protecting the consumer and at establishing conditions of competition between milk products and competing products in the field of product designation, labelling and advertising which avoid any distortion. Council Regulation (EC) No 2597/97 of 18 December 1997 laying down additional rules on the common organisation of the market in milk and milk products for drinking milk<sup>(2)</sup> provides for rules aimed at guaranteeing a

<sup>(1)</sup> OJ L 182, 3.7.1987, p. 36. Regulation as last amended by the 1994 Act of Accession.

<sup>(2)</sup> OJ L 351, 23.12.1997, p. 13. Regulation as last amended by Regulation (EC) No 1153/2007 (OJ L 258, 4.10.2007, p. 6).



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high quality of drinking milk and products which fulfil consumers' needs and wishes, thus stabilising the market concerned and providing the consumer with high quality drinking milk. Council Regulation (EC) No 2991/94 of 5 December 1994 laying down standards for spreadable fats<sup>(1)</sup> sets out the marketing standards for the milk and non-milk products concerned with a clear and distinct classification accompanied by rules on designation. In line with the objectives of the present Regulation, these rules should be maintained.

- (52) Concerning the eggs and poultrymeat sectors, provisions exist in relation to marketing standards and, in certain cases, to production. These provisions are contained in Council Regulation (EC) No 1028/2006 of 19 June 2006 on marketing standards for eggs<sup>(2)</sup>, Council Regulation (EEC) No 1906/90 of 26 June 1990 on certain marketing standards for poultrymeat<sup>(3)</sup> and Council Regulation (EEC) No 2782/75 of 29 October 1975 on the production and marketing of eggs for hatching and of farmyard poultry chicks<sup>(4)</sup>. The essential rules contained in those Regulations should be incorporated into this Regulation.
- (53) Regulation (EC) No 1028/2006 provides that marketing standards for eggs should, in principle, apply to all eggs of hens of the species *Gallus gallus*, marketed in the Community and, as a general rule, also to those intended for export to third countries. It also draws a distinction between eggs suitable and eggs not suitable for direct human consumption by the creation of two quality classes of eggs and lays down provision to ensure appropriate information to the consumer as regards quality and weight grades and the identification of the farming method used. Finally, that Regulation provides for special rules in respect of eggs imported from third countries according to which special provisions in force in certain third countries may justify derogations from the marketing standards if their equivalence to Community legislation is guaranteed.
- (54) As regards poultrymeat, Regulation (EEC) No 1906/90 determines that marketing standards should, in principle, apply to certain types of poultrymeat suitable for human consumption marketed in the Community and that poultrymeat intended for export to third countries should, however, be excluded from the application of the marketing standards. That Regulation provides for the grading of poultrymeat in two categories according to conformation and appearance and the conditions under which the meat is to be offered for sale.
- (55) According to those Regulations, Member States should be able to exempt from the application of those marketing standards eggs and poultrymeat, respectively, sold through certain forms of direct sale from the producer to the final consumer where small quantities are involved.

<sup>(1)</sup> OJ L 316, 9.12.1994, p. 2.

<sup>(2)</sup> OJ L 186, 7.7.2006, p. 1.

<sup>(3)</sup> OJ L 173, 6.7.1990, p. 1. Regulation as last amended by Regulation (EC) No 1029/2006 (OJ L 186, 7.7.2006, p. 6).

<sup>(4)</sup> OJ L 282, 1.11.1975, p. 100. Regulation as last amended by Regulation (EC) No 1791/2006.

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- (56) Regulation (EC) No 2782/75 establishes special rules concerning the marketing and transport of eggs for hatching and of farmyard poultry chicks as well as for the incubation of eggs for hatching. That Regulation provides, in particular, for the individual marking of eggs for hatching used for chick production, for the way of packing and the kind of packing material for transport. However, it excludes small sized pedigree breeding and other breeding establishments from the compulsory application of the standards laid down therein.
- (57) In line with the objectives of the present Regulation, those rules should be maintained without touching upon their substance. However, further provisions contained in those Regulations which are of technical character should be dealt with in implementing rules to be adopted by the Commission.
- (58) As it has been the case so far under the CMO for hops, a quality policy should be followed throughout the Community by implementing provisions concerning certification together with rules prohibiting, as a general rule, the marketing of products for which a certificate has not been issued, or, in the case of imported products, those which do not comply with equivalent quality characteristics.
- (59) The descriptions and definitions of olive oil and the denomination are an essential element of the market order with respect to setting quality standards and providing consumers with adequate information on the product and should be maintained in this Regulation.
- (60) One of the aforementioned aid schemes contributing to balancing the market in milk and milk products and to stabilising the market prices in that sector consists of an aid scheme, contained in Regulation (EC) No 1255/1999, for the processing of skimmed milk into casein and caseinates. Council Regulation (EEC) No 2204/90 of 24 July 1990 laying down additional general rules on the common organisation of the market in milk and milk products as regards cheese<sup>(1)</sup> provided for rules concerning the use of casein and caseinates in the manufacture of cheese in order to counter adverse effects that may result from that aid scheme, taking into account the vulnerability of cheese to substitution operations with casein and caseinates, thereby intending to stabilise the market. These rules should be incorporated into this Regulation.
- (61) The processing of certain agricultural raw materials into ethyl alcohol is closely linked with the economy of those raw materials. This can contribute considerably to enhancing their value and may be of particular economic and social importance for the economy of certain regions of the Community or may be a significant source of income for the producers of the raw materials concerned. It also permits the disposal of products of unsatisfactory quality and short-term surpluses that may cause temporary problems in certain sectors.

<sup>(1)</sup> OJ L 201, 31.7.1990, p. 7. Regulation as amended by Regulation (EC) No 2583/2001 (OJ L 345, 29.12.2001, p. 6).

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- (62) In the hops, olive oil and table olives, tobacco and silkworm sectors the legislation focuses on various kinds of organisations in order to achieve policy aims in particular with a view to stabilising the markets in, and of improving and guaranteeing the quality of, the products concerned through joint action. The provisions which have regulated that system of organisations so far are based on organisations which are recognised by the Member States or, under certain conditions, by the Commission, in accordance with provisions to be adopted by the Commission. That system should be maintained and the provisions as they have been in place so far should be harmonised.
- (63) To support certain activities of inter-branch organisations which are of particular interest in the light of the current rules concerning the CMO for tobacco, provision should be made for the rules adopted by an inter-branch organisation for its members to be extended, subject to certain conditions, to all non-member producers and groups in one or more regions. The same should also apply in respect of other activities of inter-branch organisations which are of general economic or technical interest for the tobacco sector so as to be of benefit to all persons active in the branches in question. There should be close cooperation between the Member States and the Commission. The Commission should have permanent monitoring powers, particularly as regards the agreements and concerted practices adopted by such organisations.
- (64) In certain sectors apart from those for which current rules provide for the recognition of producer or interbranch organisations, Member States may wish to recognise such kinds of organisations based on national law as far as this is compatible with Community law. This possibility should therefore be clarified. Moreover, rules should be adopted stating that the recognition of producer and interbranch organisations in accordance with the current Regulations remains valid after the adoption of this Regulation.
- (65) A single Community market involves a trading system at the external borders of the Community. That trading system should include import duties and export refunds and should, in principle, stabilise the Community market. The trading system should be based on the undertakings accepted under the Uruguay Round of multilateral trade negotiations.
- (66) Monitoring the volume in trade in agricultural products with third countries in the CMOs for the cereals, rice, sugar, seeds, olive oil and table olives, flax and hemp, beef and veal, milk and milk products, pigmeat, sheepmeat and goatmeat, eggs, poultrymeat, live plants and agricultural ethyl alcohol sectors, has, so far, both for imports and exports been subject to either compulsory licence systems or to systems where the Commission was empowered to provide for licence requirements.

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- (67) Monitoring trade flows is foremost a matter of management which should be addressed in a flexible way. Against this background and in the light of the experience gained in the CMOs where the management of licences is already conferred on the Commission, it appears appropriate to extend this approach to all sectors where import and export licences are being used. The decision on the introduction of licence requirements should be made by the Commission taking account of the need for import licences for the management of the markets concerned and, in particular, for monitoring the imports of the products in question.
- (68) For the most part, the customs duties applicable to agricultural products under the World Trade Organisation (WTO) agreements are laid down in the Common Customs Tariff. However, for some products of the cereals and rice sectors, the introduction of additional mechanisms makes it necessary to provide for the possibility to adopt derogations.
- (69) In order to prevent or counteract adverse effects on the Community market which could result from imports of certain agricultural products, imports of such products should be subject to payment of an additional duty, if certain conditions are fulfilled.
- (70) It is appropriate, under certain conditions, to confer on the Commission the power to open and administer import tariff quotas resulting from international agreements concluded in accordance with the Treaty or from other acts of the Council.
- (71) Council Regulation (EEC) No 2729/75 of 29 October 1975 on the import levies on mixtures of cereals, rice and broken rice<sup>(1)</sup> aims to ensure the proper working of the duty system for imports of mixtures of cereals, rice and broken rice. These rules should be included in this Regulation.
- (72) The Community has concluded several preferential market access arrangements with third countries which allow those countries to export cane sugar to the Community under favourable conditions. The CMO for sugar provided for the evaluation of the refiners' need for sugar for refining and, under certain conditions, the reservation of import licences to specialised users of significant quantities of imported raw cane sugar, which are considered to be full-time refiners in the Community. These provisions should be maintained.
- (73) In order to prevent illicit crops from disturbing the CMO for hemp for fibre, the respective Regulation provided for checks on imports of hemp and hemp seed to ensure that such products offer certain guarantees with regard to the tetrahydrocannabinol content. In addition, imports of hemp seed intended for uses other than sowing were subject to a control system which makes provision for the authorisation of the importers concerned. These provisions should be maintained.
- (74) A quality policy is being followed throughout the Community as regards products of the hops sector. In the case of imported products, the provisions ensuring that only products complying with equivalent minimum quality characteristics are imported should be incorporated in this Regulation.

<sup>(1)</sup> OJ L 281, 1.11.1975, p. 18. Regulation as amended by Regulation (EC) No 3290/94 (OJ L 349, 31.12.1994, p. 105).

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- (75) The customs duty system makes it possible to dispense with all other protective measures at the external frontiers of the Community. The internal market and duty mechanism could, in exceptional circumstances, prove to be inadequate. In such cases, in order not to leave the Community market without defence against disturbances that might ensue, the Community should be able to take all necessary measures without delay. Such measures should comply with the international commitments of the Community.
- (76) To ensure the proper functioning of the CMOs and, in particular, avoid market disturbance, the CMOs for a number of products traditionally provided for the possibility of prohibiting the use of inward and outward processing arrangements. This possibility should be maintained. Moreover, experience shows that where markets are disturbed or threatened to be disturbed by the use of these arrangements, action needs to be taken without major delays. The Commission should therefore be entrusted with the relevant powers. It is thus appropriate to enable the Commission to suspend the use of inward and outward processing arrangements in such situations.
- (77) Provisions for granting refunds on exports to third countries, based on the difference between prices within the Community and on the world market, and falling within the limits set by the Community's commitments in the WTO, should serve to safeguard the Community's participation in international trade in certain products falling within this Regulation. Subsidised exports should be subject to limits in terms of value and quantity.
- (78) Compliance with the limits in terms of value should be ensured at the time when the export refunds are fixed through the monitoring of payments under the rules relating to the EAGF. Monitoring can be facilitated by the compulsory advance fixing of export refunds, while allowing the possibility, in the case of differentiated refunds, of changing the specified destination within a geographical area to which a single export refund rate applies. In the case of a change of destination, the export refund applicable to the actual destination should be paid, with a ceiling on the amount applicable to the destination fixed in advance.
- (79) Compliance with the quantity limits should be ensured by a reliable and effective system of monitoring. To that end, the granting of export refunds should be made subject to an export licence. Export refunds should be granted up to the limits available, depending on the particular situation of each product concerned. Exceptions to that rule should be permitted only for processed products not listed in Annex I to the Treaty, to which volume limits do not apply. Provision should be made for a derogation from strict compliance with management rules where exports benefiting from export refunds are not likely to exceed the quantity laid down.
- (80) In the case of the export of live bovine animals, provision should be made whereby export refunds are granted and paid only if the

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provisions established in Community legislation concerning animal welfare, in particular those concerning the protection of animals during transport, are respected.

- (81) Agricultural products may in certain cases benefit from special import treatment in third countries if the products comply with certain specifications and/or price conditions. Administrative cooperation between the authorities in the importing third country and the Community is necessary to ensure the correct application of such a system. To that end the products should be accompanied by a certificate issued in the Community.
- (82) Exports of flowering bulbs to third countries are of considerable economic importance to the Community. The continuation and development of such exports may be ensured by stabilising prices in this trade. Provision should therefore be made for minimum export prices for the products in question.
- (83) In accordance with Article 36 of the Treaty the provisions of the chapter of the Treaty relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 37(2) and (3) of the Treaty and in accordance with the procedure laid down therein. In the various CMOs the provisions on state aid had been largely declared applicable. The application in particular of the Treaty rules applying to undertakings was furthermore defined in Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules on competition to the production of, and trade in, agricultural products<sup>(1)</sup>. In line with the objective of creating one comprehensive set of market policy rules it is appropriate to incorporate the provisions concerned in this Regulation.
- (84) The rules on competition relating to the agreements, decisions and practices referred to in Article 81 of the Treaty and to the abuse of dominant positions should be applied to the production of, and trade in, agricultural products, in so far as their application does not impede the functioning of national organisations of agricultural markets or jeopardise the attainment of the objectives of the CAP.
- (85) A special approach is warranted in the case of farmers' organisations the particular objective of which is the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardises the attainment of the objectives of Article 33 of the Treaty.
- (86) In order both to avoid compromising the development of a CAP and to ensure legal certainty and non-discriminatory treatment of the undertakings concerned, the Commission should have the sole power, subject to review by the Court of Justice, to determine whether agreements, decisions and practices referred to in Article 81 of the Treaty are compatible with the objectives of the CAP.
- (87) The proper working of the single market based on common prices would be jeopardised by the granting of national aid. Therefore, the provisions of the Treaty governing State aid should, as a general rule, apply to the products covered by this Regulation. In certain situations exceptions should be allowed. Where such exceptions apply, the Commission should, however, be in

<sup>(1)</sup> OJ L 214, 4.8.2006, p. 7.

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a position to draw up a list of existing, new or proposed national aids, to make appropriate observations to the Member States and to propose suitable measures to them.

- (88) Since their accession, Finland and Sweden may, due to the specific economic situation of the production and marketing of reindeer and reindeer products, grant aids in that regard. Moreover, Finland may, subject to authorisation by the Commission, grant aid respectively for certain quantities of seeds and for certain quantities of cereal seed produced solely in Finland, because of its specific climatic conditions. These exceptions need to be maintained.
- (89) In Member States with a significant reduction of sugar quota, sugar beet growers will face particularly severe adaptation problems. In such cases the transitional Community aid to sugar beet growers provided for in Chapter 10f of Title IV of Regulation (EC) No 1782/2003 will not suffice to fully address the beet growers' difficulties. Therefore, Member States having reduced their quota by more than 50 % of the sugar quota fixed on 20 February 2006 in Annex III to Regulation (EC) No 318/2006 should be authorised to grant State aid to sugar beet growers during the period of application of the transitional Community aid. To ensure that Member States do not grant State aid exceeding the needs of their sugar beet growers, the determination of the total amount of the State aid concerned should continue to be made subject to Commission approval, except in the case of Italy where the maximum need for the most productive sugar beet growers to adapt to the market conditions after the reform has been estimated at EUR 11 per tonne of sugar beet produced. Moreover, due to the particular problems expected to arise in Italy, the provision for arrangements allowing sugar beet growers to benefit directly or indirectly from the State aid granted should be maintained.
- (90) In Finland sugar beet growing is subject to particular geographical and climatic conditions which will adversely affect the sector beyond the general effects of the sugar reform. For this reason the provision made in the CMO for sugar authorising that Member State, on a permanent basis, to grant its sugar beet growers an adequate amount of State aid should be maintained.
- (91) Given the particular situation in Germany, where national support is currently granted to a large number of smaller producers of alcohol under the specific conditions of the German alcohol monopoly, it is necessary to permit, during a limited period of time, the continuation of the granting of such support. It is also necessary to provide for the submission of a report by the Commission on the functioning of that derogation, at the end of that period, accompanied by any appropriate proposals.
- (92) If a Member State wishes to support, on its territory, measures promoting the consumption of milk and milk products in the

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Community, provision should be made for the possibility of financing such measures by a promotional levy on milk producers at national level.

- (93) In order to take account of possible developments in dried fodder production, the Commission should, before 30 September 2008, on the basis of an evaluation of the CMO for dried fodder, present a report to the Council on that sector. The report should be accompanied, if necessary, by appropriate proposals. Moreover, the Commission should report at regular intervals to the European Parliament and the Council on the aid scheme applied in respect of the apiculture sector.
- (94) Adequate information is needed about the present state of the market in hops within the Community and the prospects for its development. Provision should therefore be made for the registration of all supply contracts regarding hops produced within the Community.
- (95) It is appropriate to provide, under certain conditions and for certain products, for measures to be taken in cases where disturbances are occurring or are likely to occur due to significant changes in the internal market prices or as regards quotations or prices on the world market.
- (96) It is necessary to establish a framework of specific measures for ethyl alcohol of agricultural origin so that economic data can be collected and statistical information analysed for the purpose of monitoring the market. In so far as the market in ethyl alcohol of agricultural origin is linked to the market in ethyl alcohol in general, information also needs to be made available concerning the market in ethyl alcohol of non-agricultural origin.
- (97) Expenditure incurred by the Member States as a result of the obligations arising from the application of this Regulation should be financed by the Community in accordance with Regulation (EC) No 1290/2005.
- (98) The Commission should be authorised to adopt the necessary measures to solve specific practical problems in case of emergency.
- (99) Since the common markets in agricultural products are continuously evolving, the Member States and the Commission should keep each other informed of relevant developments.
- (100) In order to avoid abuse of any of the advantages provided for in this Regulation, such advantages should not be granted or, as the case may be, should be withdrawn, in cases where it is found that the conditions for obtaining any of those advantages have been created artificially, contrary to the objectives of this Regulation.
- (101) To guarantee compliance with the obligations laid down by this Regulation, there is a need for controls and the application of administrative measures and administrative penalties in case of non-compliance. Power should, therefore, be conferred on the Commission to adopt the corresponding rules, including those concerning the recovery of undue payments and the reporting obligations of the Member States resulting from the application of this Regulation.



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- (102) The measures necessary for the implementation of this Regulation should, as a general rule, be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission <sup>(1)</sup>. However, in respect of certain measures under this Regulation which relate to Commission powers, require swift action or are of a purely administrative nature, the Commission should be empowered to act on its own.
- (103) Due to the incorporation into this Regulation of certain elements of the CMOs for fruit and vegetables and processed fruit and vegetable products and wine, certain amendments should be made to these CMOs.
- (104) This Regulation incorporates provisions concerning the applicability of the competition rules under the Treaty. Such provisions have, so far, been dealt with in Regulation (EC) No 1184/2006. The scope of that Regulation should be amended so that its provisions only apply to products listed in Annex I to the Treaty that are not covered by this Regulation.
- (105) This Regulation incorporates the provisions contained in the basic regulations listed in recitals (2) and (3) with the exception of those contained in Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1493/1999. Moreover, this Regulation incorporates the provisions of the following Regulations:
- Council Regulation (EEC) No 2729/75 of 29 October 1975 on the import levies on mixtures of cereals, rice and broken rice,
  - Council Regulation (EEC) No 2763/75 of 29 October 1975 laying down general rules for granting private storage aid for pigmeat <sup>(2)</sup>,
  - Council Regulation (EEC) No 2782/75 of 29 October 1975 on the production and marketing of eggs for hatching and of farmyard poultry chicks,
  - Council Regulation (EEC) No 707/76 of 25 March 1976 on the recognition of producer groups of silkworm rearers <sup>(3)</sup>,
  - Council Regulation (EEC) No 1055/77 of 17 May 1977 on the storage and movement of products bought in by an intervention agency <sup>(4)</sup>,
  - Council Regulation (EEC) No 2931/79 of 20 December 1979 on the granting of assistance for the exportation of agricultural products which may benefit from a special import treatment in a third country <sup>(5)</sup>,
  - Council Regulation (EEC) No 3220/84 of 13 November 1984 determining the Community scale for grading pig carcasses,

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

<sup>(2)</sup> OJ L 282, 1.11.1975, p. 19.

<sup>(3)</sup> OJ L 84, 31.3.1976, p. 1.

<sup>(4)</sup> OJ L 128, 24.5.1977, p. 1.

<sup>(5)</sup> OJ L 334, 28.12.1979, p. 8.

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- Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing milk and milk products,
- Council Regulation (EEC) No 3730/87 of 10 December 1987 laying down the general rules for the supply of food from intervention stocks to designated organisations for distribution to the most deprived persons in the Community,
- Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts <sup>(1)</sup>,
- Council Regulation (EEC) No 1186/90 of 7 May 1990 extending the scope of the Community scale for the classification of carcasses of adult bovine animals,
- Council Regulation (EEC) No 1906/90 of 26 June 1990 on certain marketing standards for poultrymeat,
- Council Regulation (EEC) No 2204/90 of 24 July 1990 laying down additional general rules on the common organisation of the market in milk and milk products as regards cheese,
- Council Regulation (EEC) No 2077/92 of 30 June 1992 concerning inter-branch organisations and agreements in the tobacco sector <sup>(2)</sup>,
- Council Regulation (EEC) No 2137/92 of 23 July 1992 concerning the Community scale for the classification of carcasses of ovine animals and determining the Community standard quality of fresh or chilled sheep carcasses,
- Council Regulation (EC) No 2991/94 of 5 December 1994 laying down standards for spreadable fats,
- Council Regulation (EC) No 2597/97 of 18 December 1997 laying down additional rules on the common organisation of the market in milk and milk products for drinking milk,
- Council Regulation (EC) No 2250/1999 of 22 October 1999 concerning the tariff quota for butter of New Zealand origin <sup>(3)</sup>,
- Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector,
- Council Regulation (EC) No 1028/2006 of 19 June 2006 on marketing standards for eggs,
- Council Regulation (EC) No 1183/2006 of 24 July 2006 concerning the Community scale for the classification of carcasses of adult bovine animals.

<sup>(1)</sup> OJ L 42, 16.2.1990, p. 6. Regulation as amended by Regulation (EC) No 163/94 (OJ L 24, 29.1.1994, p. 2).

<sup>(2)</sup> OJ L 215, 30.7.1992, p. 80.

<sup>(3)</sup> OJ L 275, 26.10.1999, p. 4.

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- (106) These Regulations should therefore be repealed. In the interests of legal certainty and given the number of acts to be repealed by this Regulation and the number of acts adopted pursuant to or amended by those acts, it is appropriate to clarify that repeal does not affect the validity of any legal acts adopted on the basis of the repealed act or of any amendments to other legal acts made thereby.
- (107) This Regulation should, as a general rule, start to apply on 1 January 2008. However, in order to ensure that the new provisions of this Regulation do not interfere with the ongoing 2007/2008 marketing year, a later date of application should be provided for in respect of those sectors for which marketing years are foreseen. This Regulation should therefore only apply as of the start of the 2008/2009 marketing year for the sectors concerned. As a consequence, the respective regulations governing those sectors should continue to apply until the end of the corresponding marketing year 2007/2008.
- (108) Moreover, in respect of certain other sectors for which no marketing years are foreseen, a later date of application should also be provided for in order to ensure the smooth transition from the existing CMOs to this Regulation. As a consequence, the regulations governing the existing CMOs for those sectors should continue to apply until the later date of application provided for in this Regulation.
- (109) As regards Regulation (EC) No 386/90, the competence for the adoption of the substance dealt with by that Regulation is being transferred to the Commission by this Regulation. Moreover, Regulations (EEC) No 3220/84, (EEC) No 1186/90, (EEC) No 2137/92 and (EC) No 1183/2006 are being repealed by this Regulation whilst only certain provisions of those Regulations are being incorporated into this Regulation. Further details contained in those Regulations will therefore have to be dealt with in implementing rules yet to be adopted by the Commission. Some more time should be allowed for the Commission to establish the respective rules. The mentioned Regulations should therefore continue to apply until 31 December 2008.
- (110) The following acts of the Council have become redundant and should be repealed:
- Council Regulation (EEC) No 315/68 of 12 March 1968 fixing quality standards for flowering bulbs, corms and tubers <sup>(1)</sup>,
  - Council Regulation (EEC) No 316/68 of 12 March 1968 fixing quality standards for fresh cut flowers and fresh ornamental foliage <sup>(2)</sup>,
  - Council Regulation (EEC) No 2517/69 of 9 December 1969 laying down certain measures for reorganising Community fruit production <sup>(3)</sup>,

<sup>(1)</sup> OJ L 71, 21.3.1968, p. 1. Regulation as last amended by Regulation (EEC) No 4112/88 (OJ L 361, 29.12.1988, p. 7).

<sup>(2)</sup> OJ L 71, 21.3.1968, p. 8. Regulation as last amended by Regulation (EEC) No 309/79 (OJ L 42, 17.2.1979, p. 21).

<sup>(3)</sup> OJ L 318, 18.12.1969, p. 15. Regulation as last amended by Regulation (EEC) No 1153/78 (OJ L 144, 31.5.1978, p. 4).

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- Council Regulation (EEC) No 2728/75 of 29 October 1975 on aids for the production of and trade in potato starch and potatoes for starch manufacture <sup>(1)</sup>,
  - Council Regulation (EEC) No 1358/80 of 5 June 1980 fixing the guide price and the intervention price for adult bovine animals for the 1980/81 marketing year and introducing a Community grading scale for carcasses of adult bovine animals <sup>(2)</sup>,
  - Council Regulation (EEC) No 4088/87 of 21 December 1987 fixing conditions for the application of preferential customs duties on imports of certain flowers originating in Cyprus, Israel and Jordan <sup>(3)</sup>,
  - Council Decision 74/583/EEC of 20 November 1974 on the monitoring of sugar movements <sup>(4)</sup>.
- (111) The transition from the arrangements provided for in the provisions and Regulations repealed by this Regulation could give rise to difficulties which are not dealt with in this Regulation. In order to deal with such difficulties, the Commission should be enabled to adopt transitional measures,

HAS ADOPTED THIS REGULATION:

<sup>(1)</sup> OJ L 281, 1.11.1975, p. 17.

<sup>(2)</sup> OJ L 140, 5.6.1980 p. 4.

<sup>(3)</sup> OJ L 382, 31.12.1987, p. 22. Regulation as last amended by Regulation (EC) No 1300/97 (OJ L 177 5.7.1997 p. 1).

<sup>(4)</sup> OJ L 317, 27.11.1974, p. 21.



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PART IV  
COMPETITION RULES

*CHAPTER I*

***Rules applying to undertakings***

▼M10

*Article 175*

**Application of Articles 81 to 86 of the Treaty**

Save as otherwise provided for in this Regulation, Articles 81 to 86 of the Treaty and implementation provisions thereof shall, subject to Articles 176 to 177 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty which relate to the production of, or trade in, the products covered by this Regulation.

▼B

*Article 176*

**Exceptions**

1. Article 81(1) of the Treaty shall not apply to the agreements, decisions and practices referred to in Article 175 of this Regulation which are an integral part of a national market organisation or are necessary for the attainment of the objectives set out in Article 33 of the Treaty.

In particular, Article 81(1) of the Treaty shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by a decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

**▼B**

The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.

3. The publication of the decision referred to in the first subparagraph of paragraph 2 shall state the names of the parties and the main content of the decision. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

**▼M3***Article 176a***Agreements and concerted practices in the fruit and vegetables sector**

1. Article 81(1) of the Treaty shall not apply to the agreements, decisions and concerted practices of recognised interbranch organisations with the object of carrying out the activities referred to in Article 123(3)(c) of this Regulation.

2. Paragraph 1 shall apply only provided that:

- (a) the agreements, decisions and concerted practices have been notified to the Commission;
- (b) within two months of receipt of all the details required the Commission has not found that the agreements, decisions or concerted practices are incompatible with Community rules.

3. The agreements, decisions and concerted practices may not be put into effect before the lapse of the period referred to in paragraph 2(b).

4. The following agreements, decisions and concerted practices shall in any case be declared incompatible with Community rules:

- (a) agreements, decisions and concerted practices which may lead to the partitioning of markets in any form within the Community;
- (b) agreements, decisions and concerted practices which may affect the sound operation of the market organisation;
- (c) agreements, decisions and concerted practices which may create distortions of competition which are not essential to achieving the objectives of the common agricultural policy pursued by the interbranch organisation activity;
- (d) agreements, decisions and concerted practices which entail the fixing of prices, without prejudice to activities carried out by interbranch organisations in the application of specific Community rules;
- (e) agreements, decisions and concerted practices which may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.

5. If, following expiry of the two-month period referred to in paragraph 2(b), the Commission finds that the conditions for applying paragraph 1 have not been met, it shall take a Decision declaring that Article 81(1) of the Treaty applies to the agreement, decision or concerted practice in question.

**▼M3**

That Commission Decision shall not apply earlier than the date of its notification to the interbranch organisation concerned, unless that interbranch organisation has given incorrect information or abused the exemption provided for in paragraph 1.

6. In the case of multiannual agreements, the notification for the first year shall be valid for the subsequent years of the agreement. However, in that event, the Commission may, on its own initiative or at the request of another Member State, issue a finding of incompatibility at any time.

**▼B***Article 177***Agreements and concerted practices in the tobacco sector**

1. Article 81(1) of the Treaty shall not apply to the agreements and concerted practices of recognised interbranch organisations in the tobacco sector, intended to implement the aims referred to in Article 123(c) of this Regulation provided that:

- (a) the agreements and concerted practices have been notified to the Commission;
- (b) the Commission, acting within three months of receipt of all the details required, has not found that those agreements or concerted practices are incompatible with Community competition rules.

The agreements and concerted practices may not be implemented during that three-month period.

2. Agreements and concerted practices shall be declared contrary to Community competition rules in the following cases where:

- (a) they may lead to the partitioning of markets in any form within the Community;
- (b) they may affect the sound operation of the market organisation;
- (c) they may create distortions of competition which are not essential to achieving the objectives of the common agricultural policy pursued by the interbranch organisation measure;
- (d) they entail the fixing of prices or quotas, without prejudice to measures taken by interbranch organisations in the application of specific provisions of Community rules;
- (e) they may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.

3. If, following expiry of the three-month period referred to in point (b) of paragraph 1, the Commission finds that the conditions for applying this Chapter have not been met, it shall without the assistance of the Committee referred to in Article 195(1), take a decision declaring that Article 81(1) of the Treaty applies to the agreement or concerted practice in question.

That decision shall not apply earlier than the date of notification to the interbranch organisation concerned, unless that interbranch organisation has given incorrect information or misused the exemption provided for in paragraph 1.

**▼B***Article 178***Binding effect of agreements and concerted practices on non-members in the tobacco sector**

1. Interbranch organisations in the tobacco sector may request that certain of their agreements or concerted practices be made binding for a limited period on individuals and groups in the economic sector concerned which are not members of the trade branches which they represent, in the areas in which the branches operate.

In order for their rules to be extended, interbranch organisations shall represent at least two thirds of the production and/or the trade concerned. Where the proposed extension of the rules is of inter-regional scope, the interbranch organisations shall prove they possess a minimum degree of representativeness, in respect of each of the grouped branches, in each region covered.

2. The rules for which an extension of scope is requested shall have been in force for at least one year and shall relate to one of the following objectives:

- (a) knowledge of production and the market;
- (b) definition of minimum qualities;
- (c) use of cultivation methods compatible with the protection of the environment;
- (d) definition of minimum standards of packing and presentation;
- (e) use of certified seed and monitoring of product quality.

3. Extension of the rules shall be subject to approval by the Commission.

**▼M3***Article 179***Implementing rules in respect of agreements and concerted practices in the fruit and vegetables and tobacco sectors**

The Commission may adopt the detailed rules for the application of Articles 176a, 177 and 178, including the rules concerning notification and publication.

**▼B***CHAPTER II**State Aid rules***▼M10***Article 180***Application of Articles 87, 88 and 89 of the Treaty**

Articles 87, 88 and 89 of the Treaty shall apply to the production of, and trade in, the products referred to in Article 1.

However, Articles 87, 88 and 89 of the Treaty shall not apply to payments made under Articles 44 to 48, 102, 102a, 103, 103a, 103b, 103e, 103ga, 104, 105, 182 and 182a, Subsection III of Section IVa of Chapter III of Title I of Part II and Section IVb of Chapter IV of Title I

**▼ M10**

of Part II of this Regulation by Member States in conformity with this Regulation. Nevertheless, with regard to Article 103n(4) only Article 88 of the Treaty shall not apply.

**▼ B***Article 181***Specific provisions for the milk and milk products sector**

Subject to Article 87(2) of the Treaty, aids the amount of which is fixed on the basis of the price or quantity of products listed in Part XVI of Annex I of this Regulation shall be prohibited.

National measures permitting equalisation between the prices of products listed in Part XVI of Annex I of this Regulation shall also be prohibited.

*Article 182***Specific national provisions**

1. Subject to Commission authorisation, aids for the production and marketing of reindeer and reindeer products (CN ex 0208 and ex 0210) may be granted by Finland and Sweden insofar as they do not entail any increase in traditional levels of production.

**▼ M3**

2. Subject to Commission authorisation, Finland may grant aid for certain quantities of seeds, with the exception of Timothy seeds (*Phleum pratense* L.), and for certain quantities of cereal seed produced solely in Finland up to and including the 2010 harvest.

By 31 December 2008, Finland shall transmit to the Commission a detailed report on the results of the aid authorised.

**▼ B**

3. Member States which reduce their sugar quota by more than 50 % of the sugar quota fixed on 20 February 2006 in Annex III to Regulation (EC) No 318/2006 may grant temporary State aid during the period for which the transitional aid for beet growers is being paid in accordance with Chapter 10f of Title IV of Regulation (EC) No 1782/2003. The Commission shall, on the basis of an application by any Member State concerned, decide on the total amount of the State aid available for this measure.

For Italy, the temporary aid referred to in the first subparagraph shall not exceed a total of EUR 11 per marketing year per tonne of sugar beet to be granted to sugar beet growers and for the transport of sugar beet.

Finland may grant aid up to EUR 350 per hectare per marketing year to sugar beet growers.

The Member States concerned shall inform the Commission within 30 days of the end of each marketing year of the amount of State aid actually granted in that marketing year.



▼ M14

4. The derogation contained in the second paragraph of Article 180 of this Regulation shall apply to aid payments granted by Germany in the existing national framework of the German Alcohol Monopoly ('the Monopoly') for products marketed after further transformation by the Monopoly as ethyl alcohol of agricultural origin listed in Annex I to the Treaty on the Functioning of the European Union (TFEU). That derogation shall operate only until 31 December 2017, shall be without prejudice to the application of Article 108(1) and the first sentence of Article 108(3) TFEU and shall be conditional upon compliance with the following provisions:

- (a) the total production of ethyl alcohol under the Monopoly benefiting from the aid shall gradually decrease from the maximum of 600 000 hl in 2011 to 420 000 hl in 2012 and to 240 000 hl in 2013 and may amount to a maximum of 60 000 hl per year from 1 January 2014 until 31 December 2017, on which date the Monopoly shall cease to exist;
- (b) the production by agricultural bonded distilleries benefiting from the aid shall gradually decrease from 540 000 hl in 2011 to 360 000 hl in 2012 and to 180 000 hl in 2013. By 31 December 2013, all agricultural bonded distilleries shall leave the Monopoly. Upon leaving the Monopoly, each agricultural bonded distillery shall be allowed to receive a compensatory aid of EUR 257,50 per hl of nominal distilling rights within the meaning of the applicable German legislation. This compensatory aid may be granted no later than 31 December 2013. It may, however, be paid in several instalments, of which the last shall be no later than 31 December 2017;
- (c) the small-scale flat-rate distilleries, distillery users and fruit cooperative distilleries may benefit from the aid granted by the Monopoly until 31 December 2017, on condition that the production benefiting from the aid does not exceed 60 000 hl per year;
- (d) the total amount of aid paid from 1 January 2011 to 31 December 2013 shall not exceed EUR 269,9 million and the total amount of aid paid from 1 January 2014 to 31 December 2017 shall not exceed EUR 268 million; and
- (e) before 30 June each year, Germany shall submit a report to the Commission on the functioning of the Monopoly and the aid granted in the framework thereof in the previous year. The Commission shall forward that report to the European Parliament and the Council. Moreover, the annual reports to be submitted in the years 2013 to 2016 shall include an annual phasing-out plan for the following year concerning the small-scale flat-rate distilleries, distillery users and fruit cooperative distilleries.

▼ M3

5. Member States may continue to pay state aids under any existing schemes in respect of the production of and trade in potatoes, fresh or chilled, of CN code 0701 until 31 December 2011.

**▼ M3**

6. With regard to the fruit and vegetables sector, Member States may pay a state aid until 31 December 2010 under the following conditions:

- (a) the state aid is paid only to producers of fruit and vegetables who are not members of a recognised producer organisation and who sign a contract with a recognised producer organisation in which they accept that they shall apply the crisis prevention and management measures of the producer organisation concerned;
- (b) the amount of aid paid to such producers is no more than 75 % of the Community support received by the members of the producer organisation concerned; and
- (c) the Member State concerned presents a report to the Commission by 31 December 2010 on the effectiveness and efficiency of the state aid, in particular analysing how much it has supported the organisation of the sector. The Commission will examine the report and decide whether to make any appropriate proposals.

**▼ M7**

7. Member States may grant until 31 March 2014 state aid of a total annual amount of up to 55 % of the ceiling set out in Article 69(4) and (5) of Regulation (EC) No 73/2009 to farmers in the dairy sector in addition to Community support granted in accordance with Article 68(1)(b) of that Regulation. ► **C2** However, in no case shall the total amount of Community support under the measures referred to in Article 69(4) of that Regulation and State aid exceed the ceiling referred to in Article 69(4) and (5). ◀

**▼ M10***Article 182a***National aid for distillation of wine in cases of crisis**

1. From 1 August 2012, Member States may grant national aid to wine producers for the voluntary or mandatory distillation of wine in justified cases of crisis.

2. The aid referred to in paragraph 1 shall be proportionate and allow this crisis to be addressed.

3. The overall amount of aid available in a Member State in any given year for such aid shall not exceed 15 % of the globally available funds per Member State laid down in Annex Xb for that year.

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4. Member States which wish to make use of the aid referred to in paragraph 1 shall submit a duly substantiated notification to the Commission. The Commission shall decide whether the measure is approved and aid may be granted.

5. The alcohol resulting from distillation referred to in paragraph 1 shall be used exclusively for industrial or energy purposes so as to avoid distortion of competition.

6. Detailed rules for the application of this Article may be adopted by the Commission.



## **B. INSURANCE**



## II

*(Non-legislative acts)*

## REGULATIONS

## COMMISSION REGULATION (EU) No 267/2010

of 24 March 2010

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector**

*(Text with EEA relevance)*

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector <sup>(1)</sup>, and in particular Article 1(1)(a), (b), (c) and (e) thereof,

Having published a draft of this Regulation,

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

Whereas:

(1) Regulation (EEC) No 1534/91 empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union <sup>(2)</sup> by regulation to certain categories of agreements, decisions and concerted practices in the insurance sector which have as their object cooperation with respect to:

- the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims,
- the establishment of common standard policy conditions,

— the common coverage of certain types of risks,

— the settlement of claims,

— the testing and acceptance of security devices,

— registers of, and information on, aggravated risks.

(2) Pursuant to Regulation (EEC) No 1534/91, the Commission adopted Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector <sup>(3)</sup>. Regulation (EC) No 358/2003 expires on 31 March 2010.

(3) Regulation (EC) No 358/2003 does not grant an exemption to agreements concerning the settlement of claims and registers of, and information on, aggravated risks. The Commission considered that it lacked sufficient experience in handling individual cases to make use of the power conferred by Regulation (EEC) No 1534/91 in those fields. That situation has not changed. Furthermore, although Regulation (EC) No 358/2003 granted an exemption for the establishment of standard policy conditions and the testing and acceptance of security devices, this Regulation should not do so since the Commission's review of the functioning of Regulation (EC) No 358/2003 revealed that it was no longer necessary to include such agreements in a sector specific block exemption regulation. In the context where those two categories of agreements are not specific to the insurance sector and, as the review showed, can also give rise to certain competition concerns, it is more appropriate that they be subject to self-assessment.

<sup>(1)</sup> OJ L 143, 7.6.1991, p. 1.

<sup>(2)</sup> With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

<sup>(3)</sup> OJ L 53, 28.2.2003, p. 8.

- (4) Following a public consultation launched on 17 April 2008, the Commission adopted a report to the European Parliament and the Council on the functioning of Regulation (EC) No 358/2003 (the Report)<sup>(1)</sup> on 24 March 2009. In the Report and its accompanying Working Document (the Working Document) preliminary amendments of Regulation (EC) No 358/2003 were proposed. On 2 June 2009, the Commission held a public meeting with interested parties, including representatives of the insurance sector, consumer organisations and national competition authorities, on the findings and proposals in the Report and Working Document.
- (5) This Regulation should ensure effective protection of competition while providing benefits to consumers and adequate legal security for undertakings. The pursuit of those objectives should take account of the Commission's experience in this field, and the results of the consultations leading up to the adoption of this Regulation.
- (6) Regulation (EEC) No 1534/91 requires the exempting regulation of the Commission to define the categories of agreements, decisions and concerted practices to which it applies, to specify the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices, and to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.
- (7) Nevertheless, it is appropriate to continue the approach taken in Regulation (EC) No 358/2003 of placing the emphasis on defining categories of agreements which are exempted up to a certain level of market share and on specifying the restrictions or clauses which are not to be contained in such agreements.
- (8) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 101(3) of the Treaty. For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. At the same time, there is no presumption that agreements which do not benefit from this Regulation are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account must be taken of several factors, and in particular the market structure on the relevant market.
- (9) Collaboration between insurance undertakings or within associations of undertakings in the compilation of information (which may also involve some statistical calculations) allowing the calculation of the average cost of covering a specified risk in the past or, for life insurance, tables of mortality rates or of the frequency of illness, accident and invalidity, makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. This can in turn facilitate market entry and thus benefit consumers. The same applies to joint studies on the probable impact of extraneous circumstances that may influence the frequency or scale of claims, or the yield of different types of investments. It is, however, necessary to ensure that such collaboration is only exempted to the extent to which it is necessary to attain these objectives. It is therefore appropriate to stipulate in particular that agreements on commercial premiums are not exempted. Indeed, commercial premiums may be lower than the amounts indicated by the compilations, tables or study results in question, since insurers can use the revenues from their investments in order to reduce their premiums. Moreover, the compilations, tables or studies in question should be non-binding and serve only for reference purposes. The exchange of information not necessary to attain the objectives set out in this recital should not be covered by this Regulation.
- (10) Moreover, the narrower the categories into which statistics on the cost of covering a specified risk in the past are grouped, the more leeway insurance undertakings have to differentiate their commercial premiums when they calculate them. It is therefore appropriate to exempt joint compilations of the past cost of risks on condition that the available statistics are provided with as much detail and differentiation as is actuarially adequate.
- (11) Furthermore, access to the joint compilations, tables and study results is necessary both for insurance undertakings active on the geographic or product market in question and for those considering entering that market. Similarly access to such compilations, tables and study results may be of value to consumer organisations or customer organisations. Insurance undertakings not yet active on the market in question and consumer or customer organisations must be granted access to such compilations, tables and study results on reasonable, affordable and non-discriminatory terms, as compared with insurance undertakings already present on that market. Such terms might for example include a commitment from an insurance undertaking not yet present on the market to provide statistical information on claims, should it ever enter the market and might also include membership of the association of insurers responsible for producing the compilations. An exception to the

<sup>(1)</sup> COM(2009) 138.



requirement to grant access to consumer organisations and customer organisations should be possible on the grounds of public security, for example where the information relates to the security systems of nuclear plants or the weakness of flood prevention systems.

- (12) The reliability of joint compilations, tables and studies becomes greater as the amount of statistics on which they are based is increased. Insurers with high market shares may generate sufficient statistics internally to be able to make reliable compilations, but those with small market shares may not be able to do so, and new entrants are even less likely to be able to generate such statistics. The inclusion in such joint compilations, tables and studies of information from all insurers on a market, including large ones, in principle promotes competition by helping smaller insurers, and facilitates market entry. Given this specificity of the insurance sector, it is not appropriate to subject any exemption for such joint compilations, tables and studies to market share thresholds.
- (13) Co-insurance or co-reinsurance pools can, in certain limited circumstances, be necessary to allow the participating undertakings of a pool to provide insurance or reinsurance for risks for which they might only offer insufficient cover in the absence of the pool. Those types of pools do not generally give rise to a restriction of competition under Article 101(1) of the Treaty and are thus not prohibited by it.
- (14) Co-insurance or co-reinsurance pools can allow insurers and reinsurers to provide insurance or reinsurance for risks even if pooling goes beyond what is necessary to ensure that such a risk is covered. However, such pools can involve restrictions of competition, such as the standardisation of policy conditions and even of amounts of cover and premiums. It is therefore appropriate to lay down the circumstances in which such pools can benefit from exemption.
- (15) For genuinely new risks it is not possible to know in advance what subscription capacity is necessary to cover the risk, nor whether two or more pools could co-exist for the purposes of providing the specific type of insurance concerned. A pooling arrangement offering the co-insurance or co-reinsurance of such new risks can therefore be exempted for a limited period of time without a market share threshold. Three years should constitute an adequate period for the constitution of sufficient historical information on claims to assess the necessity or otherwise of a pool.
- (16) Risks which did not previously exist should be considered as new risks. However, in exceptional circumstances, a risk may be considered as a new risk where an objective analysis indicates that the nature of the risk has changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover such a risk.
- (17) For risks which are not new, co-insurance and co-reinsurance pools which involve a restriction of competition may, in certain limited circumstances, involve benefits so as to justify an exemption under Article 101(3) of the Treaty, even if they could be replaced by two or more competing insurance entities. They may, for example, allow their participating undertakings to gain the necessary experience of the sector of insurance involved, or they may allow cost savings, or reduction of commercial premiums through joint reinsurance on advantageous terms. However, any exemption should be limited to agreements which do not afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question. Consumers can benefit effectively from pools only if there is sufficient competition in the relevant markets in which the pools operate. This condition should be regarded as being met when the market share of a pool remains below a given threshold and can therefore be presumed to be subject to actual or potential competition from undertakings which are not participating in that pool.
- (18) This Regulation should therefore grant an exemption to any such co-insurance or co-reinsurance pool which has existed for more than three years, or which is not created in order to cover a new risk, on condition that the combined market share held by the participating undertakings does not exceed certain thresholds. The threshold for co-insurance pools should be lower because co-insurance pools may involve uniform policy conditions and commercial premiums. For the assessment of whether a pool fulfils the market share condition, the overall market share of the participating undertakings should be aggregated. The market share of each participating undertaking is based on the overall gross premium income of that participating undertaking both within and outside that pool in the same relevant market. These exemptions however should only apply if the pool in question meets the further conditions laid down in this Regulation, which are intended to keep to a minimum the restrictions of competition between the participating undertakings of the pool. An individual analysis would be necessary in such cases, in order to determine whether or not the conditions set out in this Regulation are fulfilled.
- (19) In order to facilitate the conclusion of agreements, some of which can involve significant investment decisions, the period of validity of this Regulation should be fixed at seven years.

- (20) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) 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<sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemptions provided for in this Regulation apply nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (21) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemptions provided for in this Regulation apply nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (22) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of links between a co-insurance or co-reinsurance pool and/or its participating undertakings and other pools and/or their participating undertakings on the same relevant market are of particular importance,
- (i) has the power to exercise more than half the voting rights; or
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
  - (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);
  - (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
  - (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
  - (e) undertakings in which the rights or powers listed in point (a) are jointly held by:
    - (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d); or
    - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties;

HAS ADOPTED THIS REGULATION:

#### CHAPTER I

#### DEFINITIONS

##### Article 1

#### Definitions

For the purposes of this Regulation, the following definitions shall apply:

1. 'agreement' means an agreement, a decision of an association of undertakings or a concerted practice;
2. 'participating undertakings' means undertakings party to the agreement and their respective connected undertakings;
3. 'connected undertakings' means:
  - (a) undertakings in which a party to the agreement, directly or indirectly;
4. 'co-insurance pools' means groups set up by insurance undertakings either directly or through brokers or authorised agents, with the exception of ad-hoc co-insurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover that remainder, which:
  - (a) agree to underwrite, in the name and for the account of all the participants, the insurance of a specified risk category; or
  - (b) entrust the underwriting and management of the insurance of a specified risk category, in their name and on their behalf, to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

5. 'co-reinsurance pools' means groups set up by insurance undertakings either directly or through broker or authorised agents, possibly with the assistance of one or more reinsurance undertakings, with the exception of ad-hoc co-reinsurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of this risk is covered by follow insurers who are then invited to cover that remainder in order to:

(a) reinsure mutually all or part of their liabilities in respect of a specified risk category;

(b) incidentally accept, in the name and on behalf of all the participants, the reinsurance of the same category of risks;

6. 'new risks' means:

(a) risks which did not previously exist, and for which insurance cover requires the development of an entirely new insurance product, not involving an extension, improvement or replacement of an existing insurance product; or

(b) in exceptional cases, risks the nature of which has, on the basis of an objective analysis, changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover such a risk;

7. 'commercial premium' means the price which is charged to the purchaser of an insurance policy.

## CHAPTER II

### JOINT COMPILATIONS, TABLES, AND STUDIES

#### Article 2

#### Exemption

Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, Article 101(1) of the Treaty shall not apply to agreements entered into between two or more undertakings in the insurance sector with respect to:

(a) the joint compilation and distribution of information necessary for the following purposes:

(i) calculation of the average cost of covering a specified risk in the past (hereinafter compilations);

(ii) construction of mortality tables, and tables showing the frequency of illness, accident and invalidity in connection with insurance involving an element of capitalisation (hereinafter tables);

(b) the joint carrying-out of studies on the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment (hereinafter studies), and the distribution of the results of such studies.

#### Article 3

#### Conditions for exemption

1. The exemption provided for in Article 2(a) shall apply on condition that the compilations or tables:

(a) are based on the assembly of data, spread over a number of risk years chosen as an observation period, which relate to identical or comparable risks in sufficient numbers to constitute a base which can be handled statistically and which will yield figures on the following, amongst others:

(i) the number of claims during the said period;

(ii) the number of individual risks insured in each risk year of the chosen observation period;

(iii) the total amounts paid or payable in respect of claims that have arisen during the said period;

(iv) the total amount of capital insured for each risk year during the chosen observation period;

(b) include as detailed a breakdown of the available statistics as is actuarially adequate;

(c) do not include in any way elements for contingencies, income deriving from reserves, administrative or commercial costs or fiscal or parafiscal contributions, and take into account neither revenues from investments nor anticipated profits.

2. The exemptions provided for in Article 2 shall apply on condition that the compilations, tables or study results:

- (a) do not identify the insurance undertakings concerned or any insured party;
- (b) when compiled and distributed, include a statement that they are non-binding;
- (c) do not contain any indication of the level of commercial premiums;
- (d) are made available on reasonable, affordable and non-discriminatory terms, to any insurance undertaking which requests a copy of them, including insurance undertakings which are not active on the geographic or product market to which those compilations, tables or study results refer;
- (e) except where non-disclosure is objectively justified on grounds of public security, are made available on reasonable, affordable and non-discriminatory terms, to consumer organisations or customer organisations which request access to them in specific and precise terms for a duly justified reason.

#### Article 4

##### Agreements not covered by the exemption

The exemptions provided for in Article 2 shall not apply where participating undertakings enter into an undertaking or commitment among themselves, or oblige other undertakings, not to use compilations or tables that differ from those referred to in Article 2(a), or not to depart from the results of the studies referred to in Article 2(b).

### CHAPTER III

#### COMMON COVERAGE OF CERTAIN TYPES OF RISKS

##### Article 5

##### Exemption

Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, Article 101(1) of the Treaty shall not apply to agreements entered into between two or more undertakings in the insurance sector with respect to the setting-up and operation of pools of insurance undertakings or of insurance undertakings and reinsurance undertakings for the

common coverage of a specific category of risks in the form of co-insurance or co-reinsurance.

#### Article 6

##### Application of exemption and market share thresholds

1. As concerns co-insurance or co-reinsurance pools which are created in order exclusively to cover new risks, the exemption provided for in Article 5 shall apply for a period of three years from the date of the first establishment of the pool, regardless of the market share of the pool.

2. As concerns co-insurance or co-reinsurance pools which do not fall within the scope of paragraph 1, the exemption provided for in Article 5 shall apply as long as this Regulation remains in force, on condition that the combined market share held by the participating undertakings does not exceed:

- (a) in the case of co-insurance pools, 20 % of any relevant market;
- (b) in the case of co-reinsurance pools, 25 % of any relevant market.

3. In calculating the market share of a participating undertaking on the relevant market, account shall be taken of:

- (a) the market share of the participating undertaking within the pool in question;
- (b) the market share of the participating undertaking within another pool on the same relevant market as the pool in question, to which the participating undertaking is a party; and
- (c) the market share of the participating undertaking on the same relevant market as the pool in question, outside any pool.

4. For the purposes of applying the market share thresholds provided for in paragraph 2, the following rules shall apply:

- (a) the market share shall be calculated on the basis of gross premium income; if gross premium income data are not available, estimates based on other reliable market information, including insurance cover provided or insured risk value, may be used to establish the market share of the undertaking concerned;

(b) the market share shall be calculated on the basis of data relating to the preceding calendar year.

5. Where the market share referred to in paragraph 2(a) is initially not more than 20 % but subsequently rises above that level without exceeding 25 %, the exemption provided for in Article 5 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded.

6. Where the market share referred to in paragraph 2(a) is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 5 shall continue to apply for a period of one calendar year following the year in which the level of 25 % was first exceeded.

7. The benefit of paragraphs 5 and 6 may not be combined so as to exceed a period of two calendar years.

8. Where the market share referred to in paragraph 2(b) is initially not more than 25 % but subsequently rises above that level without exceeding 30 %, the exemption provided for in Article 5 shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded.

9. Where the market share referred to in paragraph 2(b) is initially not more than 25 % but subsequently rises above 30 %, the exemption provided for in Article 5 shall continue to apply for a period of one calendar year following the year in which the level of 30 % was first exceeded.

10. The benefit of paragraphs 8 and 9 may not be combined so as to exceed a period of two calendar years.

#### *Article 7*

#### **Conditions for exemption**

The exemption provided for in Article 5 shall apply on condition that:

(a) each participating undertaking having given a reasonable period of notice has the right to withdraw from the pool, without incurring any sanctions;

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

Done at Brussels, 24 March 2010.

(b) the rules of the pool do not oblige any participating undertaking of the pool to insure or reinsure through the pool and do not restrict any participating undertaking of the pool from insuring or reinsuring outside the pool, in whole or in part, any risk of the type covered by the pool;

(c) the rules of the pool do not restrict the activity of the pool or its participating undertakings to the insurance or reinsurance of risks located in any particular geographical part of the Union;

(d) the agreement does not limit output or sales;

(e) the agreement does not allocate markets or customers; and

(f) the participating undertakings of a co-reinsurance pool do not agree on the commercial premiums which they charge for direct insurance.

#### CHAPTER IV

#### **FINAL PROVISIONS**

#### *Article 8*

#### **Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 April 2010 to 30 September 2010 in respect of agreements already in force on 31 March 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 358/2003.

#### *Article 9*

#### **Period of validity**

This Regulation shall enter into force on 1 April 2010.

It shall expire on 31 March 2017.

*For the Commission*

*The President*

José Manuel BARROSO

**Communication from the Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector**

(Text with EEA relevance)

(2010/C 82/02)

**1. INTRODUCTION AND BACKGROUND**

1. Commission Regulation (EC) No 358/2003 <sup>(1)</sup>, the previous Insurance Block Exemption Regulation (BER) which expired on 31 March 2010, applied Article 101(3) of the Treaty on the Functioning of the European Union <sup>(2)</sup> (the Treaty) to certain categories of agreements, decisions and concerted practices in the insurance sector.
  - (a) whether the business risks or other issues in the insurance sector make it 'special' and different to other sectors such that this leads to an enhanced need for cooperation amongst insurers;
  - (b) if so, whether this enhanced need for cooperation requires a legal instrument such as the BER to protect or facilitate it; and
  - (c) if so, what is the most appropriate legal instrument (i.e. whether it is the current BER or whether partial renewal, amended renewal, or guidance would be more appropriate).
2. Following a lengthy review (the Review) of the functioning of Regulation (EC) No 358/2003, the Commission published its Report to the European Parliament and the Council on the functioning of that Regulation <sup>(3)</sup> (the Report) as well as an accompanying Working Document <sup>(4)</sup> (the Working Document) on 24 March 2009.
3. As a result of its findings following the Review, the Commission has now adopted a new insurance BER which renews the exemptions for two of the four categories of agreements exempted in the previous BER; namely: (i) joint compilations, tables and studies; and (ii) common coverage of certain types of risks (pools).

**3. RENEWED EXEMPTIONS**

5. On the basis of its Review and consultation of stakeholders which was conducted over a 2-year period, the Commission adopted the new BER (Commission Regulation (EU) No 267/2010 of 24 March) renewing (with amendments) the exemptions for two forms of cooperation, namely (i) joint compilations, tables and studies; and (ii) common coverage of certain types of risks (pools).

**2. FIRST PRINCIPLES ANALYSIS**

4. The Commission's original objective when it adopted Regulation (EC) No 358/2003 of reducing the number of notifications it received is no longer relevant since under Regulation (EC) No 1/2003 undertakings can no longer notify their agreements to the Commission, but now must conduct their own self-assessment. In this context, a specific legal instrument such as a BER should only be adopted if cooperation in the insurance sector is 'special' and different to other sectors which do not benefit from a BER (i.e. most sectors currently). The Commission's analysis as to whether or not to renew the BER addressed three key questions in relation to each of the four categories of agreements exempted by the BER, namely:
  6. When agreements falling within these categories of agreements do not meet all the conditions to benefit from the block exemption, an individual analysis under Article 101 of the Treaty is required. The analytical framework set out in the Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements <sup>(5)</sup> (the Horizontal Guidelines) will assist businesses in assessing the compatibility of agreements with Article 101 of the Treaty. <sup>(6)</sup>

**3.1. Joint compilations, tables and studies**

7. Subject to certain conditions, the previous BER exempted agreements which relate to the joint establishment and distribution of (i) calculations of the average cost of covering a specified risk in the past, and (ii) mortality tables and tables showing the frequency of illness, accident and invalidity, in connection with insurance involving an element of capitalisation. It also exempted

<sup>(1)</sup> OJ L 53, 28.2.2003, p. 8.

<sup>(2)</sup> With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Communication, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

<sup>(3)</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0138:EN:NOT>

<sup>(4)</sup> [http://ec.europa.eu/competition/sectors/financial\\_services/insurance\\_ber\\_working\\_document.pdf](http://ec.europa.eu/competition/sectors/financial_services/insurance_ber_working_document.pdf)

<sup>(5)</sup> See paragraph 7 of Commission Notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2.

<sup>(6)</sup> The current Horizontal Guidelines are under review.

(subject to certain conditions) the joint carrying out of studies on the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment and the distribution of the results of such studies.

8. As summarised in the Report, the costs of insurance products are unknown at the time the price is agreed and the risk covered. Calculation of risk is a key issue in pricing all insurance products which appears to be a differentiating factor from other sectors including the banking sector. This makes access to past statistical data in order to technically price risks crucial. Therefore, the Commission considers that cooperation in this area is both specific to the insurance industry and necessary in order to price risks.
9. The Commission also considers that there are good reasons to protect and facilitate cooperation in this area with a BER and that it is appropriate that the BER be renewed for this category of agreements in order to avoid any reduction in such pro-competitive cooperation.
10. However, in renewing the exemption the Commission made the following key changes: (i) the term 'joint calculations' was changed to 'joint compilations' (which may also include some calculations); (ii) clarification that exchange of information is only allowed where it is necessary; and (iii) access to data shared is now also allowed for consumer organisations and customer organisations (as distinguished from individuals), with a public security exception.

### 3.2. Common coverage of certain types of risks (pools)

11. The previous BER exempted<sup>(1)</sup> the setting up and operation of co-(re)insurance pools for the common coverage of new risks as well as co-(re)insurance pools covering risks which are not new, subject to certain conditions, in particular to market share thresholds.
12. As a result of its Review, the Commission considers that risk sharing for certain types of risks (such as nuclear, terrorism and environmental risks), for which individual insurance companies are reluctant or unable to insure the

entire risk alone, is crucial in order to ensure that all such risks can be covered. This makes the insurance sector different to other sectors and triggers an enhanced need for cooperation<sup>(2)</sup>. Therefore, the new BER also exempts pools under certain conditions.

13. In renewing the exemption, the Commission made the following key changes: (i) a change to the approach to market share calculation in order to bring it into line with other general and sector-specific competition rules so that not only gross premium income earned within the pool by the participating undertakings, but also outside the pool will be taken into account; and (ii) an amendment and expansion to the definition of 'new risks'.
14. In terms of self-assessment it is important to consider that there are three types of pools and determine into which category a particular pool falls: (i) pools which do not require a BER as a safe harbour because they do not give rise to a restriction of competition as long as the pooling is necessary to allow their members to provide a type of insurance that they could not provide alone; (ii) pools which fall under Article 101(1) of the Treaty and which do not comply with the conditions of the new BER but may benefit from an individual exception under Article 101(3) of the Treaty; (iii) pools which fall under Article 101(1) of the Treaty but which comply with the conditions of the BER.
15. For both types (ii) and (iii) it is necessary to carefully define the relevant product and geographic market, as market definition is a prerequisite in order to assess compliance with the market share thresholds<sup>(3)</sup>. The Commission's Notice on the definition of the relevant market for the purposes of Community competition law<sup>(4)</sup>, together with relevant Commission decisions and comfort letters in the insurance sector can be used as guidance in order for pools to determine the relevant market on which they operate.
16. However, the Review showed that many insurers were incorrectly using the pool exemption in the BER as a 'blanket' exemption, without carrying out the required careful legal assessment of a pool's compliance with the conditions of the BER<sup>(5)</sup>.

<sup>(1)</sup> For three years from the date of first establishment of the group, regardless of the market share of the group.

<sup>(2)</sup> An alternative method of covering risks through co-(re)insurance is ad hoc co-(re)insurance agreements on the subscription market, which may be a less restrictive option depending on the analysis on a case-by-case basis.

<sup>(3)</sup> Concerns were also raised about the definition of 'new risks'.

<sup>(4)</sup> OJ C 372, 9.12.1997, p. 5.

<sup>(5)</sup> In particular in relation to market share thresholds. Furthermore, it is crucial that any pools covering new risks and purporting to fall within the BER ensure that they are in fact covered by the precise definition of new risks in Article 1 of the new BER, as mentioned in the Report and Working Document.

17. Also, it should be remembered that ad hoc co-(re)insurance agreements on the subscription market <sup>(1)</sup> have never been covered by the BER and they remain outside the scope of the new BER. As mentioned in the Commission's Final Report on the Business Insurance Sector Inquiry of 25 September 2007 <sup>(2)</sup>, practices involving an alignment of premium (between co-(re)insurers through ad hoc co-(re)insurance agreements) may fall within the scope of Article 101(1) of the Treaty, but may benefit from the exemption afforded by Article 101(3) of the Treaty.

18. The Commission intends to closely monitor, in cooperation with national competition authorities within the framework of the European Competition Network, the operation of pools to ensure that blanket applications of the BER or Article 101(3) of the Treaty are not occurring. This closer monitoring will be undertaken in line with enforcement cases where pools are found to fall foul of Article 101(1) of the Treaty and/or the BER.

#### 4. NON-RENEWED EXEMPTIONS

19. On the basis of the Commission's analysis set out in the Report and Working Document, as well as in its Impact Assessment of the new BER, two of the four exemptions in the previous BER, namely agreements on standard policy conditions (SPCs) and security devices have not been renewed by the new BER. This is primarily because they are not specific to the insurance sector and therefore their inclusion in such an exceptional legal instrument may result in unjustified discrimination against other sectors which do not benefit from a BER. In addition, although these two forms of cooperation may give rise to some benefits to consumers, the Review showed that they can also give rise to certain competition concerns. Therefore, it is more appropriate that they be subject to self-assessment.

20. Although non-renewal of the BER in relation to these two types of cooperation will inevitably result in slightly less legal certainty, it should be emphasised that the insurance sector will benefit in this regard from the same level of legal certainty as the other sectors which do not benefit

from a BER. Furthermore, as outlined below the Commission plans to address both these forms of cooperation in its Horizontal Guidelines.

#### 4.1. Standard Policy Conditions

21. The previous BER exempted the joint establishment and distribution of non-binding standard policy conditions (SPCs) for direct insurance <sup>(3)</sup>.

22. On the basis of the evidence found during its Review, the Commission no longer considers that a sector specific BER is necessary since cooperation on SPCs is not specific to the insurance sector, but common to many others, such as the banking sector, which do not benefit from a BER. As SPCs are not specific to the insurance sector it is appropriate that any guidance on SPCs is afforded to industry as a whole and in the form of a horizontal instrument.

23. The Commission considers that in many cases SPCs can give rise to positive effects for competition and consumers. For example, SPCs allow the comparison of insurance policies offered by different insurers, allowing customers to verify the content of guarantees more easily and facilitating switching between insurers and insurance products. However, whilst there is a need for comparability between insurance products for consumers, too much standardisation can be harmful for consumers and can lead to a lack of non-price competition. In addition, given that certain SPCs can be imbalanced, it is more appropriate that undertakings conduct their own assessment on the basis of Article 101(3) of the Treaty in the event that Article 101(1) of the Treaty is applicable in order to demonstrate that the cooperation they are part of gives rise to efficiency gains, a fair share of which benefit consumers <sup>(4)</sup>.

24. Accordingly, the Commission is planning to expand its Horizontal Guidelines to also address SPCs for all sectors. These are currently under review and it is planned to publish a draft of the revised Horizontal Guidelines for stakeholder consultation in the first half of 2010.

<sup>(3)</sup> Article 6(1)(a) to (k) of Regulation (EC) No 358/2003.

<sup>(4)</sup> Certain of the clauses listed in Article 6(1) of the previous BER, Regulation (EC) No 358/2003, would remain relevant for self-assessment of agreements under Article 101 of the Treaty, in particular those which have an impact on prices and product innovation. Of particular relevance are, for example, clauses which: (i) contain any indication of the level of commercial premiums; (ii) indicate the amount of cover or the part which the policyholder must pay himself; or (iii) impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed; (iv) require the policyholder to obtain cover from the same insurer for different risks.

<sup>(1)</sup> Whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover the remainder.

<sup>(2)</sup> COM(2007) 556 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance (Final Report).



#### 4.2. Security devices

25. The previous BER exempted: (i) technical specifications, rules or codes of practice regarding security devices and procedures for assessing and approving their compliance with these standards as well as (ii) technical specifications, rules or codes of practice for the installation and maintenance of security devices and procedures for assessing and approving the compliance of undertakings which install or maintain security devices with such standards.
26. However, the Commission considers that the setting of technical standards falls into the general domain of standard setting, which is not unique to the insurance sector. As these kinds of agreements are not specific to the insurance sector, it is appropriate that any guidance is afforded to the industry as a whole and in the form of a horizontal instrument. This is already the case, as point 6 of the Horizontal Guidelines provides guidance on the compliance of technical standards with Article 101 of the Treaty. Moreover, the Horizontal Guidelines are currently under review and it is planned to publish a draft of the revised Horizontal Guidelines for stakeholder consultation during the first half of 2010.
27. In addition, these agreements were covered by the BER in so far as no harmonisation exists at Union level. The Commission's Review showed that there is reduced scope

for the BER, since such harmonisation is now extensive. As regards the limited area where there is not yet Union harmonisation, detailed national rules result in fragmentation of the internal market, reduction of competition between producers of security devices across the Member States and less choice for consumers as consumers do not obtain insurance in the event that their security devices do not comply with standards commonly established by insurers.

28. The Commission has therefore not renewed the BER for these categories of agreements.

#### 5. CONCLUSIONS

29. It will be necessary for undertakings to carefully assess their cooperation on joint compilations, tables and studies and pools under the conditions established by the BER, in order to avoid blanket application of the BER.
30. As regards self-assessment under Article 101(3) of the Treaty for cooperation on SPCs and security devices, undertakings benefit from two legal instruments, namely the Horizontal Guidelines (currently being revised) and the Guidelines on the application of Article 81(3) of the Treaty <sup>(1)</sup>.

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<sup>(1)</sup> OJ C 101, 27.4.2004, p. 97.

**Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector**

*Official Journal L 143 , 07/06/1991 P. 0001 - 0003*  
*Finnish special edition: Chapter 8 Volume 2 P. 0003*  
*Swedish special edition: Chapter 8 Volume 2 P. 0003*

COUNCIL REGULATION (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 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 Economic and Social Committee (3),

Whereas Article 85 (1) of the Treaty may, in accordance with Article 85 (3), be declared inapplicable to categories of agreements, decisions and concerted practices when satisfy the requirements of Article 85 (3);

Whereas the detailed rules for the application of Article 85 (3) of the Treaty must be adopted by way of a Regulation based on Article 87 of the Treaty;

Whereas cooperation between undertakings in the insurance sector is, to a certain extent, desirable to ensure the proper functioning of this sector and may at the same time promote consumers' interests;

Whereas the application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (4) enables the Commission to exercise close supervision on issues arising from concentrations in all sectors, including the insurance sector;

Whereas exemptions granted under Article 85 (3) of the Treaty cannot themselves affect Community and national provisions safeguarding consumers' interests in this sector;

Whereas agreements, decisions and concerted practices serving such aims may, in so far as they fall within the prohibition contained in Article 85 (1) of the Treaty, be exempted therefrom under certain conditions; whereas this applies in particular to agreements, decisions and concerted practices relating to the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims, the establishment of standard policy conditions, common coverage of certain types of risks, the settlement of claims, the testing and acceptance of security devices, and registers of, and information on, aggravated risks;

Whereas in view of the large number of notifications submitted pursuant to Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (5), as last

amended by the Act of Accession of Spain and Portugal, it is desirable that in order to facilitate the Commission's task, it should be enabled to declare, by way of Regulation, that the provisions of Article 85 (1) of the Treaty are inapplicable to certain categories of agreements, decisions and concerted practices;

Whereas it should be laid down under which conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers;

Whereas, in the exercise of such powers, the Commission will take account not only of the risk of competition being eliminated in a substantial part of the relevant market and of any benefit that might be conferred on policyholders resulting from the agreements, but also of the risk which the proliferation of restrictive clauses and the operation of accommodation companies would entail for policyholders;

Whereas the keeping of registers and the handling of information on aggravated risks should be carried out subject to the proper protection of confidentiality;

Whereas, under Article 6 of Regulation No 17, the Commission may provide that a decision taken in accordance with Article 85 (3) of the Treaty shall apply with retroactive effect; whereas the Commission should also be able to adopt provisions to such effect in a Regulation;

Whereas, under Article 7 of Regulation No 17, agreements, decisions and concerted practices may, by decision of the Commission, be exempted from prohibition, in particular if they are modified in such manner that they satisfy the requirements of Article 85 (3) of the Treaty; whereas it is desirable that the Commission be enabled to grant by Regulation like exemption to such agreements, decisions and concerted practices if they are modified in such manner as to fall within a category defined in an exempting Regulation;

Whereas it cannot be ruled out that, in specific cases, the conditions set out in Article 85 (3) of the Treaty may not be fulfilled; whereas the Commission must have the power to regulate such cases pursuant to Regulation No 17 by way of a Decision having effect for the future,

HAS ADOPTED THIS REGULATION: Article 1

1. Without prejudice to the application of Regulation No 17, the Commission may, by means of a Regulation and in accordance with Article 85 (3) of the Treaty, declare that Article 85 (1) shall not apply to categories of agreements between undertakings, decisions of associations of undertakings and concerted practices in the insurance sector which have as their object cooperation with respect to:

- (a) the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims;
- (b) the establishment of common standard policy conditions;
- (c) the common coverage of certain types of risks;
- (d) the settlement of claims;
- (e) the testing and acceptance of security devices;

(f) registers of, and information on, aggravated risks, provided that the keeping of these registers and the handling of this information is carried out subject to the proper protection of confidentiality.

2. The Commission Regulation referred to in paragraph 1, shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify in particular:

(a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;

(b) the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied. Article 2

Any Regulation adopted pursuant to Article 1 shall be of limited duration.

It may be repealed or amended where circumstances have changed with respect to any of the facts which were essential to its being adopted; in such case, a period shall be fixed for modification of the agreements, decisions and concerted practices to which the earlier Regulation applies. Article 3

A Regulation adopted pursuant to Article 1 may provide that it shall apply with retroactive effect to agreements, decisions and concerted practices to which, at the date of entry into force of the said Regulation, a Decision taken with retroactive effect pursuant to Article 6 of Regulation No 17 would have applied. Article 4

1. A Regulation adopted pursuant to Article 1 may provide that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed in that Regulation, to agreements, decisions and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85 (3) where:

- within six months from the entry into force of the said Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the said Regulation and

- the modifications are brought to the notice of the Commission within the time limit fixed by the said Regulation.

The provisions of the first subparagraph shall apply in the same way to those agreements, decisions and concerted practices existing at the date of accession of new Member States to which Article 85 (1) of the Treaty applies by virtue of accession and which do not satisfy the conditions of Article 85 (3).

2. Paragraph 1 shall apply to agreements, decisions and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

Paragraph 1 shall not apply to agreements, decisions and concerted practices existing at the date of accession of new Member States to which Article 85 (1) of the Treaty applies by virtue of accession and which had to be notified within six months from the date of accession in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified within the said period.

3. The benefit of provisions adopted pursuant to paragraph 1 may not be invoked in actions pending at the date of entry into force of a Regulation adopted pursuant to Article 1; neither may it be invoked as grounds for claims for damages against third parties. Article 5

Where the Commission proposes to adopt a Regulation, it shall publish a draft thereof to enable all persons and organizations concerned to submit to it their comments within such time limit, being not less than one month, as it shall fix. Article 6

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

(a) before publishing a draft Regulation;

(b) before adopting a Regulation.

2. Article 10 (5) and (6) of Regulation No 17, relating to consultation of the Advisory Committee, shall apply. However, joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them. Article 7

Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that, in any particular case, agreements, decisions and concerted practices, to which a Regulation adopted pursuant to Article 1 applies, have nevertheless certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, it may withdraw the benefit of application of the said regulation and take a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4 (1) of Regulation No 17 being required. Article 8

Not later than six years after the entry into force of the Commission Regulation provided for in Article 1, the Commission shall submit to the European Parliament and the Council a report on the functioning of this Regulation, accompanied by such proposals for amendments to this Regulation as may appear necessary in the light of experience. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 31 May 1991. For the Council

The President

A. BODRY (1) OJ No C 16, 23. 1. 1990, p. 13. (2) OJ No C 260, 15. 10. 1990, p. 57. (3) OJ No C 182, 23. 7. 1990, p. 27. (4) OJ No L 395, 30. 12. 1989, p. 1. (5) OJ No 13, 21. 2. 1962, p. 204/62.



## **C. MOTOR VEHICLES**





## COMMISSION REGULATION (EU) No 461/2010

of 27 May 2010

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices <sup>(1)</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation,

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

Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (\*) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty. Block exemption regulations apply to vertical agreements which fulfil certain conditions and may be general or sector-specific.
- (2) The Commission has defined a category of vertical agreements which it regards as normally satisfying the conditions laid down in Article 101(3) of the Treaty and to this end has adopted Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application

<sup>(1)</sup> OJ 36, 6.3.1965, p. 533/65.

(\*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices <sup>(2)</sup>, which replaces Commission Regulation (EC) No 2790/1999 <sup>(3)</sup>.

- (3) The motor vehicle sector, which includes both passenger cars and commercial vehicles, has been subject to specific block exemption regulations since 1985, the most recent being Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector <sup>(4)</sup>. Regulation (EC) No 2790/1999 expressly stated that it did not apply to vertical agreements the subject matter of which fell within the scope of any other block exemption regulation. The motor vehicle sector therefore fell outside the scope of that Regulation.
- (4) Regulation (EC) No 1400/2002 expires on 31 May 2010. However, the motor vehicle sector should continue to benefit from a block exemption in order to simplify administration and reduce compliance costs for the undertakings concerned, while ensuring effective supervision of markets in accordance with Article 103(2)(b) of the Treaty.
- (5) Experience acquired since 2002 regarding the distribution of new motor vehicles, the distribution of spare parts and the provision of repair and maintenance services for motor vehicles, makes it possible to define a category of vertical agreements in the motor vehicle sector which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty.
- (6) This category includes vertical agreements for the purchase, sale or resale of new motor vehicles, vertical agreements for the purchase, sale or resale of spare parts for motor vehicles and vertical agreements for the provision of repair and maintenance services for such vehicles, where those agreements are concluded between non-competing undertakings, between certain competitors, or by certain associations of retailers or repairers. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should be defined accordingly to include both such agreements and the corresponding concerted practices.

<sup>(2)</sup> OJ L 102, 23.4.2010, p. 1.

<sup>(3)</sup> OJ L 336, 29.12.1999, p. 21.

<sup>(4)</sup> OJ L 203, 1.8.2002, p. 30.

- (7) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.
- (8) The likelihood that such efficiency-enhancing effects will outweigh any anticompetitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use. Vertical agreements containing restrictions which are likely to restrict competition and harm consumers, or which are not indispensable to the attainment of the efficiency-enhancing effects, should be excluded from the benefit of the block exemption.
- (9) In order to define the appropriate scope of a block exemption regulation, the Commission must take into account the competitive conditions in the relevant sector. In this respect, the conclusions of the in-depth monitoring of the motor vehicle sector set out in the Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002 of 28 May 2008 <sup>(1)</sup> and in the Commission Communication on The Future Competition Law Framework applicable to the Motor Vehicle sector of 22 July 2009 <sup>(2)</sup> have shown that a distinction should be drawn between agreements for the distribution of new motor vehicles and agreements for the provision of repair and maintenance services and distribution of spare parts.
- (10) As regards the distribution of new motor vehicles, there do not appear to be any significant competition shortcomings which would distinguish this sector from other economic sectors and which could require the application of rules different from and stricter than those set out in Regulation (EU) No 330/2010. The market-share threshold, the non-exemption of certain vertical agreements and the other conditions laid down in that Regulation normally ensure that vertical agreements for the distribution of new motor vehicles comply with the requirements of Article 101(3) of the Treaty. Therefore, such agreements should benefit from the exemption granted by Regulation (EU) No 330/2010, subject to all the conditions laid down therein.
- (11) As regards agreements for the distribution of spare parts and for the provision of repair and maintenance services, certain specific characteristics of the motor vehicle aftermarket should be taken into account. In particular, the experience acquired by the Commission in applying Regulation (EC) No 1400/2002 shows that price increases for individual repair jobs are only partially reflected in increased reliability of modern cars and lengthening of service intervals. These latter trends are linked to technological evolution and to the increasing complexity and reliability of automotive components that the vehicle manufacturers purchase from original equipment suppliers. Such suppliers sell their products as spare parts in the aftermarket both through the vehicle manufacturers' authorised repair networks and through independent channels, thereby representing an important competitive force in the motor vehicle aftermarket. The costs borne on average by consumers in the Union for motor vehicle repair and maintenance services represent a very high proportion of total consumer expenditure on motor vehicles.
- (12) Competitive conditions in the motor vehicle aftermarket also have a direct bearing on public safety, in that vehicles may be driven in an unsafe manner if they have been repaired incorrectly, as well as on public health and the environment, as emissions of carbon dioxide and other air pollutants may be higher from vehicles which have not undergone regular maintenance work.
- (13) In so far as a separate aftermarket can be defined, effective competition on the markets for the purchase and sale of spare parts, as well as for the provision of repair and maintenance services for motor vehicles, depends on the degree of competitive interaction between authorised repairers, that is to say those operating within repair networks established directly or indirectly by vehicle manufacturers, as well as between authorised and independent operators, including independent spare parts suppliers and repairers. The latter's ability to compete depends on unrestricted access to essential inputs such as spare parts and technical information.
- (14) Having regard to those specificities, the rules in Regulation (EU) No 330/2010, including the uniform market share threshold of 30 %, are necessary but are not sufficient to ensure that the benefit of the block exemption is reserved only to those vertical agreements for the distribution of spare parts and for the provision of repair and maintenance services for which it can be assumed with sufficient certainty that the conditions of Article 101(3) of the Treaty are satisfied.

<sup>(1)</sup> SEC(2008) 1946.

<sup>(2)</sup> COM(2009) 388.

- (15) Therefore, vertical agreements for the distribution of spare parts and for the provision of repair and maintenance services should benefit from the block exemption only if, in addition to the conditions for exemption set out in Regulation (EU) No 330/2010, they comply with stricter requirements concerning certain types of severe restrictions of competition that may limit the supply and use of spare parts in the motor vehicle aftermarket.
- (16) In particular, the benefit of the block exemption should not be granted to agreements that restrict the sale of spare parts by members of the selective distribution system of a vehicle manufacturer to independent repairers, which use them for the provision of repair or maintenance services. Without access to such spare parts, independent repairers would not be able to compete effectively with authorised repairers, since they could not provide consumers with good quality services which contribute to the safe and reliable functioning of motor vehicles.
- (17) Moreover, in order to ensure effective competition on the repair and maintenance markets and to allow repairers to offer end users competing spare parts, the block exemption should not cover vertical agreements which, although they comply with Regulation (EU) No 330/2010, nonetheless restrict the ability of a producer of spare parts to sell such parts to authorised repairers within the distribution system of a vehicle manufacturer, independent distributors of spare parts, independent repairers or end users. This does not affect the liability of producers of spare parts under civil law, or the ability of vehicle manufacturers to require the authorised repairers within their distribution system to only use spare parts that match the quality of the components used for the assembly of a certain motor vehicle. Moreover, in view of the vehicle manufacturers' direct contractual involvement in repairs under warranty, free servicing, and recall operations, agreements containing obligations on authorised repairers to use only spare parts supplied by the vehicle manufacturer for those repairs should be covered by the exemption.
- (18) Finally, in order to allow authorised and independent repairers and end users to identify the manufacturer of motor vehicle components or of spare parts and to choose between alternative parts, the block exemption should not cover agreements by which a manufacturer of motor vehicles limits the ability of a manufacturer of components or original spare parts to place its trade mark or logo on those parts effectively and in a visible manner.
- (19) In order to allow all operators time to adapt to this Regulation, it is appropriate to extend the period of application of the provisions of Regulation (EC) No 1400/2002 relating to vertical agreements for the purchase, sale and resale of new motor vehicles until 31 May 2013. As regards vertical agreements for the distribution of spare parts and for the provision of repair and maintenance services, this Regulation should apply from 1 June 2010 so as to continue to ensure adequate protection of competition on the motor vehicle aftermarkets.
- (20) The Commission will, on a continuous basis, monitor developments in the motor vehicle sector and will take appropriate remedial action if competition shortcomings arise which may lead to consumer harm on the market for the distribution of new motor vehicles or the supply of spare parts or after-sales services for motor vehicles.
- (21) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) 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<sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (22) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (23) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects which significantly restrict access to a relevant market or competition therein are of particular importance. Such cumulative effects may, for example, arise in the case of selective distribution or non-compete obligations.

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

- (24) In order to strengthen supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements.
- (25) In order to assess the effects of this Regulation on competition in motor vehicle retailing, in the supply of spare parts and in after sales servicing for motor vehicles in the internal market, it is appropriate to draw up an evaluation report on the operation of this Regulation,

HAS ADOPTED THIS REGULATION:

#### CHAPTER I

#### COMMON PROVISIONS

##### Article 1

##### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;
- (b) 'vertical restraint' means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;
- (c) 'authorised repairer' means a provider of repair and maintenance services for motor vehicles operating within the distribution system set up by a supplier of motor vehicles;
- (d) 'authorised distributor' means a distributor of spare parts for motor vehicles operating within the distribution system set up by a supplier of motor vehicles;
- (e) 'independent repairer' means:
- (i) a provider of repair and maintenance services for motor vehicles not operating within the distribution system set up by the supplier of the motor vehicles for which it provides repair or maintenance;
- (ii) an authorised repairer within the distribution system of a given supplier, to the extent that it provides repair or

maintenance services for motor vehicles in respect of which it is not a member of the respective supplier's distribution system;

(f) 'independent distributor' means:

- (i) a distributor of spare parts for motor vehicles not operating within the distribution system set up by the supplier of the motor vehicles for which it distributes spare parts;
- (ii) an authorised distributor within the distribution system of a given supplier, to the extent that it distributes spare parts for motor vehicles in respect of which it is not a member of the respective supplier's distribution system;

(g) 'motor vehicle' means a self-propelled vehicle intended for use on public roads and having three or more road wheels;

(h) 'spare parts' means goods which are to be installed in or upon a motor vehicle so as to replace components of that vehicle, including goods such as lubricants which are necessary for the use of a motor vehicle, with the exception of fuel;

(i) 'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

2. For the purposes of this Regulation, the terms 'undertaking', 'supplier', 'manufacturer' and 'buyer' shall include their respective connected undertakings.

'Connected undertakings' means:

- (a) undertakings in which a party to the agreement, directly or indirectly:
- (i) has the power to exercise more than half the voting rights; or
- (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
- (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);

- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
- (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d); or
  - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

## CHAPTER II

**VERTICAL AGREEMENTS RELATING TO THE PURCHASE, SALE OR RESALE OF NEW MOTOR VEHICLES***Article 2***Application of Regulation (EC) No 1400/2002**

Pursuant to Article 101(3) of the Treaty, from 1 June 2010 until 31 May 2013, Article 101(1) of the Treaty shall not apply to vertical agreements relating to the conditions under which the parties may purchase, sell or resell new motor vehicles, which fulfil the requirements for an exemption under Regulation (EC) No 1400/2002 that relate specifically to vertical agreements for the purchase, sale or resale of new motor vehicles.

*Article 3***Application of Regulation (EU) No 330/2010**

With effect from 1 June 2013, Regulation (EU) No 330/2010 shall apply to vertical agreements relating to the purchase, sale or resale of new motor vehicles.

## CHAPTER III

**VERTICAL AGREEMENTS RELATING TO THE MOTOR VEHICLE AFTERMARKET***Article 4***Exemption**

Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation Article 101(1) of the Treaty shall not apply to vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles or provide repair and maintenance services for motor vehicles, which fulfil the requirements for an exemption under Regulation (EU) No 330/2010 and do not

contain any of the hardcore clauses listed in Article 5 of this Regulation.

This exemption shall apply to the extent that such agreements contain vertical restraints.

*Article 5***Restrictions that remove the benefit of the block exemption — hardcore restrictions**

The exemption provided for in Article 4 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle;
- (b) the restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end users;
- (c) the restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.

## CHAPTER IV

**FINAL PROVISIONS***Article 6***Non-application of this Regulation**

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

*Article 7***Monitoring and evaluation report**

The Commission will monitor the operation of this Regulation and draw up a report on its operation by 31 May 2021 at the latest, having regard in particular to the conditions set out in Article 101(3) of the Treaty.

*Article 8***Period of validity**

This Regulation shall enter into force on 1 June 2010.

It shall expire on 31 May 2023.

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

Done at Brussels, 27 May 2010.

*For the Commission*  
*The President*  
José Manuel BARROSO

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## Commission notice

### Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles

(Text with EEA relevance)

(2010/C 138/05)

#### I. INTRODUCTION

##### 1. Purpose of the Guidelines

- (1) These Guidelines set out principles for assessing under Article 101 of the Treaty on the Functioning of the European Union <sup>(1)</sup> particular issues arising in the context of vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts. They accompany Commission Regulation (EU) No 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector <sup>(2)</sup> (hereinafter ‘the Motor Vehicle Block Exemption Regulation’) and are aimed at helping companies to make their own assessment of such agreements.
- (2) These Guidelines provide clarification on issues that are particularly relevant for the motor vehicle sector, including the interpretation of certain provisions of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices <sup>(3)</sup> (hereinafter ‘the General Vertical Block Exemption Regulation’). They are without prejudice to the applicability of the Guidelines on Vertical Restraints <sup>(4)</sup> (hereinafter ‘the General Vertical Guidelines’) and are therefore to be read in conjunction with and as a supplement to the General Vertical Guidelines.
- (3) These Guidelines apply to both vertical agreements and concerted practices relating to the conditions under which the parties may purchase, sell or resell spare parts and/or provide repair and maintenance services for motor vehicles, and to vertical agreements and concerted practices relating to the conditions under which the parties may purchase, sell or resell new motor vehicles. As explained in Section II of these Guidelines, the latter category of agreements and concerted practices will remain subject to the relevant provisions of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector <sup>(5)</sup> until 31 May 2013. Therefore, as regards vertical agreements and concerted practices for the purchase, sale or resale of new motor vehicles, these Guidelines will only apply as from 1 June 2013. These Guidelines do not apply to vertical agreements in sectors other than motor vehicles, and the principles set out herein may not necessarily be used to assess agreements in other sectors.
- (4) These Guidelines are without prejudice to the possible parallel application of Article 102 of the Treaty to vertical agreements in the motor vehicle sector, or to the interpretation that the Court of Justice of the European Union may give in relation to the application of Article 101 of the Treaty to such vertical agreements.
- (5) Unless otherwise stated, the analysis and arguments set out in these Guidelines apply to all levels of trade. The terms ‘supplier’ and ‘distributor’ <sup>(6)</sup> are used for all levels of trade. The General Vertical Block Exemption Regulation and the Motor Vehicle Block Exemption Regulation are collectively referred to as ‘the Block Exemption Regulations’.
- (6) The standards set forth in these Guidelines must be applied to each case having regard to the individual factual and legal circumstances. The Commission will apply <sup>(7)</sup> these Guidelines reasonably and flexibly, and having regard to the experience that it has acquired in the course of its enforcement and market monitoring activities.
- (7) The history of competition enforcement in this sector shows that certain restraints can be arrived at either as a result of explicit direct contractual obligations or through indirect obligations or indirect means which nonetheless achieve the same anti-competitive result. Suppliers wishing to influence a distributor’s competitive behaviour may, for instance, resort to threats or intimidation, warnings or penalties. They may also delay or suspend deliveries or threaten to terminate the contracts of distributors that sell to foreign consumers or fail to observe a given
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- <sup>(1)</sup> With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are in substance identical. For the purposes of these Guidelines, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout these Guidelines.
- <sup>(2)</sup> OJ L 129, 28.5.2010, p. 52.
- <sup>(3)</sup> OJ L 102, 23.4.2010, p. 1.
- <sup>(4)</sup> OJ C 130, 19.5.2010, p. 1.
- <sup>(5)</sup> OJ L 203, 1.8.2002, p. 30.
- <sup>(6)</sup> Retail level distributors are commonly referred to in the sector as ‘dealers’.
- <sup>(7)</sup> Since the modernisation of the Union competition rules, the primary responsibility for such analysis lies with the parties to agreements. The Commission may however investigate the compatibility of agreements with Article 101 of the Treaty, on its own initiative or following a complaint.

price level. Transparent relationships between contracting parties would normally reduce the risk of manufacturers being held responsible for using such indirect forms of pressure aimed at achieving anticompetitive outcomes. Adhering to a Code of Conduct is one means of achieving greater transparency in commercial relationships between parties. Such codes may inter alia provide for notice periods for contract termination, which may be determined in function of the contract duration, for compensation to be given for outstanding relationship-specific investments made by the dealer in case of early termination without just cause, as well as for arbitration as an alternative mechanism for dispute resolution. If a supplier incorporates such a Code of Conduct into its agreements with distributors and repairers, makes it publicly available, and complies with its provisions, this will be regarded as a relevant factor for assessing the supplier's conduct in individual cases.

## 2. Structure of the Guidelines

- (8) These Guidelines are structured as follows:
- (a) Scope of the Motor Vehicle Block Exemption Regulation and relationship with the General Vertical Block Exemption Regulation (Section II)
  - (b) The application of the additional provisions in the Motor Vehicle Block Exemption Regulation (Section III)
  - (c) The assessment of specific restraints: single branding and selective distribution (Section IV)

### II. SCOPE OF THE MOTOR VEHICLE BLOCK EXEMPTION REGULATION AND RELATIONSHIP WITH THE GENERAL VERTICAL BLOCK EXEMPTION REGULATION

- (9) Pursuant to Article 4 thereof, the Motor Vehicle Block Exemption Regulation covers vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles.
- (10) Article 2 of the Motor Vehicle Block Exemption Regulation extends the application of the relevant provisions of Regulation (EC) No 1400/2002 until 31 May 2013 as far as they relate to vertical agreements for the purchase, sale or resale of new motor vehicles. Pursuant to Article 3 of the Motor Vehicle Block Exemption Regulation vertical

agreements for the purchase, sale and resale of new motor vehicles will be covered by the General Vertical Block Exemption Regulation, from 1 June 2013 <sup>(1)</sup>.

- (11) The distinction that the new framework makes between the markets for the sale of new motor vehicles and the motor vehicle aftermarkets reflects the differing competitive conditions on these markets.
- (12) On the basis of an in-depth market analysis set out in the Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002 of 28 May 2008 <sup>(2)</sup> and in the Commission Communication on The Future Competition Law Framework applicable to the Motor Vehicle Sector of 22 July 2009 <sup>(3)</sup>, it appears that there are no significant competition shortcomings distinguishing the new motor vehicle distribution sector from other economic sectors and which could require the application of rules different from and stricter than those in the General Vertical Block Exemption Regulation. Consequently, the application of a market share threshold of 30 % <sup>(4)</sup>, the non-exemption of certain vertical restraints and the conditions provided for in the General Vertical Block Exemption Regulation will normally ensure that vertical agreements for the distribution of new motor vehicles satisfy the conditions laid down in Article 101(3) of the Treaty without the need for any additional requirements over and above those applicable to other sectors.
- (13) However, in order to allow all operators time to adapt to the general regime, in particular in view of relationship-specific investments which have been made in the long term, the period of application of Regulation (EC) No 1400/2002 is extended by three years until 31 May 2013 with regard to those requirements that relate specifically to vertical agreements for the purchase, sale or resale of new motor vehicles. From 1 June 2010 until 31 May 2013, those provisions of Regulation (EC) No 1400/2002 which relate to both agreements for the distribution of new motor vehicles and agreements for

<sup>(1)</sup> The expiry of Regulation (EC) No 1400/2002 and its replacement with the new legal framework explained in these Guidelines does not of itself require that existing contracts be terminated. See for example Case C-125/05 *Vulcan Silkeborg A/S v Skandinavisk Motor Co. A/S*. [2006] ECR I-7637.

<sup>(2)</sup> SEC(2008) 1946.

<sup>(3)</sup> COM(2009) 388.

<sup>(4)</sup> Pursuant to Article 7 of the General Vertical Block Exemption Regulation, the calculation of this market share threshold is normally based on market sales value data or, if such data are not available, on other reliable market information, including market sales volumes. In this respect, the Commission takes note of the fact that, for the distribution of new motor vehicles, market shares are currently calculated by the industry on the basis of the volume of motor vehicles sold by the supplier on the relevant market, which includes all motor vehicles that are regarded by the buyer as interchangeable or substitutable, by reason of the products' characteristics, prices and intended use.



the purchase, sale and resale of spare parts for motor vehicles and/or the provision of repair and maintenance services, will apply only in respect of the former. During that period these Guidelines will not be used for interpreting the provisions of Regulation (EC) No 1400/2002. Instead, reference should be made to the Explanatory Brochure on that Regulation <sup>(1)</sup>.

- (14) As regards vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles and/or provide repair and maintenance services for motor vehicles, the Motor Vehicle Block Exemption Regulation applies from 1 June 2010. This means that, in order to be exempted pursuant to Article 4 of that Regulation, those agreements not only need to fulfil the conditions for an exemption under the General Vertical Block Exemption Regulation, but must also not contain any serious restrictions of competition, commonly referred to as hardcore restrictions as listed in Article 5 of the Motor Vehicle Block Exemption Regulation.
- (15) Because of the generally brand-specific nature of the markets for repair and maintenance services and for the distribution of spare parts, competition on those markets is inherently less intense compared to that on the market for the sale of new motor vehicles. While reliability has improved and service intervals have lengthened thanks to technological improvement, this evolution is outpaced by an upward price trend for individual repair and maintenance jobs. On the spare parts markets, parts bearing the motor vehicle manufacturer's brand face competition from those supplied by the original equipment suppliers (OES) and by other parties. This maintains price pressure on those markets, which in turn maintains pressure on prices on the repair and maintenance markets, since spare parts make up a large percentage of the cost of the average repair. Moreover, repair and maintenance as a whole represent a very high proportion of total consumer expenditure on motor vehicles, which itself accounts for a significant slice of the average consumer's budget.
- (16) In order to address particular competition issues arising on the motor vehicle aftermarkets, the General Vertical Block Exemption Regulation is supplemented with three additional hardcore restrictions in the Motor Vehicle Block Exemption Regulation applying to agreements for the repair and maintenance of motor vehicles and for the supply of spare parts. Further guidance on those additional hardcore restrictions is given in Section III of these Guidelines.

### III. THE APPLICATION OF THE ADDITIONAL PROVISIONS IN THE MOTOR VEHICLE BLOCK EXEMPTION REGULATION

- (17) Agreements will not benefit from the block exemption if they contain hardcore restrictions. These restrictions are listed in Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation. Including any such restrictions in an agreement gives rise to the presumption that the agreement falls within Article 101(1) of the Treaty. It also gives rise to the presumption that the agreement is unlikely to satisfy the conditions laid down in Article 101(3) of the Treaty, for which reason the block exemption does not apply. However, this is a rebuttable presumption which leaves open the possibility for undertakings to plead an efficiency defence under Article 101(3) of the Treaty in an individual case.
- (18) One of the Commission's objectives as regards competition policy for the motor vehicle sector is to protect access by spare parts manufacturers to the motor vehicle aftermarkets, thereby ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to parts wholesalers. The availability of such parts brings considerable benefits to consumers, especially since there are often large differences in price between parts sold or resold by a car manufacturer and alternative parts. Alternatives for parts bearing the trademark of the motor vehicle manufacturer (OEM parts) include original parts manufactured and distributed by original equipment suppliers (OES parts), while other parts matching the quality of the original components are supplied by 'matching quality' parts manufacturers.
- (19) 'Original parts or equipment' means parts or equipment which are manufactured according to the specifications and production standards provided by the motor vehicle manufacturer for the production of parts or equipment for the assembly of the motor vehicle in question. This includes parts or equipment which are manufactured on the same production line as those parts or equipment. It is presumed unless the contrary is proven, that parts constitute original parts if the part manufacturer certifies that the parts match the quality of the components used for the assembly of the motor vehicle in question and have been manufactured according to the specifications and production standards of the motor vehicle (see Article 3(26) of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such motor vehicles (Framework Directive) <sup>(2)</sup>).

<sup>(1)</sup> Explanatory brochure for Commission Regulation (EC) No 1400/2002 of 31 July 2002 — *Distribution and Servicing of Motor Vehicles in the European Union*.

<sup>(2)</sup> OJ L 263, 9.10.2007, p. 1.

- (20) In order to be considered as 'matching quality', parts must be of a sufficiently high quality that their use does not endanger the reputation of the authorised network in question. As with any other selection standard, the motor vehicle manufacturer may bring evidence that a given spare part does not meet this requirement.
- (21) Article 4(e) of the General Vertical Block Exemption Regulation describes it as a hardcore restriction for an agreement between a supplier of components and a buyer who incorporates those components, to prevent or restrict the supplier's ability to sell its components to end-users, independent repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods. Article 5(a), (b) and (c) of the Motor Vehicle Block Exemption Regulation lay down three additional hardcore restrictions relating to agreements for the supply of spare parts.
- (22) Article 5(a) of the Motor Vehicle Block Exemption Regulation concerns the restriction of the sale of spare parts for motor vehicles by members of a selective distribution system to independent repairers. This provision is most relevant for a particular category of parts, sometimes referred to as captive parts, which may only be obtained from the motor vehicle manufacturer or from members of its authorised networks. If a supplier and a distributor agree that such parts may not be supplied to independent repairers, this agreement would be likely to foreclose such repairers from the market for repair and maintenance services and fall foul of Article 101 of the Treaty.
- (23) Article 5(b) of the Motor Vehicle Block Exemption Regulation concerns any direct or indirect restriction agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods to authorised and/or independent distributors and repairers. So-called 'tooling arrangements' between component suppliers and motor vehicle manufacturers are one example of possible indirect restrictions of this type. Reference should be made in this respect to the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty<sup>(1)</sup> (the Subcontracting Notice). Normally, Article 101(1) of the Treaty does not apply to an arrangement whereby a motor vehicle manufacturer provides a tool to a component manufacturer which is necessary for the production of certain components, shares in the product development costs, or contributes necessary<sup>(2)</sup> intellectual property

rights, or know-how, and does not allow this contribution to be used for the production of parts to be sold directly in the aftermarket. On the other hand, if a motor vehicle manufacturer obliges a component supplier to transfer its ownership of such a tool, intellectual property rights, or know-how, bears only an insignificant part of the product development costs, or does not contribute any necessary tools, intellectual property rights, or know-how, the agreement at issue will not be considered to be a genuine sub-contracting arrangement. Therefore, it may be caught by Article 101(1) of the Treaty and be examined pursuant to the provisions of the Block Exemption Regulations.

- (24) Article 5(c) of the Motor Vehicle Block Exemption Regulation relates to the restriction agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, which limits the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts. In order to improve consumer choice, repairers and consumers should be able to identify which spare parts from alternative suppliers match a given motor vehicle, other than those bearing the car manufacturer's brand. Putting the trade mark or logo on the components and on spare parts facilitates the identification of compatible replacement parts which can be obtained from OES. By not allowing this, motor vehicle manufacturers can restrict the marketing of OES parts and limit consumers' choice in a manner that runs counter to the provisions of Article 101 of the Treaty.

#### IV. THE ASSESSMENT OF SPECIFIC RESTRAINTS

- (25) Parties to vertical agreements in the motor vehicle sector should use these Guidelines as a supplement to and in conjunction with the General Vertical Guidelines in order to assess the compatibility of specific restraints with Article 101 of the Treaty. This section gives particular guidance as to single branding and selective distribution, which are two areas which may have particular relevance for assessing the category of agreements referred to in Section II of these Guidelines.

##### 1. Single branding obligations

- (i) *Assessment of single-branding obligations under the Block Exemption Regulations*

- (26) Pursuant to Article 3 of the Motor Vehicle Block Exemption Regulation read in conjunction with Article 5(1)(a) of the General Vertical Block Exemption Regulation, a motor vehicle supplier and a distributor having a share of the relevant market that does

<sup>(1)</sup> OJ C 1, 3.1.1979, p. 2.

<sup>(2)</sup> Where the motor vehicle manufacturer provides a tool, intellectual property rights (IPR) and/or know-how to a component supplier, this arrangement will not benefit from the Sub-contracting Notice if the component supplier already has this tool, IPR or know-how at its disposal, or could, under reasonable conditions obtain them, since under these circumstances the contribution would not be necessary.

not exceed 30 % may agree on a single-branding obligation that obliges the distributor to purchase motor vehicles only from the supplier or from other firms designated by the supplier, on condition that the duration of such non-compete obligations is limited to five years or less. The same principles apply to agreements between suppliers and their authorised repairers and/or spare parts distributors. A renewal beyond five years requires explicit consent of both parties, and there should be no obstacles that hinder the distributor from effectively terminating the non-compete obligation at the end of the five-year period. Non-compete obligations are not covered by the Block Exemption Regulations when their duration is indefinite or exceeds five years, although in those circumstances the Block Exemption Regulations would continue to apply to the remaining part of the vertical agreement. The same applies to non-compete obligations that are tacitly renewable beyond a period of five years. Obstacles, threats of termination, or intimations that single-branding will be re-imposed before a sufficient period has elapsed to allow either the distributor or the new supplier to amortise their sunk investments would amount to a tacit renewal of the single-branding obligation in question.

(27) Pursuant to Article 5(1)(c) of the General Vertical Block Exemption Regulation, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers, are not covered by the exemption. Particular attention should be paid to the manner in which single branding obligations are applied to existing multi-brand distributors, in order to ensure that the obligations in question do not form part of an overall strategy aimed at eliminating competition from one or more specific suppliers, and in particular from newcomers or weaker competitors. This type of concern could arise in particular if the market share thresholds indicated in paragraph 34 of these Guidelines are exceeded and if the supplier applying this type of restraint has a position on the relevant market that enables it to contribute significantly to the overall foreclosure effect<sup>(1)</sup>.

(28) Non-compete obligations in vertical agreements do not constitute hardcore restrictions, but depending on the market circumstances, can nonetheless have negative effects which may cause the agreements to fall under Article 101(1) of the Treaty<sup>(2)</sup>. One such harmful effect may arise if barriers to entry or expansion are raised that

foreclose competing suppliers, and harm consumers in particular by increasing the prices or limiting the choice of products, lowering their quality or reducing the level of product innovation.

(29) However, non-compete obligations may also have positive effects which may justify the application of Article 101(3) of the Treaty. They may in particular help to overcome a 'free-rider' problem, by which one supplier benefits from investments made by another. A supplier may, for instance, invest in a distributor's premises, but in doing so attract customers for a competing brand that is also sold from the same premises. The same applies to other types of investment made by the supplier which may be used by the distributor to sell motor vehicles of competing manufacturers, such as investments in training.

(30) Another positive effect of non-compete obligations in the motor vehicle sector relates to the enhancement of the brand image and reputation of the distribution network. Such restraints may help to create and maintain a brand image by imposing a certain measure of uniformity and quality standardisation on distributors, thereby increasing the attractiveness of that brand to the final consumer and increasing its sales.

(31) Article 1(d) of the General Vertical Block Exemption Regulation defines a non-compete obligation as:

'(a) any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services; or

(b) any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market.'

(32) Apart from direct means to tie the distributor to its own brand(s), a supplier may also have recourse to indirect means having the same effect. In the motor vehicle sector, such indirect means may include qualitative standards specifically designed to discourage the distributors from selling products of competing brands<sup>(3)</sup>, bonuses made conditional on the distributor agreeing to sell exclusively one brand, target rebates or certain other requirements such as the requirement to set up a

<sup>(1)</sup> Commission 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.

<sup>(2)</sup> As regards the relevant factors to be taken into account to carry out the assessment of non-compete obligations under Article 101(1) of the Treaty, see the relevant section in the General Vertical Guidelines, in particular paragraphs 129 to 150.

<sup>(3)</sup> See cases *BMW*, IP/06/302 — 13.3.2006 and *Opel* 2006, IP/06/303 — 13.3.2006.

separate legal entity for the competing brand or the obligation to display the additional competing brand in a separate showroom in a geographic location where the fulfilment of such a requirement would not be economically viable (for example sparsely populated areas).

(33) The block exemption provided for in the General Vertical Block Exemption Regulation covers all forms of direct or indirect non-compete obligations provided that the market shares of both the supplier and the distributor do not exceed 30 % and the duration of the non-compete obligation does not exceed five years. However, even in cases where individual agreements satisfy those conditions, the use of non-compete obligations may result in anti-competitive effects not outweighed by their positive effects. In the motor vehicle industry, such net anti-competitive effects could in particular result from cumulative effects leading to the foreclosure of competing brands.

(34) For the distribution of motor vehicles at the retail level, foreclosure of this type is unlikely to occur in markets where all suppliers have market shares below 30 % and where the total percentage of all motor vehicle sales that are subject to single-branding obligations on the market in question (that is to say the total tied market share) is below 40 % <sup>(1)</sup>. In a situation where there is one non-dominant supplier with a market share of more than 30 % of the relevant market whereas all other suppliers' market shares are below 30 %, cumulative anticompetitive effects are unlikely as long as the total tied market share does not exceed 30 %.

(35) If access to the relevant market for the sale of new motor vehicles and competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements containing single branding obligations, the benefit of the block exemption may be withdrawn by the Commission, pursuant to Article 29 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 <sup>(2)</sup>. A withdrawal decision may be addressed in particular to those suppliers that contribute in a significant manner to a cumulative foreclosure effect on the relevant market. Where that effect occurs on a national market, the National Competition Authorities of that Member State may also withdraw the benefit of the block exemption in respect of that territory.

(36) In addition, if parallel networks of agreements containing similar vertical restraints cover more than 50 % of a given

market, the Commission may adopt a Regulation declaring the block exemption inapplicable to the market in question in respect of such restraints. In particular, such a situation may arise if cumulative effects resulting from the widespread use of single-branding obligations lead to consumer harm on that market.

(37) With regard to the assessment of minimum purchasing obligations calculated on the basis of the distributor's total annual requirements, it may be justified to withdraw the benefit of the block exemption if cumulative anticompetitive effects arise even if the supplier imposes a minimum purchasing obligation that is below the 80 % limit established in Article 1(d) of the General Vertical Block Exemption Regulation. The parties need to consider whether, in the light of the relevant factual circumstances, an obligation on the distributor to ensure that a given percentage of its total purchases of motor vehicles bear the supplier's brand will prevent the distributor from taking on one or more additional competing brands. From that perspective, even a minimum purchasing requirement set at a level lower than 80 % of total annual purchases will amount to a single-branding obligation if it obliges a distributor wishing to take up a new brand of its choice from a competing manufacturer to purchase so many motor vehicles of the brand that it currently sells that the distributor's business is made economically unsustainable <sup>(3)</sup>. Such a minimum purchasing obligation will also amount to a single branding obligation if it forces a competing supplier to split its envisaged sales volume in a given territory over several distributors, leading to duplication of investments and a fragmented sales presence.

(ii) *Assessment of single-branding obligations outside the scope of the Block Exemption Regulations*

(38) Parties may also be called upon to assess the compatibility with the competition rules of single-branding obligations in respect of agreements that do not qualify for block exemption because the parties' market shares exceed 30 % or the duration of the agreement exceeds five years. Such agreements will therefore be subject to individual scrutiny in order to ascertain whether they are caught by Article 101(1) of the Treaty and if so, whether efficiencies offsetting any possible anti-competitive effect can be demonstrated. If that is the case, they may be able to benefit from the exception laid down in Article 101(3) of the Treaty. For assessment in an individual case the general principles set out in Section VI.2.1 of the General Vertical Guidelines will apply.

<sup>(3)</sup> For instance, if a dealer purchases 100 cars of brand A in a year to meet demand, and wishes to buy 100 cars of brand B, an 80 % minimum purchasing obligation as regards brand A would imply that the following year, the dealer would have to buy 160 brand A cars. Given that penetration rates are likely to be relatively stable, this would likely leave the dealer with a large unsold stock of brand A. It would therefore be forced to dramatically reduce its purchases of brand B in order to avoid such a situation. Depending on the specific circumstances of the case, such a practice can be viewed as a single-branding obligation.

<sup>(1)</sup> See General Vertical Guidelines at paragraph 141.

<sup>(2)</sup> OJ L 1, 4.1.2003, p. 1.

(39) In particular, agreements entered into between a motor vehicle manufacturer or its importer, on the one hand, and spare parts distributors and/or authorised repairers, on the other, will fall outside the Block Exemption Regulations when the market shares held by the parties exceed the 30 % threshold, which is likely to be the case for most such agreements. Single-branding obligations that will need to be assessed in such circumstances include all types of restriction that directly or indirectly limit authorised distributors' or repairers' ability to obtain original or matching quality spare parts from third parties. However, an obligation on an authorised repairer to use original spare parts supplied by the motor vehicle manufacturer for repairs carried out under warranty, free servicing and motor vehicle recall work would not be considered to be a single-branding obligation, but rather an objectively justified requirement.

(40) Single-branding obligations in agreements for the distribution of new motor vehicles will also need to be individually assessed where their duration exceeds five years or/and where the market share of the supplier exceeds 30 %, which may be the case for certain suppliers in some Member States. In such circumstances, the parties should have regard not only to the supplier's and buyer's market share, but also to the total tied market share taking into account the thresholds indicated in paragraph 34. Above those thresholds, individual cases will be assessed in accordance with the general principles set out in Section VI.2.1 of the General Vertical Guidelines.

(41) Outside the scope of the Block Exemption Regulations, the assessment of minimum purchasing obligations calculated on the basis of the distributor's total annual requirements will take into account all the relevant factual circumstances. In particular, a minimum purchasing requirement set at a level lower than 80 % of total annual purchases will amount to a single-branding obligation if it has the effect of preventing distributors from dealing in one or more additional competing brands.

## 2. Selective distribution

(42) Selective distribution is currently the predominant form of distribution in the motor vehicle sector. Its use is widespread in motor vehicle distribution, as well as for repair and maintenance and the distribution of spare parts.

(43) In purely qualitative selective distribution, distributors and repairers are only selected on the basis of objective criteria required by the nature of the product or service, such as the technical skills of sales personnel, the layout of sales

facilities, sales techniques and the type of sales service to be provided by the distributor<sup>(1)</sup>. The application of such criteria does not put a direct limit on the number of distributors or repairers admitted to the supplier's network. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) of the Treaty for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate the use of selective distribution, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Second, distributors or repairers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Third, the criteria laid down must not go beyond what is necessary.

(44) Whereas qualitative selective distribution involves the selection of distributors or repairers only on the basis of objective criteria required by the nature of the product or service, quantitative selection adds further criteria for selection that more directly limit the potential number of distributors or repairers either by directly fixing their number, or for instance, requiring a minimum level of sales. Networks based on quantitative criteria are generally held to be more restrictive than those that rely on qualitative selection alone, and are accordingly more likely to be caught by Article 101(1) of the Treaty.

(45) If selective distribution agreements are caught by Article 101(1) of the Treaty, the parties will need to assess whether their agreements can benefit from the Block Exemption Regulations, or individually, from the exception in Article 101(3) of the Treaty.

(i) *The assessment of selective distribution under the Block Exemption Regulations*

(46) The Block Exemption Regulations exempt selective distribution agreements, irrespective of whether quantitative or purely qualitative selection criteria are used, so long as the parties' market shares do not exceed 30 %. However, that exemption is conditional on the agreements not containing any of the hardcore restrictions set out

<sup>(1)</sup> It should be recalled however that, in accordance with the established case law of the European Courts, purely qualitative selective distribution systems may nevertheless restrict competition where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different way of competing. This situation will generally not arise on the markets for the sale of new motor vehicles, on which leasing and other similar arrangements are a valid alternative to outright purchase of a motor vehicle, nor in the markets for repair and maintenance, as long as independent repairers provide consumers with an alternative channel for the upkeep of their motor vehicles. See for example Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission* [1996] ECR II-1961.

in Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation, or any of the excluded restrictions described in Article 5 of the General Vertical Block Exemption Regulation.

(47) Three of the hardcore restrictions in the General Vertical Block Exemption Regulation relate specifically to selective distribution. Article 4(b) describes as hardcore the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods or services, except the restriction of sales by the members of a selective distribution system to unauthorised distributors in markets where such a system is operated. Article 4(c) describes as hardcore agreements restricting active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment, while Article 4(d) relates to the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade. Those three hardcore restrictions have special relevance for motor vehicle distribution.

(48) The internal market has enabled consumers to purchase motor vehicles in other Member States and take advantage of price differentials between them, and the Commission views the protection of parallel trade in this sector as an important competition objective. The consumer's ability to buy goods in other Member States is especially important as far as motor vehicles are concerned, given the high value of the goods and the direct benefits in the form of lower prices accruing to consumers buying motor vehicles elsewhere in the Union. The Commission is therefore concerned that distribution agreements should not restrict parallel trade, since this cannot be expected to satisfy the conditions laid down in Article 101(3) of the Treaty<sup>(1)</sup>.

(49) The Commission has brought several cases against motor vehicle manufacturers for impeding such trade, and its decisions have been largely confirmed by the European

<sup>(1)</sup> The notion that cross-border trade restrictions may harm consumers has been confirmed by the Court in Case C-551/03 P, *General Motors*, [2006] ECR I-3173, paragraphs 67 and 68; Case C-338/00 P, *Volkswagen/Commission*, [2003] ECR I-9189, paragraphs 44 and 49, and Case T-450/05, *Peugeot/Commission*, judgment of 9 July 2009, not yet reported, paragraphs 46-49.

Courts<sup>(2)</sup>. This experience shows that restrictions on parallel trade may take a number of forms. A supplier may, for instance, put pressure on distributors, threaten them with contract termination, fail to pay bonuses, refuse to honour warranties on motor vehicles imported by a consumer or cross-supplied between distributors established in different Member States, or make a distributor wait significantly longer for delivery of an identical motor vehicle when the consumer in question is resident in another Member State.

(50) One particular example of indirect restrictions on parallel trade arises when a distributor is unable to obtain new motor vehicles with the appropriate specifications needed for cross-border sales. In those specific circumstances, the benefit of the block exemption may depend on whether a supplier provides its distributors with motor vehicles with specifications identical to those sold in other Member States for sale to consumers from those countries (the so-called 'availability clause')<sup>(3)</sup>.

(51) For the purposes of the application of the Block Exemption Regulations, and in particular as regards the application of Article 4(c) of the General Vertical Block Exemption Regulation, the notion of 'end users' includes leasing companies. This means in particular that distributors in selective distribution systems may not be prevented from selling new motor vehicles to leasing companies of their choice. However, a supplier using selective distribution may prevent its distributors from selling new motor vehicles to leasing companies when there is a verifiable risk that those companies will resell them while still new. A supplier can therefore require a dealer to check, before selling to a particular company, the general leasing conditions applied so as to verify that the company in question is indeed a leasing company rather than an unauthorised reseller. However, an obligation on a dealer to provide its supplier with copies of each leasing agreement before the dealer sells a motor vehicle to a leasing company could amount to an indirect restriction on sales.

(52) The notion of 'end users' also encompasses consumers who purchase through an intermediary. An intermediary is a person or an undertaking which purchases a new motor vehicle on behalf of a named consumer without being a member of the distribution network. Those operators perform an important role in the

<sup>(2)</sup> Commission Decision 98/273/EC of 28 January 1998 in Case IV/35.733 — *VW*, Commission Decision 2001/146/EC of 20 September 2000 in Case COMP/36.653 — *Opel*, OJ L 59, 28.2.2001, p. 1, Commission Decision 2002/758/EC of 10 October 2001 in Case COMP/36.264 — *Mercedes-Benz*, OJ L 257, 25.9.2002, p. 1, Commission Decision 2006/431/EC of 5 October 2005 in Cases F-2/36.623/36.820/37.275 — *SEP et autres/Peugeot SA*.

<sup>(3)</sup> Joined Cases 25 and 26/84 *Ford-Werke AG and Ford of Europe Inc. v Commission of the European Communities*, [1985] ECR 2725.

motor vehicle sector, in particular by facilitating consumers' purchases of motor vehicles in other Member States. Evidence of intermediary status should as a rule be established by a valid mandate including the name and address of the consumer obtained prior to the transaction. The use of the Internet as a means to attract customers in relation to a given range of motor vehicles and collect electronic mandates from them does not affect intermediary status. Intermediaries are to be distinguished from independent resellers, which purchase motor vehicles for resale and do not operate on behalf of named consumers. Independent resellers are not to be considered as end users for the purposes of the Block Exemption Regulations.

(ii) *The assessment of selective distribution outside the scope of the Block Exemption Regulations*

- (53) As paragraph 175 of the General Vertical Guidelines explains, the possible competition risks brought about by selective distribution are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors and facilitation of collusion between suppliers or buyers.
- (54) To assess the possible anti-competitive effects of selective distribution under Article 101(1) of the Treaty, a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. As pointed out in paragraph 43, qualitative selective distribution is normally not caught by Article 101(1) of the Treaty.
- (55) The fact that a network of agreements does not benefit from the block exemption because the market share of one or more of the parties is above the 30 % threshold for exemption does not imply that such agreements are illegal. Instead, the parties to such agreements need to subject them to an individual analysis to check whether they fall under Article 101(1) of the Treaty and, if so, whether they may nonetheless benefit from the exception in Article 101(3) of the Treaty.
- (56) As regards the specificities of new motor vehicle distribution, quantitative selective distribution will generally satisfy the conditions laid down in Article 101(3) of the Treaty if the parties' market shares do not exceed 40 %. However, the parties to such agreements should bear in mind that the presence of particular selection standards could have an effect on whether their agreements satisfy the conditions laid down in Article 101(3) of the Treaty. For instance, although the use of location clauses in selective distribution agreements for new motor vehicles, that is to say agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment, will usually bring efficiency benefits in the form of more efficient logistics and predictable network coverage, those benefits may be outweighed by disadvantages if the market share of the supplier is very high, and in those circumstances such clauses might not be able to benefit from the exception in Article 101(3) of the Treaty.
- (57) Individual assessment of selective distribution for authorised repairers also raises specific issues. Insofar as a market exists<sup>(1)</sup> for repair and maintenance services that is separate from that for the sale of new motor vehicles, this is considered to be brand-specific. On that market, the main source of competition results from the competitive interaction between independent repairers and authorised repairers of the brand in question.
- (58) Independent repairers in particular provide vital competitive pressure, as their business models and their related operating costs are different from those in the authorised networks. Moreover, unlike authorised repairers, which to a large extent use car manufacturer-branded parts, independent garages generally have greater recourse to other brands, thereby allowing a motor vehicle owner to choose between competing parts. In addition, given that a large majority of repairs for newer motor vehicles are currently carried out in authorised repair shops, it is important that competition between authorised repairers remains effective, which may only be the case if access to the networks remains open for new entrants.
- (59) The new legal framework makes it easier for the Commission and National Competition Authorities to protect competition between independent garages and authorised repairers, as well as between the members of each authorised repairer network. In particular, the reduction in the market share threshold for exemption of qualitative selective distribution from 100 % to 30 % broadens the scope for competition authorities to act.
- (60) When assessing the competitive impact of vertical agreements on the motor vehicle aftermarkets, the parties should therefore be aware of the Commission's determination to preserve competition both between the members of authorised repair networks and between those members and independent repairers. To this end, particular attention should be paid to three specific types of

<sup>(1)</sup> In some circumstances, a system market which includes motor vehicles and spare parts together may be defined, taking into account, inter alia, the life-time of the motor vehicle as well as the preferences and buying behaviour of the users. See Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, paragraph 56. One important factor is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the motor vehicle or not. For instance, buying behaviour may significantly differ between buyers of trucks who purchase and operate a fleet, and who take into account maintenance costs at the moment of purchasing the motor vehicle and buyers of individual motor vehicles. Another relevant factor is the existence and relative position of part suppliers, repairers and/or parts distributors operating in the aftermarket independently from motor vehicle manufacturers. In most cases, there is likely to be a brand-specific aftermarket, in particular because the majority of buyers are private individuals or small and medium-size enterprises that purchase motor vehicles and aftermarket services separately and do not have systematic access to data permitting them to assess the overall costs of motor vehicle ownership in advance.

conduct which may restrict such competition, namely preventing access of independent repairers to technical information, misusing the legal and/or extended warranties to exclude independent repairers, or making access to authorised repairer networks conditional upon non-qualitative criteria.

- (61) Although the following three subsections refer specifically to selective distribution, the same anti-competitive foreclosure effects could stem from other types of vertical agreements that limit, directly or indirectly, the number of service partners contractually linked to a motor vehicle manufacturer.

#### Access to technical information by independent operators

- (62) Although purely qualitative selective distribution is in general considered to fall outside Article 101(1) of the Treaty for lack of anti-competitive effects<sup>(1)</sup>, qualitative selective distribution agreements concluded with authorised repairers and/or parts distributors may be caught by Article 101(1) of the Treaty if, within the context of those agreements, one of the parties acts in a way that forecloses independent operators from the market, for instance by failing to release technical repair and maintenance information to them. In that context, the notion of independent operators includes independent repairers, spare parts manufacturers and distributors, manufacturers of repair equipment or tools, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering training for repairers.

- (63) Suppliers provide their authorised repairers with the full scope of technical information needed to perform repair and maintenance work on motor vehicles of their brands and are often the only companies able to provide repairers with all of the technical information that they need on the brands in question. In such circumstances, if the supplier fails to provide independent operators with appropriate access to its brand-specific technical repair and maintenance information, possible negative effects stemming from its agreements with authorised repairers and/or parts distributors could be strengthened, and cause the agreements to fall within Article 101(1) of the Treaty.

- (64) Moreover, a lack of access to necessary technical information could cause the market position of independent operators to decline, leading to consumer harm,

<sup>(1)</sup> As pointed out in paragraph 54 above, this will generally be the case on the markets for repair and maintenance as long as independent repairers provide consumers with an alternative channel for the upkeep of their motor vehicles.

in terms of a significant reduction in choice of spare parts, higher prices for repair and maintenance services, a reduction in choice of repair outlets and potential safety problems. In those circumstances, the efficiencies that might normally be expected to result from the authorised repair and parts distribution agreements would not be such as to offset these anti-competitive effects, and the agreements in question would consequently fail to satisfy the conditions laid down in Article 101(3) of the Treaty.

- (65) Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information<sup>(2)</sup> as well as Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information<sup>(3)</sup> provide for a system for disseminating repair and maintenance information in respect of passenger cars put on the market from 1 September 2009. Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro 6) and on access to vehicle repair and maintenance information<sup>(4)</sup> and the ensuing implementing measures provide for such a system in respect of commercial vehicles put on the market from 1 January 2013. The Commission will take those Regulations into account when assessing cases of suspected withholding of technical repair and maintenance information concerning motor vehicles marketed before those dates. When considering whether withholding a particular item of information may lead the agreements at issue to be caught by Article 101(1) of the Treaty, a number of factors should be considered, including:

- (a) whether the item in question is technical information, or information of another type, such as commercial information<sup>(5)</sup>, which may legitimately be withheld;

<sup>(2)</sup> OJ L 171, 29.6.2007, p. 1.

<sup>(3)</sup> OJ L 199, 28.7.2008, p. 1.

<sup>(4)</sup> OJ L 188, 18.7.2009, p. 1.

<sup>(5)</sup> Commercial information can be thought of as information that is used for carrying on a repair and maintenance business but is not needed to repair or maintain motor vehicles. Examples include billing software, or information on the hourly tariffs practiced within the authorised network.



- (b) whether withholding the technical information in question will have an appreciable impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market;
- (c) whether the technical information in question is made available to members of the relevant authorised repair network; if it is made available to the authorised network in whatever form, it should also be made available to independent operators on a non-discriminatory basis;
- (d) whether the technical information in question will ultimately <sup>(1)</sup> be used for the repair and maintenance of motor vehicles, or rather for another purpose <sup>(2)</sup>, such as for the manufacturing of spare parts or tools.
- (66) Technological progress implies that the notion of technical information is fluid. Currently, particular examples of technical information include software, fault codes and other parameters, together with updates, which are required to work on electronic control units with a view to introducing or restoring settings recommended by the supplier, motor vehicle identification numbers or any other motor vehicle identification methods, parts catalogues, repair and maintenance procedures, working solutions resulting from practical experience and relating to problems typically affecting a given model or batch, and recall notices as well as other notices identifying repairs that may be carried out without charge within the authorised repair network. The part code and any other information necessary to identify the correct car manufacturer-branded spare part to fit a given individual motor vehicle (that is to say the part that the car manufacturer would generally supply to the members of its authorised repair networks to repair the motor vehicle in question) also constitute technical information <sup>(3)</sup>. The lists of items set out in Article 6(2) of Regulation (EC) No 715/2007 and Regulation (EC) No 595/2009 should also be used as a guide to what the Commission views as technical information for the purposes of applying Article 101 of the Treaty.
- (67) The way in which technical information is supplied is also important for assessing the compatibility of authorised repair agreements with Article 101 of the Treaty. Access should be given upon request and without undue delay, the information should be provided in a usable form, and the price charged should not discourage access to it by failing to take into account the extent to which the independent operator uses the information. A supplier of motor vehicles should be required to give independent operators access to technical information on new motor vehicles at the same time as such access is given to its authorised repairers and should not oblige independent operators to purchase more than the information necessary to carry out the work in question. Article 101 of the Treaty does not, however, oblige a supplier to provide technical information in a standardised format or through a defined technical system, such as the CEN/ISO standard and the OASIS format as provided for by Regulation (EC) No 715/2007 and Commission Regulation (EC) No 295/2009 of 18 March 2009 concerning the classification of certain goods in the Combined Nomenclature <sup>(4)</sup>.
- (68) The above considerations also apply to the availability of tools and training to independent operators. 'Tools' in this context includes electronic diagnostic and other repair tools, together with related software, including periodic updates thereof, and after-sales services for such tools.
- Misuse of warranties**
- (69) Qualitative selective distribution agreements may also be caught by Article 101(1) of the Treaty if the supplier and the members of its authorised network explicitly or implicitly reserve repairs on certain categories of motor vehicles to the members of the authorised network. This might happen, for instance, if the manufacturer's warranty vis-à-vis the buyer, whether legal or extended, is made conditional on the end user having repair and maintenance work that is not covered by warranty carried out only within the authorised repair networks. The same applies to warranty conditions which require the use of the manufacturer's brand of spare parts in respect of replacements not covered by the warranty terms. It also seems doubtful that selective distribution agreements containing such practices could bring benefits to consumers in such a way as to allow the agreements in question to benefit from the exception in Article 101(3) of the Treaty. However, if a supplier legitimately refuses to honour a warranty claim on the grounds that the situation leading to the claim in question is causally linked to a failure on the part of a repairer to carry out a particular repair or maintenance operation in the correct manner or to the use of poor quality spare parts, this will have no bearing on the compatibility of the supplier's repair agreements with the competition rules.
- <sup>(1)</sup> Such as information supplied to publishers for resupply to motor vehicle repairers.
- <sup>(2)</sup> Information used for fitting a spare part to or using a tool on a motor vehicle should be considered as being used for repair and maintenance, while information on the design, production process or the materials used for manufacturing a spare part should not be considered to fall within this category, and may therefore be withheld.
- <sup>(3)</sup> The independent operator should not have to purchase the spare part in question to be able to obtain this information.
- <sup>(4)</sup> OJ L 95, 9.4.2009, p. 7.

#### Access to authorised repairer networks

- (70) Competition between authorised and independent repairers is not the only form of competition that needs to be taken into account when analysing the compatibility of authorised repair agreements with Article 101 of the Treaty. Parties should also assess the degree to which authorised repairers within the relevant network are able to compete with one another. One of the main factors driving this competition relates to the conditions of access to the network established under the standard authorised repairer agreements. In view of the generally strong market position of networks of authorised repairers, their particular importance for owners of newer motor vehicles, and the fact that consumers are not prepared to travel long distances to have their cars repaired, the Commission considers it important that access to the authorised repair networks should generally remain open to all firms that meet defined quality criteria. Submitting applicants to quantitative selection is likely to cause the agreement to fall within Article 101(1) of the Treaty.
- (71) A particular case arises when agreements oblige authorised repairers to also sell new motor vehicles. Such agreements

are likely to be caught by Article 101(1) of the Treaty, since the obligation in question is not required by the nature of the contract services. Moreover, for an established brand, agreements containing such an obligation would not normally be able to benefit from the exception in Article 101(3) of the Treaty, since the impact would be to severely restrict access to the authorised repair network, thereby reducing competition without bringing corresponding benefits to consumers. However, in certain cases, a supplier wishing to launch a brand on a particular geographic market might initially find it difficult to attract distributors willing to make the necessary investment unless they could be sure that they would not face competition from 'stand-alone' authorised repairers that sought to free-ride on these initial investments. In those circumstances, contractually linking the two activities for a limited period of time would have a pro-competitive effect on the motor vehicle sales market by allowing a new brand to launch, and would have no effect on the potential brand-specific repair market, which would in any event not exist if the motor vehicles could not be sold. The agreements in question would therefore be unlikely to be caught by Article 101(1) of the Treaty.

## **D. POSTAL SERVICES**



## **Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services**

*Official Journal C 039 , 06/02/1998 P. 0002 - 0018*

Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02)

(Text with EEA relevance)

### **PREFACE**

Subsequent to the submission by the Commission of a Green Paper on the development of the single market for postal services (1) and of a communication to the European Parliament and the Council, setting out the results of the consultations on the Green Paper and the measures advocated by the Commission (2), a substantial discussion has taken place on the future regulatory environment for the postal sector in the Community. By Resolution of 7 February 1994 on the development of Community postal services (3), the Council invited the Commission to propose measures defining a harmonised universal service and the postal services which could be reserved. In July 1995, the Commission proposed a package of measures concerning postal services which consisted of a proposal for a Directive of the European Parliament and the Council on common rules for the development of Community postal services and the improvement of quality of service (4) and a draft of the present Notice on the application of the competition rules (5).

This notice, which complements the harmonisation measures proposed by the Commission, builds on the results of those discussions in accordance with the principles established in the Resolution of 7 February 1994. It takes account of the comments received during the public consultation on the draft of this notice published in December 1995, of the European Parliament's resolution (6) on this draft adopted on 12 December 1996, as well as of the discussions on the proposed Directive in the European Parliament and in Council.

The Commission considers that because they are an essential vehicle of communication and trade, postal services are vital for all economic and social activities. New postal services are emerging and market certainty is needed to favour investment and the creation of new employment in the sector. As recognized by the Court of Justice of the European Communities, Community law, and in particular the competition rules of the EC Treaty, apply to the post sector (7). The Court stated that 'in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition` and that those rules 'must be read in conjunction with Article 90(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject 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.` Questions are therefore frequently put to the Commission on the attitude it intends to take, for purposes of the implementation of the competition rules contained in the Treaty, with regard to the behaviour of postal operators and with regard to State measures relating to public undertakings and undertakings to which the Member States grant special or exclusive rights in the postal sector.

This notice sets out the Commission's interpretation of the relevant Treaty provisions and the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector in individual cases, while maintaining the necessary safeguards for the provision of a universal service, and gives to enterprises and Member States clear guidelines so as to avoid infringements of the Treaty. This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

Furthermore, this Notice sets out the approach the Commission intends to take when applying the competition rules to the behaviour of postal operators and when assessing the compatibility of State measures restricting the freedom to provide service and/or to compete in the postal markets with the competition rules and other rules of the Treaty. In addition, it addresses the issue of non-discriminatory access to the postal network and the safeguards required to ensure fair competition in the sector.

Especially on account of the development of new postal services by private and public operators, certain Member States have revised, or are revising, their postal legislation in order to restrict the monopoly of their postal organisations to what is considered necessary for the realisation of the public-interest objective. At the same time, the Commission is faced with a growing number of complaints and cases under competition law on which it must take position. At this stage, a notice is therefore the appropriate instrument to provide guidance to Member States and postal operators, including those enjoying special or exclusive rights, to ensure correct implementation of the competition rules. This Notice, although it cannot be exhaustive, aims to provide the necessary guidance for the correct interpretation, in particular, of Articles 59, 85, 86, 90, and 92 of the Treaty in individual cases. By issuing the present notice, the Commission is taking steps to bring transparency and to facilitate investment decisions of all postal operators, in the interest of the users of postal services in the European Union.

As the Commission explained in its communication of 11 September 1996 on 'Services of general interest in Europe' (8), solidarity and equal treatment within a market economy are fundamental Community objectives. Those objectives are furthered by services of general interest. Europeans have come to expect high-quality services at affordable prices, and many of them even view services of general interest as social rights.

As regards, in particular, the postal sector, consumers are becoming increasingly assertive in exercising their rights and wishes. Worldwide competition is forcing companies using such services to seek out better price deals comparable to those enjoyed by their competitors. New technologies, such as fax or electronic mail, are putting enormous pressures on the traditional postal services. Those developments have given rise to worries about the future of those services accompanied by concerns over employment and economic and social cohesion. The economic importance of those services is considerable. Hence the importance of modernising and developing services of general interest, since they contribute so much to European competitiveness, social solidarity and quality of life.

The Community's aim is to support the competitiveness of the European economy in an increasingly competitive world and to give consumers more choice, better quality and lower prices, while at the same time helping, through its policies, to strengthen economic and social cohesion between the Member States and to reduce certain inequalities. Postal services have a key role to play here. The Community is committed to promoting their functions of general economic interest, as solemnly confirmed in the new Article 7d, introduced by the Amsterdam

Treaty, while improving their efficiency. Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price. However, those mechanisms sometimes have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion in the Union may not be attained. The public authority must then ensure that the general interest is taken into account.

The traditional structures of some services of general economic interest, which are organised on the basis of national monopolies, constitute a challenge for European economic integration. This includes postal monopolies, even where they are justified, which may obstruct the smooth functioning of the market, in particular by sealing off a particular market sector.

The real challenge is to ensure smooth interplay between the requirements of the single market in terms of free movement, economic performance and dynamism, free competition, and the general interest objectives. This interplay must benefit individual citizens and society as a whole. This is a difficult balancing act, since the goalposts are constantly moving: the single market is continuing to expand and public services, far from being fixed, are having to adapt to new requirements.

The basic concept of universal service, which was originated by the Commission (9), is to ensure the provision of high-quality service to all prices everyone can afford. Universal service is defined in terms of principles: equality, universality, continuity and adaptability; and in terms of sound practices: openness in management, price-setting and funding and scrutiny by bodies independent of those operating the services. Those criteria are not always all met at national level, but where they have been introduced using the concept of European universal service, there have been positive effects for the development of general interest services. Universal service is the expression in Europe of the requirements and special features of the European model of society in a policy which combines a dynamic market, cohesion and solidarity.

High-quality universal postal services are of great importance for private and business customers alike. In view of the development of electronic commerce their importance will even increase in the very near future. Postal services have a valuable role to play here.

As regards the postal sector, Directive 97/67/EC has been adopted by the European Parliament and the Council (hereinafter referred to as 'the Postal Directive'). It aims to introduce common rules for developing the postal sector and improving the quality of service, as well as gradually opening up the markets in a controlled way.

The aim of the Postal Directive is to safeguard the postal service as a universal service in the long term. It imposes on Member States a minimum harmonised standard of universal services including a high-quality service countrywide with regular guaranteed deliveries at prices everyone can afford. This involves the collection, transport, sorting and delivery of letters as well as catalogues and parcels within certain price and weight limits. It also covers registered and insured (*valeur déclarée*) items and applies to both domestic and cross-border deliveries. Due regard is given to considerations of continuity, confidentiality, impartiality and equal treatment as well as adaptability.

To guarantee the funding of the universal service, a sector may be reserved for the operators of this universal service. The scope of the reserved sector has been harmonised in the Postal

Directive According to the Postal Directive, Member States can only grant exclusive rights for the provision of postal services to the extent that this is necessary to guarantee the maintenance of the universal service. Moreover, the Postal Directive establishes the maximum scope that Member States may reserve in order to achieve this objective. Any additional funding which may be required for the universal service may be found by writing certain obligations into commercial operator's franchises; for example, they may be required to make financial contributions to a compensation fund administered for this purpose by a body independent of the beneficiary or beneficiaries, as foreseen in Article 9 of the Postal Directive.

The Postal Directive lays down a minimum common standard of universal services and establishes common rules concerning the reserved area. It therefore increases legal certainty as regards the legality of some exclusive and special rights in the postal sector. There are, however State measures that are not dealt with in it and that can be in conflict with the Treaty rules addressed to Member States. The autonomous behaviour of the postal operators also remains subject to the competition rules in the Treaty.

Article 90(2) of the Treaty provides that suppliers of services of general interest may be exempted from the rules in the Treaty, to the extent that the application of those rules would obstruct the performance of the general interest tasks for which they are responsible. That exemption from the Treaty rules is however subject to the principle of proportionality. That principle is designed to ensure the best match between the duty to provide general interest services and the way in which the services are actually provided, so that the means used are in proportion to the ends pursued. The principle is formulated to allow for a flexible and context-sensitive balance that takes account of the technical and budgetary constraints that may vary from one sector to another. It also makes for the best possible interaction between market efficiency and general interest requirements, by ensuring that the means used to satisfy the requirements do not unduly interfere with the smooth running of the single European market and do not affect trade to an extent that would be contrary to the Community interest (10).

The application of the Treaty rules, including the possible application of the Article 90(2) exemption, as regards both behaviour of undertakings and State measures can only be done on a case-by-case basis. It seems, however, highly desirable, in order to increase legal certainty as regards measures not covered by the Postal Directive, to explain the Commission's interpretation of the Treaty and the approach that it aims to follow in its future application of those rules. In particular, the Commission considers that, subject to the provisions of Article 90(2) in relation to the provision of the universal service, the application of the Treaty rules would promote the competitiveness of the undertakings active in the postal sector, benefit consumers and contribute in a positive way to the objectives of general interest.

The postal sector in the European Union is characterised by areas which Member States have reserved in order to guarantee universal service and which are now being harmonised by the Postal Directive in order to limit distortive effects between Member States. The Commission must, according to the Treaty, ensure that postal monopolies comply with the rules of the Treaty, and in particular the competition rules, in order to ensure maximum benefit and limit any distortive effects for the consumers. In pursuing this objective by applying the competition rules to the sector on a case-by-case-basis, the Commission will ensure that monopoly power is not used for extending a protected dominant position into liberalised activities or for unjustified discrimination in favour of big accounts at the expense of small users. The Commission will



also ensure that postal monopolies granted in the area of cross-border services are not used for creating or maintaining illicit price cartels harming the interest of companies and consumers in the European Union.

This notice explains to the players on the market the practical consequences of the applicability of the competition rules to the postal sector, and the possible derogations from the principles. It sets out the position the Commission would adopt, in the context set by the continuing existence of special and exclusive rights as harmonised by the Postal Directive, in assessing individual cases or before the Court of Justice in cases referred to the Court by national courts under Article 177 of the Treaty.

## 1. DEFINITIONS

In the context of this notice, the following definitions shall apply (11):

'postal services': services involving the clearance, sorting, transport and delivery of postal items;

'public postal network': the system of organisation and resources of all kinds used by the universal service provider(s) for the purposes in particular of:

- the clearance of postal items covered by a universal service obligation from access points throughout the territory,
- the routing and handling of those items from the postal network access point to the distribution centre,
- distribution to the addresses shown on items;

'access points': physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public postal network by customers;

'clearance': the operation of collecting postal items deposited at access points;

'distribution': the process from sorting at the distribution centre to delivery of postal items to their addresses;

'postal item': an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value;

'item of correspondence': a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence;

'direct mail': a communication consisting solely of advertising, marketing or publicity material and comprising an identical message, except for the addressee's name, address and identifying number as well as other modifications which do not alter the nature of the message, which is sent to a significant number of addresses, to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. The National Regulatory Authority should

interpret the term 'significant number of addressees` within each Member State and publish an appropriate definition. Bills, invoices, financial statements and other non-identical messages should not be regarded as direct mail. A communication combining direct mail with other items within the same wrapping should not be regarded as direct mail. Direct mail includes cross-border as well as domestic direct mail;

'document exchange`: provision of means, including the supply of ad hoc premises as well as transportation by a third party, allowing self-delivery by mutual exchange of postal items between users subscribing to this service;

'express mail service`: a service featuring, in addition to greater speed and reliability in the collection, distribution, and delivery of items, all or some of the following supplementary facilities: guarantee of delivery by a fixed date; collection from point of origin; personal delivery to addressee; possibility of changing the destination and address in transit; confirmation to sender of receipt of the item dispatched; monitoring and tracking of items dispatched; personalised service for customers and provision of an à la carte service, as and when required. Customers are in principle prepared to pay a higher price for this service;

'universal service provider`: the public or private entity providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission;

'exclusive rights`: rights granted by a Member State which reserve the provision of postal services to one undertaking through any legislative, regulatory or administrative instrument and reserve to it the right to provide a postal service, or to undertake an activity, within a given geographical area;

'special rights`: rights granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:

- limits, on a discretionary basis, to two or more the number of such undertakings authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or
- designates, otherwise than according to such criteria, several competing undertakings as undertakings authorised to provide a service or undertake an activity, or
- confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or undertake the same activity in the same geographical area under substantially comparable conditions;

'terminal dues`: the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member State or from a third country;

'intermediary`: any economical operator who acts between the sender and the universal service provider, by clearing, routing and/or pre-sorting postal items, before channelling them into the public postal network of the same or of another country;

'national regulatory authority': the body or bodies, in each Member State, to which the Member State entrusts, inter alia, the regulatory functions falling within the scope of the Postal Directive;

'essential requirements': general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services (12). These reasons are: the confidentiality of correspondence, security of the network as regards the transport of dangerous goods and, where justified, data protection, environmental protection and regional planning.

Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy.

## 2. MARKED DEFINITION AND POSITION ON THE POSTAL MARKET

### a) Geographical and product market definition

2.1. Articles 85 and 86 of the Treaty prohibit as incompatible with the common market any conduct by one or more undertakings that may negatively affect trade between Member States which involves the prevention, restriction, or distortion of competition and/or an abuse of a dominant position within the common market or a substantial part of it. The territories of the Member States constitute separate geographical markets with regard to the delivery of domestic mail and also with regard to the domestic delivery of inward cross-border mail, owing primarily to the exclusive rights of the operators referred to in point 4.2 and to the restrictions imposed on the provision of postal services. Each of the geographical markets constitutes a substantial part of the common market. For the determination of 'relevant market', the country of origin of inward cross-border mail is immaterial.

2.2. As regards the product markets, the differences in practice between Member States demonstrate that recognition of several distinct markets is necessary in some cases. Separation of different product-markets is relevant, among, other things, to special or exclusive rights granted. In its assessment of individual cases on the basis of the different market and regulatory situations in the Member States and on the basis of a harmonised framework provided by the Postal Directive, the Commission will in principle consider that a number of distinct product markets exist, like the clearance, sorting, transport and delivery of mail, and for example direct mail, and cross-border mail. The Commission will take into account the fact that these markets are wholly or partly liberalised in a number of Member States. The Commission will consider the following markets when assessing individual cases.

2.3. The general letter service concerns the delivery of items of correspondence to the addresses shown on the items.

It does not include self-provision, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail.

Also excluded, in accordance with practice in many Member States, are such postal items as are not considered items of correspondence, since they consist of identical copies of the same written communication and have not been altered by additions, deletions or indications other than the name of the addressee and his address. Such items are magazines, newspapers, printed periodicals catalogues, as well as goods or documents accompanying and relating to such items.

Direct mail is covered by the definition of items of correspondence. However, direct mail items do not contain personalised messages. Direct mail addresses the needs of specific operators for commercial communications services, as a complement to advertising in the media. Moreover, the senders of direct mail do not necessarily require the same short delivery times, priced at first-class letter tariffs, asked for by customers requesting services on the market as referred to above. The fact that both services are not always directly interchangeable indicates the possibility of distinct markets.

2.4. Other distinct markets include, for example, the express mail market, the document exchange market, as well as the market for new services (services quite distinct from conventional services). Activities combining the new telecommunications technologies and some elements of the postal services may be, but are not necessarily, new services within the meaning of the Postal Directive. Indeed, they may reflect the adaptability of traditional services.

A document exchange differs from the market referred to in point 2.3 since it does not include the collection and the delivery to the addressee of the postal items transported. It involves only means, including the supply of ad hoc premises as well as transportation by a third party, allowing self-delivery by mutual exchange of postal items between users subscribing to this service. The users of a document exchange are members of a closed user group.

The express mail service also differs from the market referred to in point 2.3 owing to the value added by comparison with the basic postal service (13). In addition to faster and more reliable collection, transportation and delivery of the postal items, an express mail service is characterised by the provision of some or all of the following supplementary services: guarantee of delivery by a given date; collection from the sender's address; delivery to the addressee in person; possibility of a change of destination and addressee in transit; conformation to the sender of delivery; tracking and tracing; personalised treatment for customers and the offer of a range of services according to requirements. Customers are in principle prepared to pay a higher price for this service. The reservable services as defined in the Postal Directive may include accelerated delivery of items of domestic correspondence falling within the prescribed price and weight limits.

2.5. Without prejudice to the definition of reservable services given in the Postal Directive, different activities can be recognised, within the general letter service, which meet distinct needs and should in principle be considered as different markets; the markets for the clearance and for the sorting of mail, the market for the transport of mail and, finally, the delivery of mail (domestic or inward cross-border). Different categories of customers must be distinguished in this respect. Private customers demand the distinct products or services as one integrated service. However, business customers, which represent most of the revenues of the operators referred to in point 4.2, actively pursue the possibilities of substituting for distinct components of the final service alternative solutions (with regard to quality of service levels and/or costs incurred) which are in some cases provided by, or sub-contracted to, different operators. Business customers want to balance the advantages and disadvantages of self-provision versus provision by the postal operator. The existing monopolies limit the external supply of those individual services, but they would otherwise limit the external supply of those individual according to market conditions. That market reality supports the opinion that clearance,

sorting, transport and delivery of postal items constitute different markets (14). From a competition-law point of view, the distinction between the four markets may be relevant.

That is the case for cross-border mail where the clearance and transport will be done by a postal operator other than the one providing the distribution. This is also the case as regards domestic mail, since most postal operators permit major customers to undertake sorting of bulk traffic in return for discounts, based on their public tariffs. The deposit and collection of mail and method of payment also vary in these circumstances. Mail rooms of larger companies are now often operated by intermediaries, which prepare and pre-sort mail before handing it over to the postal operator for final distribution. Moreover, all postal operators allow some kind of downstream access to distribution. Moreover, all postal operators allow some kind of downstream access to their postal network, for instance by allowing or even demanding (sorted) mail to be deposited at an expediting or sorting centre. This permits in many cases a higher reliability (quality of service) by bypassing any sources of failure in the postal network upstream.

#### (b) Dominant position

2.6. Since in most Member States the operator referred to in point 4.2 is, by virtue of the exclusive rights granted to him, the only operator controlling a public postal network covering the whole territory of the Member State, such an operator has a dominant position within the meaning of Article 86 of the Treaty on the national market for the distribution of items of correspondence. Distribution is the service to the user which allows for important economies of scale, and the operator providing this service is in most cases also dominant on the markets for the clearance, sorting and transport of mail. In addition, the enterprise which provides distribution, particularly if it also operates post office premises, has the important advantage of being regarded by the users as the principal postal enterprise, because it is the most conspicuous one, and is therefore the natural first choice. Moreover, this dominant position also includes, in most Member States, services such as registered mail or special delivery services, and/or some sectors of the parcels market.

#### (c) Duties of dominant postal operators

2.7. According to point (b) of the second paragraph of Article 86 of the Treaty, an abuse may consist in limiting the performance of the relevant service to the prejudice of its consumers. Where a Member State grants exclusive rights to an operator referred to in point 4.2 for services which it does not offer, or offers in conditions not satisfying the needs of customers in the same way as the services which competitive economic operators would have offered, the Member State induces those operators, by the simple exercise of the exclusive right which has been conferred on them, to limit the supply of the relevant service, as the effective exercise of those activities by private companies is, in this case, impossible. This is particularly the case where measures adopted to protect the postal service restrict the provision of other distinct services on distinct or neighbouring markets such as the express mail market. The Commission has requested several Member States to abolish restrictions resulting from exclusive rights regarding the provision of express mail services by international couriers (15).

Another type of possible abuse involves providing a seriously inefficient service and failing to take advantage of technical developments. This harms customers who are prevented from choosing between alternative suppliers. For instance, a report prepared for the Commission

(16) in 1994 showed that, where they have not been subject to competition, the public postal operators in the Member States have not made any significant progress since 1990 in the standardisation of dimensions and weights. The report also showed that some postal operators practised hidden cross-subsidies between reserved and non-reserved services (see points 3.1 and 3.4), which explained, according to that study, most of the price disparities between Member States in 1994, especially penalising residential users who do not qualify for any discounts schemes, since they make use of reserved services that are priced at a higher level than necessary.

The examples given illustrate the possibility that, where they are granted special or exclusive rights, postal operators may let the quality of the service decline (17) and omit to take necessary steps to improve service quality. In such cases, the Commission may be induced to act taking account of the conditions explained in point 8.3.

As regards cross-border postal services, the study referred to above showed that the quality of those services needed to be improved significantly in order to meet the needs of customers, and in particular of residential customers who cannot afford to use the services of courier companies or facsimile transmission instead. Independent measurements carried out in 1995 and 1996 show an improvement of quality of service since 1994. However, those measurements only concern first class mail, and the most recent measurements show that the quality has gone down slightly again.

The majority of Community public postal operators have notified an agreement on terminal dues to the Commission for assessment under the competition rules of the Treaty. The parties to the agreement have explained that their aim is to establish fair compensation for the delivery of cross-border mail reflecting more closely the real costs incurred and to improve the quality of cross-border mail services.

2.8. Unjustified refusal to supply is also an abuse prohibited by Article 86 of the Treaty. Such behaviour would lead to a limitation of services within the meaning of Article 86, second paragraph, (b) and, if applied only to some users, result in discrimination contrary to Article 86, second paragraph, (c), which requires that no dissimilar conditions be applied to equivalent transactions. In most of the Member States, the operators referred to in point 4.2 provide access at various access points of their postal networks to intermediaries. Conditions of access, and in particular the tariffs applied, are however, often confidential and may facilitate the application of discriminatory conditions. Member States should ensure that their postal legislation does not encourage postal operators to differentiate unjustifiably as regards the conditions applied or to exclude certain companies.

2.9. While a dominant firm is entitled to defend its position by competing with rivals, it has a special responsibility not to further diminish the degree of competition remaining on the market. Exclusionary practices may be directed against existing competitors on the market or intended to impede market access by new entrants. Examples of such illegal behaviour include: refusal to deal as a means of eliminating a competitor by a firm which is the sole or dominant source of supply of a product or controls access to an essential technology or infrastructure; predatory pricing and selective price cutting (see section 3); exclusionary dealing agreements; discrimination as part of a wider pattern of monopolizing conduct designed to exclude competitors; and exclusionary rebate schemes.

### 3. CROSS-SUBSIDISATION

#### (a) Basic principles

3.1. Cross-subsidisation means that an undertaking bears or allocates all or part of the costs of its activity in one geographical or product market to its activity in another geographical or product market. Under certain circumstances, cross-subsidisation in the postal sector, where nearly all operators provide reserved and non-reserved services, can distort competition and lead to competitors being beaten by offers which are made possible not by efficiency (including economies of scope) and performance but by cross-subsidies. Avoiding cross-subsidisation leading to unfair competition is crucial for the development of the postal sector.

3.2. Cross-subsidisation does not distort competition when the costs of reserved activities are subsidised by the revenue generated by other reserved services since there is no competition possible as to these services. This form of subsidisation may sometimes be necessary, to enable the operators referred to in point 4.2 to perform their obligation to provide a service universally, and on the same conditions to everybody (18). For instance, unprofitable mail delivery in rural areas is subsidised through revenues from profitable mail delivery in urban areas. The same could be said of subsidising the provision of reserved services through revenues generated by activities open to competition. Moreover, cross-subsidisation between non-reserved activities is not in itself abusive.

3.3. By contrast, subsidising activities open to competition by allocating their costs to reserved services is likely to distort competition in breach of Article 86. It could amount to an abuse by an undertaking holding a dominant position within the Community. Moreover, users of activities covered by a monopoly would have to bear costs which are unrelated to the provision of those activities. Nonetheless, dominant companies too many compete on price, or improve their cash flow and obtain only partial contribution to their fixed (overhead) costs, unless the prices are predatory or go against relevant national or Community regulations.

#### (b) Consequences

3.4. A reference to cross-subsidisation was made in point 2.7; duties of dominant postal operators. The operators referred to in point 4.2 should not use the income from the reserved area to cross-subsidise activities in areas open to competition. Such a practice could prevent, restrict or distort competition in the non-reserved area. However, in some justified cases, subject to the provisions of Article 90(2), cross-subsidisation can be regarded as lawful, for example for cultural mail (19), as long as it is applied in a non discriminatory manner, or for particular services to the socially, medically and economically disadvantaged. When necessary, the Commission will indicate what other exemptions the Treaty would allow to be made. In all other cases, taking into account the indications given in point 3.3, the price of competitive services offered by the operator referred to in point 4.2 should, because of the difficulty of allocating common costs, in principle be at least equal to the average total costs of provision. This means covering the direct costs plus an appropriate proportion of the common and overhead costs of the operator. Objective criteria, such as volumes, time (labour) usage, or intensity of usage, should be used to determine the appropriate proportion. When using the turnover generated by the services involved as a criterion in a case of cross-subsidisation, allowance should be made for the fact that in such a scenario the turnover of the relevant activity is being kept artificially low. Demand-influenced factors, such as revenues or profits,

are themselves influenced by predation. If services were offered systematically and selectively at a price below average total cost, the Commission would, on a case-by-case basis, investigate the matter under Article 86, or under Article 86 and Article 90(1) or under Article 92.

#### 4. PUBLIC UNDERTAKINGS AND SPECIAL OR EXCLUSIVE RIGHTS

4.1. The treaty obliges the Member States, in respect of public undertakings and undertakings to which they grant special or exclusive rights, neither to enact nor maintain in force any measures contrary to the Treaty rules (Article 90(1)). The expression 'undertaking' includes every person or legal entity exercising an economic activity, irrespective of the legal status of the entity and the way in which it is financed. The clearance, sorting, transportation and distribution of postal items constitute economic activities, and these services are normally supplied for reward.

The term 'public undertaking' includes every undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of ownership of it, their financial participation in it or the rules which govern it (20). A dominant influence on the part of the public authorities may in particular be presumed when the public authorities hold, directly or indirectly, the majority of the subscribed capital of the undertaking, control the majority of the voting rights attached to shares issued by the undertaking or can appoint more than half of the members of the administrative, managerial or supervisory body. Bodies which are part of the Member State's administration and which provide in an organised manner postal services for third parties against remuneration are to be regarded as such undertakings. Undertakings to which special or exclusive rights are granted can, according to Article 90(1), be public as well as private.

4.2. National regulations concerning postal operators to which the Member States have granted special or exclusive rights to provide certain postal services are 'measures' within the meaning of Article 90(1) of the Treaty and must be assessed under the Treaty provisions to which that Article refers.

In addition to Member States' obligations under Article 90(1), public undertakings and undertakings that have been granted special or exclusive rights are subject to Articles 85 and 86.

4.3. In most Member States, special and exclusive rights apply to services such as the clearance, transportation and distribution of certain postal items, as well as the way in which those services are provided, such as the exclusive right to place letter boxes along the public highway or to issue stamps bearing the name of the country in question.

#### 5. FREEDOM TO PROVIDE SERVICES

##### (a) Basic principles

5.1. The granting of special or exclusive rights to one or more operators referred to in point 4.2 to carry out the clearance, including public collection, transport and distribution of certain categories of postal items inevitably restricts the provision of such services, both by companies established in other Member States and by undertakings established in the Member State concerned. This restriction has a transborder character when the addresses or the senders of the postal items handled by those undertakings are established in other Member States. In practice, restrictions on the provision of postal services, within the meaning of Article 59 of the Treaty



(21), comprise prohibiting the conveyance of certain categories of postal items to other Member States including by intermediaries, as well as the prohibition on distributing cross-border mail. The Postal Directive lays down the justified restrictions on the provision of postal services.

5.2. Article 66, read in conjunction with Article 55 and 56 of the Treaty, sets out exceptions from Article 59. Since they are exceptions to a fundamental principle, they must be interpreted restrictively. As regards postal services, the exception under Article 55 only applies to the conveyance and distribution of a special kind of mail, that is mail generated in the course of judicial or administrative procedures, connected, even occasionally, with the exercise of official authority, in particular notifications in pursuance of any judicial or administrative procedures. The conveyance and distribution of such items on a Member State's territory may therefore be subjected to a licensing requirement (see point 5.5) in order to protect the public interest. The conditions of the other derogations from the Treaty listed in those provisions will not normally be fulfilled in relation to postal services. Such services cannot, in themselves, threaten public policy and cannot affect public health.

5.3. The case-law of the Court of Justice allows, in principle, further derogations on the basis of mandatory requirements, provided that they fulfil non-economic essential requirements in the general interest, are applied without discrimination, and are appropriate and proportionate to the objective to be achieved. As regards postal services, the essential requirements which the Commission would consider as justifying restrictions on the freedom to provide postal services are data protection subject to approximation measures taken in this field, the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, as well as, where justified under the provisions of the Treaty, environmental protection and regional planning. Conversely, the Commission would not consider it justified to impose restrictions on the freedom to provide postal services for reasons of consumer protection since this general interest requirement can be met by the general legislation on fair trade practices and consumer protection. Benefits to consumers are enhanced by the freedom to provide postal services, provided that universal service obligations are well defined on the basis of the Postal Directive and can be fulfilled.

5.4. The Commission therefore considers that the maintenance of any special or exclusive right which limits cross-border provision of postal services needs to be justified in the light of Articles 90 and 59 of the Treaty. At present, the special or exclusive rights whose scope does not go beyond the reserved services as defined in the Postal Directive are *prima facie* justified under Article 90(2). Outward cross-border mail is *de jure* or *de facto* liberalised in some Member States, such as Denmark, the Netherlands, Finland, Sweden, and the United Kingdom.

#### (b) Consequences

5.5. The adoption of the measures contained in the Postal Directive requires Member States to regulate postal services. Where Member States restrict postal services to ensure the achievement of universal service and essential requirements, the content of such regulation must correspond to the objective pursued. Obligations should, as a general rule, be enforced within the framework of class licences and declaration procedures by which operators of postal services supply their name, legal form, title and address as well as a short description of the services they offer to the public. Individual licensing should only be applied for specific postal services, where it is demonstrated that less restrictive procedures cannot ensure those

objectives. Member States may be invited, on a case-by-case basis, to notify the measures they adopt to the Commission to enable it to assess their proportionality.

## 6. MEASURES ADOPTED BY MEMBER STATES

### (a) Basic principles

6.1. Member States have the freedom to define what are general interest services, to grant the special or exclusive rights that are necessary for providing them, to regulate their management and, where appropriate, to fund them. However, under Article 90(1) of the Treaty, Member States must, in the case of public undertakings and undertakings to which they have granted special or exclusive rights, neither enact nor maintain in force any measure contrary to the Treaty rules, and in particular its competition rules.

### (b) Consequences

6.2. The operation of a universal clearance and distribution network confers significant advantages on the operator referred to in point 4.2 in offering not only reserved or liberalised services falling within the definition of universal service, but also other (non-universal postal) services. The prohibition under Articles 90(1), read in conjunction with Article 86(b), applies to the use, without objective justification, of a dominant position on one market to obtain market power on related or neighbouring markets which are distinct from the former, at the risk of eliminating competition on those markets. In countries where local delivery of items of correspondence is liberalised, such as Spain, and the monopoly is limited to inter-city transport and delivery, the use of a dominant position to extend the monopoly from the latter market to the former would therefore be incompatible with the Treaty provisions, in the absence of specific justification, if the functioning of services in the general economic interest was not previously endangered. The Commission considers that it would be appropriate for Member States to inform the Commission of any extension of special or exclusive rights and of the justification therefor.

6.3. There is a potential effect on the trade between Member States from restrictions on the provision of postal services, since the postal services offered by operators other than the operators referred to in point 4.2 can cover mailings to or from other Member States, and restrictions may impede cross-border activities of operators in other Member States.

6.4. As explained in point 8(b)(vii), Member States must monitor access conditions and the exercise of special and exclusive rights. They need not necessarily set up new bodies to do this but they should not give to their operator (22) as referred to in point 4.2, or to a body which is related (legally, administratively and structurally) to that operator, the power of supervision of the exclusive rights granted and of the activities of postal operators generally. An enterprise in a dominant position must not be allowed to have such a power over its competitors. The independence, both in theory and in practice, of the supervisory authority from all the enterprise supervised is essential. The system of undistorted competition required by the Treaty can only be ensured if equal opportunities for the different economic operators, including confidentiality of sensitive business information, are guaranteed. To allow an operator to check the declarations of its competitors or to assign to an undertaking the power to supervise the activities of its competitors or to be associated in the granting of licences means that such undertaking is given commercial information about its competitors and thus has the opportunity to influence the activity of those competitors.

## 7. POSTAL OPERATORS AND STATE AID

### (a) Principles

While a few operators referred to in point 4.2 are highly profitable, the majority appear to be operating either in financial deficit or at close to break-even in postal operations, although information on underlying financial performance is limited, as relatively few operators publish relevant information of an auditable standard on a regular basis. However, direct financial support in the form of subsidies or indirect support such as tax exemptions is being given to fund some postal services, even if the actual amounts are often not transparent.

The Treaty makes the Commission responsible for enforcing Article 92, which declares State aid that affects trade between Member States of the Community to be incompatible with the common market except in certain circumstances where an exemption is, or may be, granted. Without prejudice to Article 90(2), Articles 92 and 93 are applicable to postal services (23).

Pursuant to Article 93(3), Member States are required to notify to the Commission for approval all plans to grant aid or to alter existing aid arrangements. Moreover, the Commission is required to monitor aid which it has previously authorised or which dates from before the entry into force of the Treaty or before the accession of the Member State concerned.

All universal service providers currently fall within the scope of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (24), as last amended by Directive 93/84/EEC (25). In addition to the general transparency requirement for the accounts of operators referred to in point 4.2 as discussed in point 8(b)(vi), Member States must therefore ensure that financial relations between them and those operators are transparent as required by the Directive, so that the following are clearly shown:

- (a) public funds made available directly, including tax exemptions or reductions;
- (b) public funds made available through other public undertakings or financial institutions;
- (c) the use to which those public funds are actually put.

The Commission regards, in particular, the following as making available public funds:

- (a) the setting-off of operating losses;
- (b) the provision of capital;
- (c) non-refundable grants or loans on privileged terms;
- (d) the granting of financial advantages by forgoing profits or the recovery of sums due;
- (e) the forgoing of a normal return on public funds used;
- (f) compensation for financial burdens imposed by the public authorities.

### (b) Application of Articles 90 and 92

The Commission has been called upon to examine a number of tax advantages granted to a postal operator on the basis of Article 92 in connection with Article 90 of the Treaty. The Commission sought to check whether that privileged tax treatment could be used to cross-

subsidize that operator's operations in sectors open to competition. At that time, the postal operator did not have an analytical cost-accounting system serving to enable the Commission to distinguish between the reserved activities and the competitive ones. Accordingly, the Commission, on the basis of the findings of studies carried out in that area, assessed the additional costs due to universal-service obligations borne by that postal operator and compared those costs with the tax advantages. The Commission concluded that the costs exceeded those advantages and therefore decided that the tax system under examination could not lead to cross-subsidization of that operator's operations in the competitive areas (26).

It is worth noting that in its decision the Commission invited the Member State concerned to make sure that the postal operator adopted an analytical cost-accounting system and requested an annual report which would allow the monitoring of compliance with Community law.

The Court of First Instance has endorsed the Commission's decision and has stated that the tax advantages to that postal operator are State aid which benefit from an exemption from the prohibition set out in Article 92(1) on the basis of Article 90(2) (27).

## 8. SERVICE OF GENERAL ECONOMIC INTEREST

### (a) Basic principles

8.1. Article 90(2) of the Treaty allows an exception from the application of the Treaty rules where the application of those rules obstructs, in law or in fact, the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of general economic interest. Without prejudice to the rights of the Member States to define particular requirements of services of general interest, that task consists primarily in the provision and the maintenance of a universal public postal service, guaranteeing at affordable, cost-effective and transparent tariffs nationwide access to the public postal network within a reasonable distance and during adequate opening hours, including the clearance of postal items from accessible postal boxes or collection points throughout the territory and the timely delivery of such items to the address indicated, as well as associated services entrusted by measures of a regulatory nature to those operators for universal delivery at a specified quality. The universal service is to evolve in response to the social, economical and technical environment and to the demands of users.

The general interest involved requires the availability in the Community of a genuinely integrated public postal network, allowing efficient circulation of information and thereby fostering, on the one hand, the competitiveness of European industry and the development of trade and greater cohesion between the regions and Member States, and on the other, the improvement of social contacts between the citizens of the Union. The definition of the reserved area has to take into account the financial resources necessary for the provision of the service of general economic interest.

8.2. The financial resources for the maintenance and improvement of that public network still derive mainly from the activities referred to in point 2.3. Currently, and in the absence of harmonisation at Community level, most Member States have fixed the limits of the monopoly by reference to the weight of the item. Some Member States apply a combined weight and price limit whereas one Member State applies a price limit only. Information collected by the Commission on the revenues obtained from mail flows in the Member States seems to indicate that the maintenance of special or exclusive rights with regard to this market could, in the

absence of exceptional circumstances, be sufficient to guarantee the improvement and maintenance of the public postal network.

The service for which Member States can reserve exclusive or special rights, to the extent necessary to ensure the maintenance of the universal service, is harmonised in the Postal Directive. To the extent to which Member States grant special or exclusive rights for this service, the service is to be considered a separate product-market in the assessment of individual cases in particular with regard to direct mail, the distribution of inward cross-border mail, outward cross-border mail, as well as with regard to the collection, sorting and transport of mail. The Commission will take account of the fact that those markets are wholly or partly liberalised in a number of Member States.

8.3. When applying the competition rules and other relevant Treaty rules to the postal sector, the Commission, acting upon a complaint or upon its own initiative, will take account of the harmonized definition set out in the Postal Directive in assessing whether the scope of the reserved area can be justified under Article 90(2). The point of departure will be a presumption that, to the extent that they fall within the limits of the reserved area as defined in the Postal Directive, the special or exclusive rights will be prima facie justified under Article 90(2). That presumption can, however, be rebutted if the facts in a case show that a restriction does not fulfil the conditions of Article 90(2) (28).

8.4. The direct mail market is still developing at a different pace from one Member State to the other, which makes it difficult for the Commission, at this stage, to specify in a general way the obligations of the Member States regarding that service. The two principal issues in relation to direct mail are potential abuse by customers of its tariffication and of its liberalisation (reserved items being delivered by an alternative operators as if they were non-reserved direct mail items) so as to circumvent the reserved services referred to in point 8.2. Evidence from the Member States which do not restrict direct mail services, such as Spain, Italy, the Netherlands, Austria, Sweden and Finland, is still inconclusive and does not yet allow a definitive general assessment. In view of that uncertainty, it is considered appropriate to proceed temporarily on a case-by-case basis. If particular circumstances make it necessary, and without prejudice to point 8.3, Member States may maintain certain existing restrictions on direct mail services or introduce licensing in order to avoid artificial traffic distortions and substantial destabilization of revenues.

8.5. As regards the distribution of inward cross-border mail, the system of terminal dues received by the postal operator of the Member State of delivery of cross-border mail from the operator of the Member State of origin is currently under revision to adapt terminal dues, which are in many cases too low, to actual costs of delivery.

Without prejudice to point 8.3, Member States may maintain certain existing restrictions on the distribution of inward cross-border mail (29), so as to avoid artificial diversion of traffic, which would inflate the share of cross-border mail in Community traffic. Such restrictions may only concern items falling under the reservable area of services. In assessing the situation in the framework of individual cases, the Commission will take into account the relevant, specific circumstances in the Member States.

8.6. The clearance, sorting and transport of postal items has been or is currently increasingly being opened up to third parties by postal operators in a number of Member States. Given that

the revenue effects of such opening up may vary according to the situation in the different Member States, certain Member States may, if particular circumstances make it necessary, and without prejudice to point 8.3, maintain certain existing restrictions on the clearance, sorting and transport of postal items by intermediaries (30), so as to allow for the necessary restructuring of the operator referred to in point 4.2. However, such restrictions should in principle be applied only to postal items covered by the existing monopolies, should not limit what is already accepted in the Member State concerned, and should be compatible with the principle of non-discriminatory access to the postal network as set out in point 8(b)(vii).

(b) Conditions for the application of Article 90(2) to the postal sector

The following conditions should apply with regard to the exception under Article 90(2):

(i) Liberalisation of other postal services

Except for those services for which reservation is necessary, and which the Postal Directive allows to be reserved, Member States should withdraw all special or exclusive rights for the supply of postal services to the extent that the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of a general economic interest is not obstructed in law or in fact, with the exception of mail connected to the exercise of official authority, and they should take all necessary measures to guarantee the right of all economic operators to supply postal services.

This does not prevent Member States from making, where necessary, the supply of such services subject to declaration procedures or class licences and, when necessary, to individual licensing procedures aimed at the enforcement of essential requirements and at safeguarding the universal service. Member States should, in that event, ensure that the conditions set out in those procedures are transparent, objective, and without discriminatory effect, and that there is an efficient procedure of appealing to the courts against any refusal.

(ii) Absence of less restrictive means to ensure the services in the general economic interest

Exclusive rights may be granted or maintained only where they are indispensable for ensuring the functioning of the tasks of general economic interest. In many areas the entry of new companies into the market could, on the basis of their specific skills and expertise, contribute to the realisation of the services of general economic interest.

If the operator referred to in point 4.2 fails to provide satisfactorily all of the elements of the universal service required by the Postal Directive (such as the possibility of every citizen in the Member State concerned, and in particular those living in remote areas, to have access to newspapers, magazines and books), even with the benefit of a universal postal network and of special or exclusive rights, the Member State concerned must take action (31). Instead of extending the rights already granted, Member States should create the possibility that services are provided by competitors and for this purpose may impose obligations on those competitors in addition to essential requirements. All of those obligations should be objective, non-discriminatory and transparent.

(iii) Proportionality

Member States should moreover ensure that the scope of any special and exclusive rights granted is in proportion to the general economic interest which is pursued through those rights.

Prohibiting self-delivery, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail, or collection and transport of such items by a third party acting solely on its behalf, would for example not be proportionate to the objective of guaranteeing adequate resources for the public postal network. Member States must also adjust the scope of those special or exclusive rights, according to changes in the needs and the conditions under which postal services are provided and taking account of any State aid granted to the operator referred to in point 4.2.

(iv) Monitoring by an independent regulatory body

The monitoring of the performance of the public-service tasks of the operators referred to in point 4.2 and of open access to the public postal network and, where applicable, the grant of licences or the control of declarations as well as the observance by economic operators of the special or exclusive rights of operators referred to in point 4.2 should be ensured by a body or bodies independent of the latter (32).

That body should in particular ensure: that contracts for the provision of reserved services are made fully transparent, are separately invoiced and distinguished from non-reserved services, such as printing, labelling and enveloping; that terms and conditions for services which are in part reserved and in part liberalised are separate; and that the reserved element is open to all postal users, irrespective of whether or not the non-reserved component is purchased.

(v) Effective monitoring of reserved services

The tasks excluded from the scope of competition should be effectively monitored by the Member State according to published service targets and performance levels and there should be regular and public reporting on their fulfilment.

(vi) Transparency of accounting

Each operator referred to in point 4.2 uses a single postal network to compete in a variety of markets. Price and service discrimination between or within classes of customers can easily be practised by operators running a universal postal network, given the significant overheads which cannot be fully and precisely assigned to any one service in particular. It is therefore extremely difficult to determine cross-subsidies within them, both between the different stages of the handling of postal items in the public postal network and between the reserved services and the services provided under conditions of competition. Moreover, a number of operators offer preferential tariffs for cultural items which clearly do not cover the average total costs. Member States are obliged by Article 5 and 90 to ensure that Community law is fully complied with. The Commission considers that the most appropriate way of fulfilling that obligation would be for Member States to require operators referred to in point 4.2 to keep separate financial records, identifying separately, inter alia, costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions, and making it possible to assess fully the conditions applied at the various access points of the public postal network. Services made up of elements falling within the reserved and competitive services should also distinguish between the costs of each element. Internal accounting systems should operate on the basis of consistently applied and objectively justified cost-accounting principles. The financial accounts should be drawn up, audited by an independent auditor, which may be appointed by the National Regulatory

Authority, and be published in accordance with the relevant Community and national legislation applying to commercial organisations.

(vii) Non-discriminatory access to the postal network

Operators should provide the universal postal service by affording non-discriminatory access to customers or intermediaries at appropriate public points of access, in accordance with the needs of those users. Access conditions including contracts (when offered) should be transparent, published in an appropriate manner and offered on a non-discriminatory basis.

Preferential tariffs appear to be offered by some operators to particular groups of customers in a non-transparent fashion. Member States should monitor the access conditions to the network with a view to ensuring that there is no discrimination either in the conditions of use or in the charges payable. It should in particular be ensured that intermediaries, including operators from other Member States, can choose from amongst available access points to the public postal network and obtain access within a reasonable period at price conditions based on costs, that take into account the actual services required.

The obligation to provide non-discriminatory access to the public postal network does not mean that Member States are required to ensure access for items of correspondence from its territory, which were conveyed by commercial companies to another State, in breach of a postal monopoly, to be introduced in the public postal network via a postal operator of that other State, for the sole purpose of taking advantage of lower postal tariffs. Other economic reasons, such as production costs and facilities, added values or the level of service offered in other Member States are not regarded as improper. Fraud can be made subject to penalties by the independent regulatory body.

At present cross-border access to postal networks is occasionally rejected, or only allowed subject to conditions, for postal items whose production process includes cross-border data transmission before those postal items were given physical form. Those cases are usually called non-physical remail. In the present circumstances there may indeed be an economic problem for the postal operator that delivers the mail, due to the level of terminal dues applied between postal operators. The operators seek to resolve this problem by the introduction of an appropriate terminal dues system.

The Commission may request Member States, in accordance with the first paragraph of Article 5 of the Treaty, to inform the Commission of the conditions of access applied and of the reasons for them. The Commission is not to disclose information acquired as a result of such requests to the extent that it is covered by the obligation of professional secrecy.

## 9. REVIEW

This notice is adopted at Community level to facilitate the assessment of certain behaviour of undertakings and certain State measures relating to postal services. It is appropriate that after a certain period of development, possibly by the year 2000, the Commission should carry out an evaluation of the postal sector with regard to the Treaty rules, to establish whether modifications of the views set out in this notice are required on the basis of social, economic or technological considerations and on the basis of experience with cases in the postal sector. In due time the Commission will carry out a global evaluation of the situation in the postal sector in the light of the aims of this notice.



- (1) COM(91) 476 final.
- (2) 'Guidelines for the development of Community postal services` (COM(93) 247 of 2 June 1993).
- (3) OJ C 48, 16.2.1994, p. 3.
- (4) OJ C 322, 2.12.1995, p. 22.
- (5) OJ C 322, 2.12.1995, p. 3.
- (6) OJ C 20, 20.1.1997, p. 159.
- (7) In particular in Joined Cases C-48/90 and C-66/90, Netherlands and Koninklijke PTT Nederland and PTT Post BV v. Commission [1992] ECR I-565 and Case C-320/91 Procureur du Roi v. Paul Corbeau [1993] ECR I-2533.
- (8) COM(96) 443 final.
- (9) See footnote 8.
- (10) See judgment of 23 October 1997 in Cases C-157/94 to C-160/94 'Member State Obligations - Electricity` Commission v. Netherlands (157/94), Italy (158/94). France (154/94), Spain (160/94).
- (11) The definitions will be interpreted in the light of the Postal Directive and any changes resulting from review of that Directive.
- (12) The meaning of this important phrase in the context of Community competition law is explained in paragraph 5.3.
- (13) Commission Decisions 90/16/EEC (OJ L 10, 12.1.1990, p. 47) and 90/456/EEC (OJ L 233, 28.8.1990, p. 19).
- (14) See Commission Notice on the definition of the relevant market for the purpose of the application of Community competition law (OJ C 372, 9.12.1997, p. 5).
- (15) See footnote 13.
- (16) UFC - Que Choisir, Postal services in the European Union, April 1994.
- (17) In many Member States users could, some decades ago, still rely on this service to receive in the afternoon, standard letters posted in the morning. Since then, a continuous decline in the quality of the service has been observed, and in particular of the number of daily rounds of the postmen, which were reduced from five to one (or two in some cities of the European Union). The exclusive rights of the postal organisations favoured a fall in quality, since they prevented other companies from entering the market. As a consequence the postal organisations failed to compensate for wage increases and reduction of the working hours by introducing modern technology, as was done by enterprises in industries open to competition.
- (18) See these Postal Directive, recitals 16 and 28, and Chapter 5.
- (19) Referred to by UPU as 'work of the mind`, comprising books, newspapers, periodicals and journals.

- (20) Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 195, 29.7.1980, p. 35.
- (21) For a general explanation of the principles deriving from Article 59, see Commission interpretative communication concerning the free movement of services across frontiers (OJ C 334, 9.12.1993, p. 3).
- (22) See in particular, Case C-18/88 RTT v GB-Inno-BM [1991] ECR I-5981, paragraphs 25 to 28.
- (23) Case C-387/92 Banco de Credito Industrial v. Ayuntamiento Valencia [1994] ECR I-877.
- (24) OJ L 195, 29.7.1980, p. 35.
- (25) OJ L 254, 12.10.1993, p. 16.
- (26) Case NN 135/92, OJ C 262, 7.10.1995, p. 11.
- (27) Case T-106/95 FFSA v. Commission [1997] ECR II-229.
- (28) In relation to the limits on the application of the exception set out in Article 90(2), see the position taken by the Court of Justice in the following cases: Case C-179/90 *Merci convenzionali porto di Genova v. Siderurgica Gabrielli* [1991] ECR I-1979; Case C-41/90 *Klaus Höfner and Fritz Elser v. Macroton* [1991] ECR I-5889.
- (29) This may in particular concern mail from one State which has been conveyed by commercial companies to another State to be introduced in the public postal network via a postal operator of that other State.
- (30) Even in a monopoly situation, senders will have the freedom to make use of particular services provided by an intermediary, such as (pre-)sorting before deposit with the postal operator.
- (31) According to Article 3 of the Postal Directive, Member States are to ensure that users enjoy the right to a universal service.
- (32) See in particular Articles 9 and 22 of the Postal Directive.

## **E. TRANSPORT**



## **E.1 AIR TRANSPORT**



## I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

## REGULATIONS

## COUNCIL REGULATION (EC) No 487/2009

of 25 May 2009

**on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector**

(Codified version)

(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,

Having regard to the Opinion of the European Parliament <sup>(1)</sup>,

Whereas:

(1) Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector <sup>(2)</sup> has been substantially amended several times <sup>(3)</sup>. In the interests of clarity and rationality the said Regulation should be codified.

(2) Common provisions for the application of Article 81(3) of the Treaty should be adopted by way of Regulation or Directive pursuant to Article 83 of the Treaty. The Commission should be enabled to declare by way of regulation that the provisions of Article 81(1) of the Treaty do not apply to certain categories of agreements between undertakings, decisions by associations of undertakings and concerted practices.

(3) The Commission should be empowered to grant block exemptions in the air transport sector in respect of traffic within the Community, as well as in respect of traffic between the Community and third countries.

(4) It should be laid down under what specific conditions and in what circumstances the Commission may exercise such powers in close and constant liaison with the competent authorities of the Member States.

(5) It is desirable, in particular, that block exemptions be granted for certain categories of agreements, decisions and concerted practices. Those exemptions should be granted for a limited period during which air carriers can adapt to a more competitive environment. The Commission, in close liaison with the Member States, should be able to define precisely the scope of those exemptions and the conditions attached to them.

(6) This Regulation is without prejudice to the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION:

*Article 1*

This Regulation shall apply to air transport.

*Article 2*

1. In accordance with Article 81(3) of the Treaty, the Commission may by Regulation declare that Article 81(1) of the Treaty shall not apply to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices.

The Commission may, in particular, adopt such Regulations in respect of agreements, decisions or concerted practices which have as their object any of the following:

- (a) joint planning and coordination of airline schedules;
- (b) consultations on tariffs for the carriage of passengers and baggage and of freight on scheduled air services;
- (c) joint operations on new less busy scheduled air services;

<sup>(1)</sup> Opinion of 21 October 2008 (not yet published in the Official Journal).

<sup>(2)</sup> OJ L 374, 31.12.1987, p. 9.

<sup>(3)</sup> See Annex I.

- (d) slot allocation at airports and airport scheduling; the Commission shall take care to ensure consistency with Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports <sup>(1)</sup>;
- (e) common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings; the Commission shall take care to ensure consistency with Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems <sup>(2)</sup>.

2. Without prejudice to the second subparagraph of paragraph 1, the Commission Regulations referred to therein shall define the categories of agreements, decisions or concerted practices to which they apply and shall specify in particular:

- (a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;
- (b) the clauses which must be contained in the agreements, decisions and concerted practices, or any other conditions which must be satisfied.

#### Article 3

Any Regulation adopted pursuant to Article 2 shall apply for a specified period.

It may be repealed or amended where circumstances have changed with respect to any of the factors which prompted its adoption; in such a case, a period shall be fixed for amendment of the agreements and concerted practices to which the earlier Regulation applied before repeal or amendment.

#### Article 4

Regulations adopted pursuant to Article 2 shall include a provision stating that they apply with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of the entry into force of such Regulations.

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

Done at Brussels, 25 May 2009.

For the Council

The President

J. ŠEBESTA

#### Article 5

A Regulation adopted pursuant to Article 2 may stipulate that the prohibition contained in Article 81(1) of the Treaty shall not apply, for such a period as fixed by that Regulation, to agreements, decisions and concerted practices already in existence at the date of accession to which Article 81(1) applies by virtue of the accession of Austria, Finland and Sweden and which do not satisfy the conditions of Article 81(3) of the Treaty.

However, this Article shall not apply to agreements, decisions and concerted practices which at the date of accession already fall under Article 53(1) of the EEA Agreement.

#### Article 6

Before adopting a Regulation pursuant to Article 2, the Commission shall publish a draft thereof and invite all persons and organisations concerned to submit their comments within a reasonable time-limit, being not less than one month, as the Commission shall fix.

#### Article 7

The Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions 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 <sup>(3)</sup> before publishing a draft Regulation and before adopting a Regulation pursuant to Article 2.

#### Article 8

Regulation (EEC) No 3976/87 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and be read in accordance with the correlation table set out in Annex II.

#### Article 9

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

<sup>(1)</sup> OJ L 14, 22.1.1993, p. 1.  
<sup>(2)</sup> OJ L 220, 29.7.1989, p. 1.

<sup>(3)</sup> OJ L 1, 4.1.2003, p. 1.



## ANNEX I

**Repealed Regulation with list of its successive amendments**

Council Regulation (EEC) No 3976/87  
(OJ L 374, 31.12.1987, p. 9).

Council Regulation (EEC) No 2344/90  
(OJ L 217, 11.8.1990, p. 15).

Council Regulation (EEC) No 2411/92  
(OJ L 240, 24.8.1992, p. 19).

1994 Act of Accession, Annex I, Point III.A.3  
(JO C 241, 29.8.1994, p. 56).

Council Regulation (EC) No 1/2003  
(OJ L 1, 4.1.2003, p. 1).

Only Article 41

Council Regulation (EC) No 411/2004  
(OJ L 68, 6.3.2004, p. 1).

Only Article 2

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## ANNEX II

## CORRELATION TABLE

Regulation (EEC) No 3976/87	This Regulation
Article 1	Article 1
Article 2(1)	Article 2(1), first subparagraph
Article 2(2), introductory wording	Article 2(1), second subparagraph, introductory wording
Article 2(2), first indent	Article 2(1), second subparagraph, point (a)
Article 2(2), second indent	Article 2(1), second subparagraph, point (b)
Article 2(2), third indent	Article 2(1), second subparagraph, point (c)
Article 2(2), fourth indent	Article 2(1), second subparagraph, point (d)
Article 2(2), fifth indent	Article 2(1), second subparagraph, point (e)
Article 2(3)	Article 2(2)
Articles 3 and 4	Articles 3 and 4
Article 4a, first sentence	Article 5, first paragraph
Article 4a, second sentence	Article 5, second paragraph
Article 5	Article 6
Article 6	Article 7
—	Article 8
Article 9	Article 9
—	Annex I
—	Annex II

**AIR TRANSPORT AGREEMENT**

THE UNITED STATES OF AMERICA (hereinafter the United States), of the one part;

and

THE REPUBLIC OF AUSTRIA,

THE KINGDOM OF BELGIUM,

THE REPUBLIC OF BULGARIA,

THE REPUBLIC OF CYPRUS,

THE CZECH REPUBLIC,

THE KINGDOM OF DENMARK,

THE REPUBLIC OF ESTONIA,

THE REPUBLIC OF FINLAND,

THE FRENCH REPUBLIC,

THE FEDERAL REPUBLIC OF GERMANY,

THE HELLENIC REPUBLIC,

THE REPUBLIC OF HUNGARY,

IRELAND,

THE ITALIAN REPUBLIC,

THE REPUBLIC OF LATVIA,

THE REPUBLIC OF LITHUANIA,

THE GRAND DUCHY OF LUXEMBOURG,

MALTA,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF POLAND,

THE PORTUGUESE REPUBLIC,

ROMANIA,

THE SLOVAK REPUBLIC,

THE REPUBLIC OF SLOVENIA,

THE KINGDOM OF SPAIN,

THE KINGDOM OF SWEDEN,

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

being parties to the Treaty establishing the European Community and being Member States of the European Union (hereinafter the Member States),

and the EUROPEAN COMMUNITY, of the other part;

DESIRING to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation;

DESIRING to facilitate the expansion of international air transport opportunities, including through the development of air transportation networks to meet the needs of passengers and shippers for convenient air transportation services;

DESIRING to make it possible for airlines to offer the travelling and shipping public competitive prices and services in open markets;

DESIRING to have all sectors of the air transport industry, including airline workers, benefit in a liberalised agreement;

DESIRING to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation;

NOTING the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944;

RECOGNISING that government subsidies may adversely affect airline competition and may jeopardize the basic objectives of this Agreement;

AFFIRMING the importance of protecting the environment in developing and implementing international aviation policy;

NOTING the importance of protecting consumers, including the protections afforded by the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal 28 May 1999;

INTENDING to build upon the framework of existing agreements with the goal of opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic;

RECOGNISING the importance of enhancing the access of their airlines to global capital markets in order to strengthen competition and promote the objectives of this Agreement;

INTENDING to establish a precedent of global significance to promote the benefits of liberalisation in this crucial economic sector;

HAVE AGREED AS FOLLOWS:

3. 'Convention' means the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944, and includes:

#### *Article 1*

#### **Definitions**

For the purposes of this Agreement, unless otherwise stated, the term:

1. 'Agreement' means this Agreement, its Annexes and Appendix, and any amendments thereto;

2. 'air transportation' means the carriage by aircraft of passengers, baggage, cargo, and mail, separately or in combination, held out to the public for remuneration or hire;

(a) any amendment that has entered into force under Article 94(a) of the Convention and has been ratified by both the United States and the Member State or Member States as is relevant to the issue in question,

and

(b) any Annex or any amendment thereto adopted under Article 90 of the Convention, insofar as such Annex or amendment is at any given time effective for both the United States and the Member State or Member States as is relevant to the issue in question;

4. 'full cost' means the cost of providing service plus a reasonable charge for administrative overhead;

5. 'international air transportation' means air transportation that passes through the airspace over the territory of more than one State;

6. 'Party' means either the United States or the European Community and its Member States;

7. 'price' means any fare, rate or charge for the carriage of passengers, baggage and/or cargo (excluding mail) in air transportation, including surface transportation in connection with international air transportation, if applicable, charged by airlines, including their agents, and the conditions governing the availability of such fare, rate or charge;

8. 'stop for non-traffic purposes' means a landing for any purpose other than taking on or discharging passengers, baggage, cargo and/or mail in air transportation;

9. 'territory' means, for the United States, the land areas (mainland and islands), internal waters and territorial sea under its sovereignty or jurisdiction, and, for the European Community and its Member States, the land areas (mainland and islands), internal waters and territorial sea in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and any successor instrument; application of this Agreement to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated, and to the continuing suspension of Gibraltar Airport from European Community aviation measures existing as at 18 September 2006 as between Member States, in accordance with the Ministerial statement on Gibraltar Airport agreed in Córdoba on September 2006;

and

10. 'user charge' means a charge imposed on airlines for the provision of airport, airport environmental, air navigation, or aviation security facilities or services including related services and facilities.

#### Article 2

##### Fair and equal opportunity

Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.

#### Article 3

##### Grant of rights

1. Each Party grants to the other Party the following rights for the conduct of international air transportation by the airlines of the other Party:

- (a) the right to fly across its territory without landing;
- (b) the right to make stops in its territory for non-traffic purposes;
- (c) the right to perform international air transportation between points on the following routes:
  - (i) for airlines of the United States (hereinafter US airlines), from points behind the United States via the United States and intermediate points to any point or points in any Member State or States and beyond; and for all-cargo service, between any Member State and any point or points (including in any other Member States);
  - (ii) for airlines of the European Community and its Member States (hereinafter Community airlines), from points behind the Member States via the Member States and intermediate points to any point or points in the United States and beyond; for all-cargo service, between the United States and any point or points; and, for combination services, between any point or points in the United States and any point or points in any member of the European Common Aviation Area (hereinafter the ECAA) as of the date of signature of this Agreement;

and

- (d) the rights otherwise specified in this Agreement.

2. Each airline may on any or all flights and at its option:

- (a) operate flights in either or both directions;
- (b) combine different flight numbers within one aircraft operation;
- (c) serve behind, intermediate, and beyond points and points in the territories of the Parties in any combination and in any order;
- (d) omit stops at any point or points;
- (e) transfer traffic from any of its aircraft to any of its other aircraft at any point;

- (f) serve points behind any point in its territory with or without change of aircraft or flight number and hold out and advertise such services to the public as through services;
  - (g) make stopovers at any points whether within or outside the territory of either Party;
  - (h) carry transit traffic through the other Party's territory;
- and
- (i) combine traffic on the same aircraft regardless of where such traffic originates;

without directional or geographic limitation and without loss of any right to carry traffic otherwise permissible under this Agreement.

3. The provisions of paragraph 1 of this Article shall apply subject to the requirements that:

- (a) for US airlines, with the exception of all-cargo services, the transportation is part of a service that serves the United States,
- and
- (b) for Community airlines, with the exception of (i) all-cargo services and (ii) combination services between the United States and any member of the ECAA as of the date of signature of this Agreement, the transportation is part of a service that serves a Member State.

4. Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention.

5. Any airline may perform international air transportation without any limitation as to change, at any point, in type or number of aircraft operated; provided that, (a) for US airlines, with the exception of all-cargo services, the transportation is part of a service that serves the United States, and (b) for Community airlines, with the exception of (i) all-cargo services and (ii) combination services between the United States and a member of the ECAA as of the date of signature of this Agreement, the transportation is part of a service that serves a Member State.

6. Nothing in this Agreement shall be deemed to confer on:

- (a) US airlines the right to take on board, in the territory of any Member State, passengers, baggage, cargo, or mail carried for compensation and destined for another point in the territory of that Member State;
- (b) Community airlines the right to take on board, in the territory of the United States, passengers, baggage, cargo, or mail carried for compensation and destined for another point in the territory of the United States.

7. Community airlines' access to US Government procured transportation shall be governed by Annex 3.

#### Article 4

#### Authorisation

On receipt of applications from an airline of one Party, in the form and manner prescribed for operating authorisations and technical permissions, the other Party shall grant appropriate authorisations and permissions with minimum procedural delay, provided:

- (a) for a US airline, substantial ownership and effective control of that airline are vested in the United States, US nationals, or both, and the airline is licensed as a US airline and has its principal place of business in US territory;
- (b) for a Community airline, substantial ownership and effective control of that airline are vested in a Member State or States, nationals of such a State or States, or both, and the airline is licensed as a Community airline and has its principal place of business in the territory of the European Community;
- (c) the airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application or applications;

and

- (d) the provisions set forth in Article 8 (Safety) and Article 9 (Security) are being maintained and administered.

*Article 5***Revocation of authorisation**

1. Either Party may revoke, suspend or limit the operating authorisations or technical permissions or otherwise suspend or limit the operations of an airline of the other Party where:

- (a) for a US airline, substantial ownership and effective control of that airline are not vested in the United States, US nationals, or both, or the airline is not licensed as a US airline or does not have its principal place of business in US territory;
- (b) for a Community airline, substantial ownership and effective control of that airline are not vested in a Member State or States, nationals of such a State or States, or both, or the airline is not licensed as a Community airline or does not have its principal place of business in the territory of the European Community;

or

- (c) that airline has failed to comply with the laws and regulations referred to in Article 7 (Application of Laws) of this Agreement.

2. Unless immediate action is essential to prevent further non-compliance with subparagraph 1(c) of this Article, the rights established by this Article shall be exercised only after consultation with the other Party.

3. This Article does not limit the rights of either Party to withhold, revoke, limit or impose conditions on the operating authorisation or technical permission of an airline or airlines of the other Party in accordance with the provisions of Article 8 (Safety) or Article 9 (Security).

*Article 6***Additional matters related to ownership, investment, and control**

Notwithstanding any other provision in this Agreement, the Parties shall implement the provisions of Annex 4 in their decisions under their respective laws and regulations concerning ownership, investment and control.

*Article 7***Application of laws**

1. The laws and regulations of a Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of

such aircraft while within its territory, shall be applied to the aircraft utilised by the airlines of the other Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first Party.

2. While entering, within, or leaving the territory of one Party, the laws and regulations applicable within that territory relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party's airlines.

*Article 8***Safety**

1. The responsible authorities of the Parties shall recognise as valid, for the purposes of operating the air transportation provided for in this Agreement, certificates of airworthiness, certificates of competency, and licences issued or validated by each other and still in force, provided that the requirements for such certificates or licences at least equal the minimum standards that may be established pursuant to the Convention. The responsible authorities may, however, refuse to recognise as valid for purposes of flight above their own territory, certificates of competency and licences granted to or validated for their own nationals by such other authorities.

2. The responsible authorities of a Party may request consultations with other responsible authorities concerning the safety standards maintained by those authorities relating to aeronautical facilities, aircrews, aircraft, and operation of the airlines overseen by those authorities. Such consultations shall take place within 45 days of the request unless otherwise agreed. If following such consultations, the requesting responsible authorities find that those authorities do not effectively maintain and administer safety standards and requirements in these areas that at least equal the minimum standards that may be established pursuant to the Convention, the requesting responsible authorities shall notify those authorities of such findings and the steps considered necessary to conform with these minimum standards, and those authorities shall take appropriate corrective action. The requesting responsible authorities reserve the right to withhold, revoke or limit the operating authorisation or technical permission of an airline or airlines for which those authorities provide safety oversight in the event those authorities do not take such appropriate corrective action within a reasonable time and to take immediate action as to such airline or airlines if essential to prevent further non-compliance with the duty to maintain and administer the aforementioned standards and requirements resulting in an immediate threat to flight safety.

3. The European Commission shall simultaneously receive all requests and notifications under this Article.

4. Nothing in this Article shall prevent the responsible authorities of the Parties from conducting safety discussions, including those relating to the routine application of safety standards and requirements or to emergency situations that may arise from time to time.

#### Article 9

#### Security

1. In accordance with their rights and obligations under international law, the Parties reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of this Agreement. Without limiting the generality of their rights and obligations under international law, the Parties shall in particular act in conformity with the following agreements: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo, 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague, 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal, 23 September 1971, and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal, 24 February 1988.

2. The Parties shall provide upon request all necessary assistance to each other to address any threat to the security of civil aviation, including the prevention of acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, of their passengers and crew, and of airports and air navigation facilities.

3. The Parties shall, in their mutual relations, act in conformity with the aviation security standards and appropriate recommended practices established by the International Civil Aviation Organisation and designated as Annexes to the Convention; they shall require that operators of aircraft of their registries, operators of aircraft who have their principal place of business or permanent residence in their territory, and the operators of airports in their territory act in conformity with such aviation security provisions.

4. Each Party shall ensure that effective measures are taken within its territory to protect aircraft and to inspect passengers, crew, and their baggage and carry-on items, as well as cargo and aircraft stores, prior to and during boarding or loading; and that those measures are adjusted to meet increased threats to the security of civil aviation. Each Party agrees that the security provisions required by the other Party for departure from and while within the territory of that other Party must be observed. Each Party shall give positive consideration to any request from the other Party for special security measures to meet a particular threat.

5. With full regard and mutual respect for each other's sovereignty, a Party may adopt security measures for entry into its territory. Where possible, that Party shall take into account the security measures already applied by the other Party and any views that the other Party may offer. Each Party recognises, however, that nothing in this Article limits the ability of a Party to refuse entry into its territory of any flight or flights that it deems to present a threat to its security.

6. A Party may take emergency measures including amendments to meet a specific security threat. Such measures shall be notified immediately to the responsible authorities of the other Party.

7. The Parties underline the importance of working towards compatible practices and standards as a means of enhancing air transport security and minimising regulatory divergence. To this end, the Parties shall fully utilise and develop existing channels for the discussion of current and proposed security measures. The Parties expect that the discussions will address, among other issues, new security measures proposed or under consideration by the other Party, including the revision of security measures occasioned by a change in circumstances; measures proposed by one Party to meet the security requirements of the other Party; possibilities for the more expeditious adjustment of standards with respect to aviation security measures; and compatibility of the requirements of one Party with the legislative obligations of the other Party. Such discussions should serve to foster early notice and prior discussion of new security initiatives and requirements.

8. Without prejudice to the need to take immediate action in order to protect transportation security, the Parties affirm that when considering security measures, a Party shall evaluate possible adverse effects on international air transportation and, unless constrained by law, shall take such factors into account when it determines what measures are necessary and appropriate to address those security concerns.

9. When an incident or threat of an incident of unlawful seizure of aircraft or other unlawful acts against the safety of passengers, crew, aircraft, airports or air navigation facilities occurs, the Parties shall assist each other by facilitating communications and other appropriate measures intended to terminate rapidly and safely such incident or threat.



10. When a Party has reasonable grounds to believe that the other Party has departed from the aviation security provisions of this Article, the responsible authorities of that Party may request immediate consultations with the responsible authorities of the other Party. Failure to reach a satisfactory agreement within 15 days from the date of such request shall constitute grounds to withhold, revoke, limit, or impose conditions on the operating authorisation and technical permissions of an airline or airlines of that Party. When required by an emergency, a Party may take interim action prior to the expiry of 15 days.

11. Separate from airport assessments undertaken to determine conformity with the aviation security standards and practices referred to in paragraph 3 of this Article, a Party may request the cooperation of the other Party in assessing whether particular security measures of that other Party meet the requirements of the requesting Party. The responsible authorities of the Parties shall coordinate in advance the airports to be assessed and the dates of assessment and establish a procedure to address the results of such assessments. Taking into account the results of the assessments, the requesting Party may decide that security measures of an equivalent standard are applied in the territory of the other Party in order that transfer passengers, transfer baggage, and/or transfer cargo may be exempted from re-screening in the territory of the requesting Party. Such a decision shall be communicated to the other Party.

#### Article 10

### Commercial opportunities

1. The airlines of each Party shall have the right to establish offices in the territory of the other Party for the promotion and sale of air transportation and related activities.

2. The airlines of each Party shall be entitled, in accordance with the laws and regulations of the other Party relating to entry, residence, and employment, to bring in and maintain in the territory of the other Party managerial, sales, technical, operational, and other specialist staff who are required to support the provision of air transportation.

3. (a) Without prejudice to subparagraph (b) below, each airline shall have in relation to ground handling in the territory of the other Party:

(i) the right to perform its own ground-handling (self-handling) or, at its option

(ii) the right to select among competing suppliers that provide ground-handling services in whole or in part where such suppliers are allowed market access on the basis of the laws and regulations of each Party, and where such suppliers are present in the market.

(b) The rights under (i) and (ii) in subparagraph (a) above shall be subject only to specific constraints of available space or capacity arising from the need to maintain safe operation of the airport. Where such constraints preclude self-handling and where there is no effective competition between suppliers that provide ground-handling services, all such services shall be available on both an equal and an adequate basis to all airlines; prices of such services shall not exceed their full cost including a reasonable return on assets, after depreciation.

4. Any airline of each Party may engage in the sale of air transportation in the territory of the other Party directly and/or, at the airline's discretion, through its sales agents or other intermediaries appointed by the airline. Each airline shall have the right to sell such transportation, and any person shall be free to purchase such transportation, in the currency of that territory or in freely convertible currencies.

5. Each airline shall have the right to convert and remit from the territory of the other Party to its home territory and, except where inconsistent with generally applicable law or regulation, the country or countries of its choice, on demand, local revenues in excess of sums locally disbursed. Conversion and remittance shall be permitted promptly without restrictions or taxation in respect thereof at the rate of exchange applicable to current transactions and remittance on the date the carrier makes the initial application for remittance.

6. The airlines of each Party shall be permitted to pay for local expenses, including purchases of fuel, in the territory of the other Party in local currency. At their discretion, the airlines of each Party may pay for such expenses in the territory of the other Party in freely convertible currencies according to local currency regulation.

7. In operating or holding out services under the Agreement, any airline of a Party may enter into cooperative marketing arrangements, such as blocked-space or code-sharing arrangements, with:

(a) any airline or airlines of the Parties;

(b) any airline or airlines of a third country;

and

(c) a surface (land or maritime) transportation provider of any country;

provided that (i) all participants in such arrangements hold the appropriate authority and (ii) the arrangements meet the conditions prescribed under the laws and regulations normally applied by the Parties to the operation or holding out of international air transportation.

8. The airlines of each Party shall be entitled to enter into franchising or branding arrangements with companies, including airlines, of either Party or third countries, provided that the airlines hold the appropriate authority and meet the conditions prescribed under the laws and regulations normally applied by the Parties to such arrangements. Annex 5 shall apply to such arrangements.

9. The airlines of each Party may enter into arrangements for the provision of aircraft with crew for international air transportation with:

(a) any airlines or airlines of the Parties;

and

(b) any airlines or airlines of a third country;

provided that all participants in such arrangements hold the appropriate authority and meet the conditions prescribed under the laws and regulations normally applied by the Parties to such arrangements. Neither Party shall require an airline of either Party providing the aircraft to hold traffic rights under this Agreement for the routes on which the aircraft will be operated.

10. Notwithstanding any other provision of this Agreement, airlines and indirect providers of cargo transportation of the Parties shall be permitted, without restriction, to employ in connection with international air transportation any surface transportation for cargo to or from any points in the territories of the Parties, or in third countries, including transport to and from all airports with customs facilities, and including, where applicable, the right to transport cargo in bond under applicable laws and regulations. Such cargo, whether moving by surface or by air, shall have access to airport customs processing and facilities. Airlines may elect to perform their own surface transportation or to provide it through arrangements with other surface carriers, including surface transportation operated by other airlines and indirect providers of cargo air transportation. Such inter-modal cargo services may be offered at a single, through price for the air and surface transportation combined, provided that shippers are not misled as to the facts concerning such transportation.

## Article 11

### Customs duties and charges

1. On arriving in the territory of one Party, aircraft operated in international air transportation by the airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts (including engines), aircraft stores (including but not limited to such items of food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges that are (a) imposed by the national authorities or the European Community, and (b) not based on the cost of services provided, provided that such equipment and supplies remain on board the aircraft.

2. There shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of an airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts (including engines) introduced into the territory of a Party for the servicing, maintenance, or repair of aircraft of an airline of the other Party used in international air transportation;

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

and

(d) printed matter, as provided for by the customs legislation of each Party, introduced into or supplied in the territory of one Party and taken on board for use on outbound aircraft of an airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

3. Equipment and supplies referred to in paragraphs 1 and 2 of this Article may be required to be kept under the supervision or control of the appropriate authorities.

4. The exemptions provided by this Article shall also be available where the airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs 1 and 2 of this Article.

5. Nothing in this Agreement shall prevent either Party from imposing taxes, levies, duties, fees or charges on goods sold other than for consumption on board to passengers during a sector of an air service between two points within its territory at which embarkation or disembarkation is permitted.

6. In the event that two or more Member States envisage applying to the fuel supplied to aircraft of US airlines in the territories of such Member States for flights between such Member States any waiver of the exemption contained in Article 14(b) of Council Directive 2003/96/EC of 27 October 2003, the Joint Committee shall consider that issue, in accordance with paragraph 4(e) of Article 18.

7. A Party may request the assistance of the other Party, on behalf of its airline or airlines, in securing an exemption from taxes, duties, charges and fees imposed by State and local governments or authorities on the goods specified in paragraphs 1 and 2 of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the cost of providing the service. In response to such a request, the other Party shall bring the views of the requesting Party to the attention of the relevant governmental unit or authority and urge that those views be given appropriate consideration.

#### Article 12

##### User charges

1. User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be assessed on the airlines of the other Party on terms not less favourable than the most favourable terms available to any other airline at the time the charges are assessed.

2. User charges imposed on the airlines of the other Party may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such

charges may include a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.

3. Each Party shall encourage consultations between the competent charging authorities or bodies in its territory and the airlines using the services and facilities, and shall encourage the competent charging authorities or bodies and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of paragraphs 1 and 2 of this Article. Each Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposal for changes in user charges to enable users to express their views before changes are made.

4. Neither Party shall be held, in dispute resolution procedures pursuant to Article 19, to be in breach of a provision of this Article, unless (a) it fails to undertake a review of the charge or practice that is the subject of complaint by the other Party within a reasonable amount of time; or (b) following such a review it fails to take all steps within its power to remedy any charge or practice that is inconsistent with this Article.

#### Article 13

##### Pricing

1. Prices for air transportation services operated pursuant to this Agreement shall be established freely and shall not be subject to approval, nor may they be required to be filed.

2. Notwithstanding paragraph 1:

(a) the introduction or continuation of a price proposed to be charged or charged by a US airline for international air transportation between a point in one Member State and a point in another Member State shall be consistent with Article 1(3) of Council Regulation (EEC) 2409/92 of 23 July 1992, or a not more restrictive successor regulation;

(b) under this paragraph, the airlines of the Parties shall provide immediate access, on request, to information on historical, existing, and proposed prices to the responsible authorities of the Parties in a manner and format acceptable to those authorities.

#### Article 14

##### Government subsidies and support

1. The Parties recognise that government subsidies and support may adversely affect the fair and equal opportunity of airlines to compete in providing the international air transportation governed by this Agreement.

2. If one Party believes that a government subsidy or support being considered or provided by the other Party for or to the airlines of that other Party would adversely affect or is adversely affecting that fair and equal opportunity of the airlines of the first Party to compete, it may submit observations to that Party. Furthermore, it may request a meeting of the Joint Committee as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.

3. Each Party may approach responsible governmental entities in the territory of the other Party, including entities at the State, provincial or local level, if it believes that a subsidy or support being considered or provided by such entities will have the adverse competitive effects referred to in paragraph 2. If a Party decides to make such direct contact it shall inform promptly the other Party through diplomatic channels. It may also request a meeting of the Joint Committee.

4. Issues raised under this Article could include, for example, capital injections, cross-subsidisation, grants, guarantees, ownership, relief or tax exemption, by any governmental entities.

#### Article 15

### Environment

1. The Parties recognise the importance of protecting the environment when developing and implementing international aviation policy. The Parties recognise that the costs and benefits of measures to protect the environment must be carefully weighed in developing international aviation policy.

2. When a Party is considering proposed environmental measures, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects.

3. When environmental measures are established, the aviation environmental standards adopted by the International Civil Aviation Organisation in Annexes to the Convention shall be followed except where differences have been filed. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and 3(4) of this Agreement.

4. If one Party believes that a matter involving aviation environmental protection raises concerns for the application or implementation of this Agreement, it may request a meeting of the Joint Committee, as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.

#### Article 16

### Consumer protection

The Parties affirm the importance of protecting consumers, and either Party may request a meeting of the Joint Committee to discuss consumer protection issues that the requesting Party identifies as significant.

#### Article 17

### Computer reservation systems

1. Computer reservation systems (CRS) vendors operating in the territory of one Party shall be entitled to bring in, maintain, and make freely available their CRSs to travel agencies or travel companies whose principal business is the distribution of travel-related products in the territory of the other Party provided the CRS complies with any relevant regulatory requirements of the other Party.

2. Neither Party shall, in its territory, impose or permit to be imposed on the CRS vendors of the other Party more stringent requirements with respect to CRS displays (including edit and display parameters), operations, practices, sales, or ownership than those imposed on its own CRS vendors.

3. Owners/operators of CRSs of one Party that comply with the relevant regulatory requirements of the other Party, if any, shall have the same opportunity to own CRSs within the territory of the other Party as do owners/operators of that Party.

#### Article 18

### The Joint Committee

1. A Joint Committee consisting of representatives of the Parties shall meet at least once a year to conduct consultations relating to this Agreement and to review its implementation.

2. A Party may also request a meeting of the Joint Committee to seek to resolve questions relating to the interpretation or application of this Agreement. However, with respect to Article 20 or Annex 2, the Joint Committee may consider questions only relating to the refusal by either Participant to implement the commitments undertaken, and the impact of competition decisions on the application of this Agreement. Such a meeting shall begin at the earliest possible date, but not later than 60 days from the date of receipt of the request, unless otherwise agreed.

3. The Joint Committee shall review, no later than at its first annual meeting and thereafter as appropriate, the overall implementation of the Agreement, including any effects of aviation infrastructure constraints on the exercise of rights provided for in Article 3, the effects of security measures taken under Article 9, the effects on the conditions of competition, including in the field of Computer Reservation Systems, and any social effects of the implementation of the Agreement.

4. The Joint Committee shall also develop cooperation by:
- (a) fostering expert-level exchanges on new legislative or regulatory initiatives and developments, including in the fields of security, safety, the environment, aviation infrastructure (including slots), and consumer protection;
  - (b) considering the social effects of the Agreement as it is implemented and developing appropriate responses to concerns found to be legitimate;
  - (c) considering potential areas for the further development of the Agreement, including the recommendation of amendments to the Agreement;
  - (d) maintaining an inventory of issues regarding government subsidies or support raised by either Party in the Joint Committee;
  - (e) making decisions, on the basis of consensus, concerning any matters with respect to application of paragraph 6 of Article 11;
  - (f) developing, within one year of provisional application, approaches to regulatory determinations with regard to airline fitness and citizenship, with the goal of achieving reciprocal recognition of such determinations;
  - (g) developing a common understanding of the criteria used by the Parties in making their respective decisions in cases concerning airline control, to the extent consistent with confidentiality requirements;
  - (h) fostering consultation, where appropriate, on air transport issues dealt with in international organisations and in relations with third countries, including consideration of whether to adopt a joint approach;
  - (i) taking, on the basis of consensus, the decisions to which paragraph 3 of Article 1 of Annex 4 and paragraph 3 of Article 2 of Annex 4 refer.
5. The Parties share the goal of maximising the benefits for consumers, airlines, labour, and communities on both sides of the Atlantic by extending this Agreement to include third countries. To this end, the Joint Committee shall work to develop a proposal regarding the conditions and procedures, including any necessary amendments to this Agreement, that would be required for third countries to accede to this Agreement.
6. The Joint Committee shall operate on the basis of consensus.

## Article 19

### Arbitration

1. Any dispute relating to the application or interpretation of this Agreement, other than issues arising under Article 20 or under Annex 2, that is not resolved by a meeting of the Joint Committee may be referred to a person or body for decision by agreement of the Parties. If the Parties do not so agree, the dispute shall, at the request of either Party, be submitted to arbitration in accordance with the procedures set forth below.
2. Unless the Parties otherwise agree, arbitration shall be by a tribunal of three arbitrators to be constituted as follows:
  - (a) Within 20 days after the receipt of a request for arbitration, each Party shall name one arbitrator. Within 45 days after these two arbitrators have been named, they shall by agreement appoint a third arbitrator, who shall act as President of the tribunal.
  - (b) If either Party fails to name an arbitrator, or if the third arbitrator is not appointed in accordance with subparagraph (a) of this paragraph, either Party may request the President of the Council of the International Civil Aviation Organisation to appoint the necessary arbitrator or arbitrators within 30 days of receipt of that request. If the President of the Council of the International Civil Aviation Organisation is a national of either the United States or a Member State, the most senior Vice President of that Council who is not disqualified on that ground shall make the appointment.
3. Except as otherwise agreed, the tribunal shall determine the limits of its jurisdiction in accordance with this Agreement and shall establish its own procedural rules. At the request of a Party, the tribunal, once formed, may ask the other Party to implement interim relief measures pending the tribunal's final determination. At the direction of the tribunal or at the request of either Party, a conference shall be held not later than 15 days after the tribunal is fully constituted for the tribunal to determine the precise issues to be arbitrated and the specific procedures to be followed.
4. Except as otherwise agreed or as directed by the tribunal:
  - (a) The statement of claim shall be submitted within 30 days of the time the tribunal is fully constituted, and the statement of defence shall be submitted 40 days thereafter. Any reply by the claimant shall be submitted within 15 days of the submission of the statement of defence. Any reply by the respondent shall be submitted within 15 days thereafter.

(b) The tribunal shall hold a hearing at the request of either Party, or may hold a hearing on its own initiative, within 15 days after the last reply is filed.

5. The tribunal shall attempt to render a written decision within 30 days after completion of the hearing or, if no hearing is held, within 30 days after the last reply is submitted. The decision of the majority of the tribunal shall prevail.

6. The Parties may submit requests for clarification of the decision within 10 days after it is rendered and any clarification given shall be issued within 15 days of such request.

7. If the tribunal determines that there has been a violation of this Agreement and the responsible Party does not cure the violation, or does not reach agreement with the other Party on a mutually satisfactory resolution within 40 days after notification of the tribunal's decision, the other Party may suspend the application of comparable benefits arising under this Agreement until such time as the Parties have reached agreement on a resolution of the dispute. Nothing in this paragraph shall be construed as limiting the right of either Party to take proportional measures in accordance with international law.

8. The expenses of the tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Parties. Any expenses incurred by the President of the Council of the International Civil Aviation Organisation, or by any Vice President of that Council, in connection with the procedures of paragraph 2(b) of this Article shall be considered to be part of the expenses of the tribunal.

#### Article 20

##### Competition

1. The Parties recognise that competition among airlines in the transatlantic market is important to promote the objectives of this Agreement, and confirm that they apply their respective competition regimes to protect and enhance overall competition and not individual competitors.

2. The Parties recognise that differences may arise concerning the application of their respective competition regimes to international aviation affecting the transatlantic market, and that competition among airlines in that market might be fostered by minimising those differences.

3. The Parties recognise that cooperation between their respective competition authorities serves to promote competition in markets and has the potential to promote compatible regulatory results and to minimise differences in approach with respect to their respective competition reviews of inter-carrier agreements. Consequently, the Parties shall further this cooperation to the extent feasible, taking into account the different responsibilities, competencies and procedures of the authorities, in accordance with Annex 2.

4. The Joint Committee shall be briefed annually on the results of the cooperation under Annex 2.

#### Article 21

##### Second stage negotiations

1. The Parties share the goal of continuing to open access to markets and to maximise benefits for consumers, airlines, labour, and communities on both sides of the Atlantic, including the facilitation of investment so as to better reflect the realities of a global aviation industry, the strengthening of the transatlantic air transportation system, and the establishment of a framework that will encourage other countries to open their own air services markets. The Parties shall begin negotiations not later than 60 days after the date of provisional application of this Agreement, with the goal of developing the next stage expeditiously.

2. To that end, the agenda for the second stage negotiations shall include the following items of priority interest to one or both Parties:

- (a) further liberalisation of traffic rights;
  - (b) additional foreign investment opportunities;
  - (c) effect of environmental measures and infrastructure constraints on the exercise of traffic rights;
  - (d) further access to Government-financed air transportation;
- and
- (e) provision of aircraft with crew.

3. The Parties shall review their progress towards a second stage agreement no later than 18 months after the date when the negotiations are due to start in accordance with paragraph 1. If no second stage agreement has been reached by the Parties within 12 months of the start of the review, each Party reserves the right thereafter to suspend rights specified in this Agreement. Such suspension shall take effect no sooner than the start of the International Air Transport Association (IATA) traffic season that commences no less than 12 months after the date on which notice of suspension is given.

#### Article 22

##### Relationship to other agreements

1. During the period of provisional application pursuant to Article 25 of this Agreement, the bilateral agreements listed in section 1 of Annex 1, shall be suspended, except to the extent provided in section 2 of Annex 1.

2. Upon entry into force pursuant to Article 26 of this Agreement, this Agreement shall supersede the bilateral agreements listed in section 1 of Annex 1, except to the extent provided in section 2 of Annex 1.

3. If the Parties become parties to a multilateral agreement, or endorse a decision adopted by the International Civil Aviation Organisation or another international organisation, that addresses matters covered by this Agreement, they shall consult in the Joint Committee to determine whether this Agreement should be revised to take into account such developments.

#### Article 23

##### Termination

Either Party may, at any time, give notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organisation. This Agreement shall terminate at midnight GMT at the end of the International Air Transport Association (IATA) traffic season in effect one year following the date of written notification of termination, unless the notice is withdrawn by agreement of the Parties before the end of this period.

#### Article 24

##### Registration with ICAO

This Agreement and all amendments thereto shall be registered with the International Civil Aviation Organisation.

#### Article 25

##### Provisional application

Pending entry into force pursuant to Article 26:

1. The Parties agree to apply this Agreement from 30 March 2008.
2. Either Party may at any time give notice in writing through diplomatic channels to the other Party of a decision to no longer apply this Agreement. In that event, application shall cease at midnight GMT at the end of the International Air Transport Association (IATA) traffic season in effect one year following the date of written notification, unless the notice is withdrawn by agreement of the Parties before the end of this period.

#### Article 26

##### Entry into force

This Agreement shall enter into force one month after the date of the later note in an exchange of diplomatic notes between the Parties confirming that all necessary procedures for entry into force of this Agreement have been completed. For purposes of this exchange, the United States shall deliver to the European Community the diplomatic note to the European Community and its Member States, and the European Community shall deliver to the United States the diplomatic note or notes from the European Community and its Member States. The diplomatic note or notes from the European Community and its Member States shall contain communications from each Member State confirming that its necessary procedures for entry into force of this Agreement have been completed.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Agreement.

DONE at Brussels on the twenty-fifth day of April 2007 and at Washington on the thirtieth day of April 2007, in duplicate.

За Република България



Pour le Royaume de Belgique  
Voor het Koninkrijk België  
Für das Königreich Belgien



Cette signature engage également la Communauté française, la Communauté flamande, la Communauté germanophone, la Région wallonne, la Région flamande et la Région de Bruxelles-Capitale.

Deze handtekening verbindt eveneens de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, het Vlaamse Gewest, het Waalse Gewest en het Brussels Hoofdstedelijk Gewest.

Diese Unterschrift bindet zugleich die Deutschsprachige Gemeinschaft, die Flämische Gemeinschaft, die Französische Gemeinschaft, die Wallonische Region, die Flämische Region und die Region Brüssel-Hauptstadt.

Za Českou republiku



På Kongeriget Danmarks vegne



Für die Bundesrepublik Deutschland



Eesti Vabariigi nimel



Για την Ελληνική Δημοκρατία



Por el Reino de España





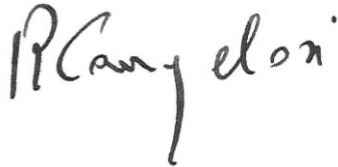
Pour la République française



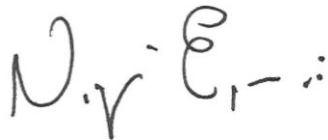
Thar cheann Na hÉireann  
For Ireland



Per la Repubblica italiana



Για την Κυπριακή Δημοκρατία



Latvijas Republikas vārdā



Lietuvos Respublikos vardu



Pour le Grand-Duché de Luxembourg



A Magyar Köztársaság részéről



Għal Malta



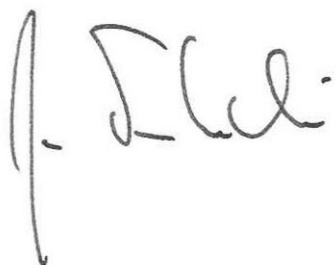
Voor het Koninkrijk der Nederlanden



Für die Republik Österreich



W imieniu Rzeczypospolitej Polskiej



Pela República Portuguesa



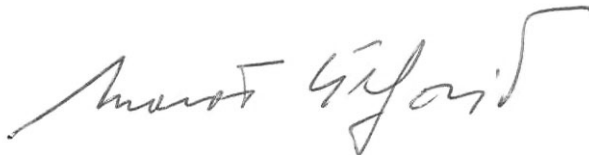
Pentru România



Za Republiko Slovenijo



Za Slovenskú republiku




Suomen tasavallan puolesta



För Konungariket Sverige



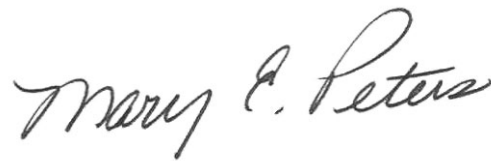
For the United Kingdom of Great Britain and Northern Ireland



За Европейската общност  
 For the European Community  
 Por la Comunidad Europea  
 Za Evropské společenství  
 For Det Europæiske Fællesskab  
 Für die Europäische Gemeinschaft  
 Euroopa Ühenduse nimel  
 Για την Ευρωπαϊκή Κοινότητα  
 Pour la Communauté européenne  
 Per la Comunità europea  
 Eiropas Kopienas vārdā  
 Europos bendrijos vardu  
 az Európai Közösség részéről  
 Ghall-Komunità Ewropea  
 Voor de Europese Gemeenschap  
 W imieniu Wspólnoty Europejskiej  
 Pela Comunidade Europeia  
 Pentru Comunitatea Europeană  
 Za Európske spoločenstvo  
 za Evropsko skupnost  
 Euroopan yhteisön puolesta  
 På Europeiska gemenskapens vägnar




For the United States of America

## ANNEX 1

**Section 1**

As provided in Article 22 of this Agreement, the following bilateral agreements between the United States and Member States shall be suspended or superseded by this Agreement:

- (a) The Republic of Austria: Air services agreement, signed at Vienna, 16 March 1989; amended 14 June 1995.
- (b) The Kingdom of Belgium: Air transport agreement, effected by exchange of notes at Washington, 23 October 1980; amended 22 September and 12 November 1986; amended 5 November 1993 and 12 January 1994.  
  
(amendment concluded on 5 September 1995 (provisionally applied).)
- (c) The Republic of Bulgaria: Civil aviation security Agreement, signed at Sofia 24 April 1991.
- (d) The Czech Republic: Air transport agreement, signed at Prague, 10 September 1996; amended 4 June 2001 and 14 February 2002.
- (e) The Kingdom of Denmark: Agreement relating to air transport services, effected by exchange of notes at Washington, 16 December 1944; amended 6 August 1954; amended 16 June 1995.
- (f) The Republic of Finland: Air transport agreement, signed at Helsinki, 29 March 1949; related protocol signed 12 May 1980; agreement amending 1949 agreement and 1980 protocol concluded 9 June 1995.
- (g) The French Republic: Air transport agreement, signed at Washington, 18 June 1998; amended 10 October 2000; amended 22 January 2002.
- (h) The Federal Republic of Germany: Air transport agreement and exchanges of notes, signed at Washington, 7 July 1955; amended 25 April 1989.  
  
(related protocol concluded 1 November 1978; related agreement concluded 24 May 1994; protocol amending the 1955 agreement concluded on 23 May 1996; agreement amending the 1996 protocol concluded on 10 October 2000 (all provisionally applied).)
- (i) The Hellenic Republic: Air transport agreement, signed at Athens, 31 July 1991; extended until 31 July 2007 by exchange of notes of 22 and 28 June 2006.
- (j) The Republic of Hungary: Air transport agreement and memorandum of understanding, signed at Budapest, 12 July 1989; extended until 12 July 2007 by exchange of notes of 11 and 20 July 2006.
- (k) Ireland: Agreement relating to air transport services, effected by exchange of notes at Washington, 3 February 1945; amended 25 January 1988 and 29 September 1989; amended 25 July and 6 September 1990.  
  
(Memorandum of consultations, signed at Washington, 28 October 1993 (provisionally applied).)
- (l) The Italian Republic: Air transport agreement, with memorandum and exchange of notes, signed at Rome, 22 June 1970; amended 25 October 1988; related memorandum of understanding signed 27 September 1990; amendment of 1970 agreement and 1990 MOU concluded 22 November and 23 December 1991; amendment of 1970 agreement and 1990 MOU concluded 30 May and 21 October 1997; agreement supplementing the 1970 agreement concluded 30 December 1998 and 2 February 1999.  
  
(Protocol amending the 1970 agreement concluded 6 December 1999 (provisionally applied).)
- (m) The Grand Duchy of Luxembourg: Air transport agreement, signed at Luxembourg, 19 August 1986; amended 6 June 1995; amended 13 and 21 July 1998.
- (n) Malta: Air transport agreement, signed at Washington, 12 October 2000.

- (o) The Kingdom of the Netherlands: Air transport agreement, signed at Washington, 3 April 1957; protocol amending the 1957 agreement concluded on 31 March 1978; amendment of 1978 protocol concluded 11 June 1986; amendment of 1957 agreement concluded 13 October and 22 December 1987; amendment of 1957 agreement concluded 29 January and 13 March 1992; amendment of 1957 agreement and 1978 protocol concluded 14 October 1992.
- (p) The Republic of Poland: Air transport agreement, signed at Warsaw, 16 June 2001.
- (q) The Portuguese Republic: Air transport agreement, signed at Lisbon, 30 May 2000.
- (r) Romania: Air transport agreement, signed at Washington, 15 July 1998.
- (s) The Slovak Republic: Air transport agreement, signed at Bratislava, 22 January 2001.
- (t) The Kingdom of Spain: Air transport agreement signed at Madrid, 20 February 1973; related agreement of 20 February 31 March and 7 April 1987; amendment of 1973 agreement concluded 31 May 1989; amendment of 1973 agreement concluded 27 November 1991.
- (u) The Kingdom of Sweden: Agreement relating to air transport services, effected by exchange of notes at Washington, 16 December 1944; amended 6 August 1954; amended 16 June 1995.
- (v) The United Kingdom of Great Britain and Northern Ireland: Agreement concerning air services, and exchange of letters, signed at Bermuda, 23 July 1977; agreement relating to North Atlantic air fares, concluded 17 March 1978; agreement amending the 1977 agreement, concluded 25 April 1978; agreement modifying and extending the 1978 agreement relating to North Atlantic air fares, concluded 2 and 9 November 1978; agreement amending the 1977 agreement, concluded 4 December 1980; agreement amending the 1977 agreement, concluded 20 February 1985; agreement amending Article 7, Annex 2, and Annex 5 of the 1977 agreement, concluded 25 May 1989; agreement concerning amendments of the 1977 agreement, termination of the US/UK Arbitration Concerning Heathrow Airport User Charges and the request for arbitration made by the United Kingdom in its embassy's note No 87 of 13 October 1993 and settlement of the matters which gave rise to those proceedings, concluded 11 March 1994; agreement amending the 1977 agreement, concluded 27 March 1997.

(Arrangements, being provisionally applied, contained in the memorandum of consultations dated 11 September 1986; arrangements contained in the exchange of letters dated 27 July 1990; arrangements contained in the memorandum of consultations of 11 March 1991; arrangements contained in the exchange of letters dated 6 October 1994; arrangements contained in the memorandum of consultations of 5 June 1995; arrangements contained in the exchange of letters dated 31 March and 3 April 2000 (all provisionally applied)).

## Section 2

Notwithstanding section 1 of this Annex, for areas that are not encompassed within the definition of 'territory' in Article 1 of this Agreement, the agreements in paragraphs (e) (Denmark–United States), (g) (France–United States), and (v) (United Kingdom–United States) of that section shall continue to apply, according to their terms.

## Section 3

Notwithstanding Article 3 of this Agreement, US airlines shall not have the right to provide all-cargo services, that are not part of a service that serves the United States, to or from points in the Member States, except to or from points in the Czech Republic, the French Republic, the Federal Republic of Germany, the Grand Duchy of Luxembourg, Malta, the Republic of Poland, the Portuguese Republic, and the Slovak Republic.

## Section 4

Notwithstanding any other provisions of this Agreement, this section shall apply to scheduled and charter combination air transportation between Ireland and the United States with effect from the beginning of IATA winter season 2006/2007 until the end of the IATA winter season 2007/2008.

- (a) (i) Each US and Community airline may operate three non-stop flights between the United States and Dublin for each non-stop flight that the airline operates between the United States and Shannon. This entitlement for non-stop Dublin flights shall be based on an average of operations over the entire three-season transitional period. A flight shall be deemed to be a non-stop Dublin, or a non-stop Shannon, flight, according to the first point of entry into, or the last point of departure from, Ireland.

- (ii) The requirement to serve Shannon in subparagraph (a)(i) of this Section shall terminate if any airline inaugurates scheduled or charter combination service between Dublin and the United States, in either direction, without operating at least one non-stop flight to Shannon for every three non-stop flights to Dublin, averaged over the transition period.
  - (b) For services between the United States and Ireland, Community airlines may serve only Boston, New York, Chicago, Los Angeles, and three additional points in the United States, to be notified to the United States upon selection or change. These services may operate via intermediate points in other Member States or in third countries.
  - (c) Code sharing shall be authorised between Ireland and the United States only via other points in the European Community. Other code-share arrangements will be considered on the basis of comity and reciprocity.
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## ANNEX 2

**Concerning cooperation with respect to competition issues  
in the air transportation industry***Article 1*

The cooperation as set forth in this Annex shall be implemented by the Department of Transportation of the United States of America and the Commission of the European Communities (hereinafter referred to as the Participants), consistent with their respective functions in addressing competition issues in the air transportation industry involving the United States and the European Community.

*Article 2***Purpose**

The purpose of this cooperation is:

1. to enhance mutual understanding of the application by the Participants of the laws, procedures and practices under their respective competition regimes to encourage competition in the air transportation industry;
2. to facilitate understanding between the Participants of the impact of air transportation industry developments on competition in the international aviation market;
3. to reduce the potential for conflicts in the Participants' application of their respective competition regimes to agreements and other cooperative arrangements which have an impact on the transatlantic market;

and

4. to promote compatible regulatory approaches to agreements and other cooperative arrangements through a better understanding of the methodologies, analytical techniques including the definition of the relevant market(s) and analysis of competitive effects, and remedies that the Participants use in their respective independent competition reviews.

*Article 3***Definitions**

For the purpose of this Annex, the term 'competition regime' means the laws, procedures and practices that govern the Participants' exercise of their respective functions in reviewing agreements and other cooperative arrangements among airlines in the international market. For the European Community, this includes, but is not limited to, Articles 81, 82, and 85 of the Treaty Establishing the European Community and their implementing Regulations pursuant to the said Treaty, as well as any amendments thereto. For the Department of Transportation, this includes, but is not limited to, sections 41308, 41309, and 41720 of Title 49 of the United States Code, and its implementing Regulations and legal precedents pursuant thereto.

*Article 4***Areas of cooperation**

Subject to the qualifications in subparagraphs 1(a) and 1(b) of Article 5, the types of cooperation between the Participants shall include the following:

1. Meetings between representatives of the Participants, to include competition experts, in principle on a semi-annual basis, for the purpose of discussing developments in the air transportation industry, competition policy matters of mutual interest, and analytical approaches to the application of competition law to international aviation, particularly in the transatlantic market. The above discussions may lead to the development of a better understanding of the Participants' respective approaches to competition issues, including existing commonalities, and to more compatibility in those approaches, in particular with respect to inter-carrier agreements.
2. Consultations at any time between the Participants, by mutual agreement or at the request of either Participant, to discuss any matter related to this Annex, including specific cases.



3. Each Participant may, at its discretion, invite representatives of other governmental authorities to participate as appropriate in any meetings or consultations held pursuant to paragraphs 1 or 2 above.
4. Timely notifications of the following proceedings or matters, which in the judgment of the notifying Participant may have significant implications for the competition interests of the other Participant:
  - (a) With respect to the Department of Transportation, (i) proceedings for review of applications for approval of agreements and other cooperative arrangements among airlines involving international air transportation, in particular for antitrust immunity involving airlines organised under the laws of the United States and the European Community, and (ii) receipt by the Department of Transportation of a joint venture agreement pursuant to section 41720 of Title 49 of the United States Code;  
  
and
  - (b) With respect to the Commission of the European Communities, (i) proceedings for review of agreements and other cooperative arrangements among airlines involving international air transportation, in particular for alliance and other cooperative agreements involving airlines organised under the laws of the United States and the European Community, and (ii) consideration of individual or block exemptions from European Union competition law;
5. Notifications of the availability, and any conditions governing that availability, of information and data filed with a Participant, in electronic form or otherwise, that, in the judgment of that Participant, may have significant implications for the competition interests of the other Participant;  
  
and
6. Notifications of such other activities relating to air transportation competition policy as may seem appropriate to the notifying Participant.

*Article 5*

**Use and disclosure of information**

1. Notwithstanding any other provision of this Annex, neither Participant is expected to provide information to the other Participant if disclosure of the information to the requesting Participant:
  - (a) is prohibited by the laws, regulations or practices of the Participant possessing the information;
  - or
  - (b) would be incompatible with important interests of the Participant possessing the information.
2. Each Participant shall to the extent possible maintain the confidentiality of any information provided to it in confidence by the other Participant under this Annex and to oppose any application for disclosure of such information to a third party that is not authorised by the supplying Participant to receive the information. Each Participant intends to notify the other Participant whenever any information proposed to be exchanged in discussions or in any other manner may be required to be disclosed in a public proceeding.
3. Where pursuant to this Annex a Participant provides information on a confidential basis to the other Participant for the purposes specified in Article 2, that information should be used by the receiving Participant only for that purpose.

*Article 6*

**Implementation**

1. Each Participant is designating a representative to be responsible for coordination of activities established under this Annex.
2. This Annex, and all activities undertaken by a Participant pursuant to it, are
  - (a) intended to be implemented only to the extent consistent with all laws, regulations, and practices applicable to that Participant;  
  
and
  - (b) intended to be implemented without prejudice to the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws.

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## ANNEX 3

**Concerning US Government procured transportation**

Community airlines shall have the right to transport passengers and cargo on scheduled and charter flights for which a US Government civilian department, agency, or instrumentality (1) obtains the transportation for itself or in carrying out an arrangement under which payment is made by the Government or payment is made from amounts provided for the use of the Government, or (2) provides the transportation to or for a foreign country or international or other organisation without reimbursement, and that transportation is (a) between any point in the United States and any point in a Member State, except — with respect to passengers only — between points for which there is a city-pair contract fare in effect, or (b) between any two points outside the United States. This paragraph shall not apply to transportation obtained or funded by the Secretary of Defence or the Secretary of a military department.

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## ANNEX 4

**Concerning additional matters related to ownership, investment and control***Article 1***Ownership of airlines of a Party**

1. Ownership by nationals of a Member State or States of the equity of a US airline shall be permitted, subject to two limitations. First, ownership by all foreign nationals of more than 25 % of a corporation's voting equity is prohibited. Second, actual control of a US airline by foreign nationals is also prohibited. Subject to the overall 25 % limitation on foreign ownership of voting equity:

(a) ownership by nationals of a Member State or States of:

(i) as much as 25 % of the voting equity;

and/or

(ii) as much as 49,9 % of the total equity

of a US airline shall not be deemed, of itself, to constitute control of that airline;

and

(b) ownership by nationals of a Member State or States of 50 % or more of the total equity of a US airline shall not be presumed to constitute control of that airline. Such ownership shall be considered on a case-by-case basis.

2. Ownership by US nationals of a Community airline shall be permitted subject to two limitations. First, the airline must be majority owned by Member States and/or by nationals of Member States. Second, the airline must be effectively controlled by such States and/or such nationals.

3. For the purposes of paragraph (b) of Article 4 and subparagraph 1(b) of Article 5 of this Agreement, a member of the ECAA as of the date of signature of this Agreement and citizens of such a member shall be treated as a Member State and its nationals, respectively. The Joint Committee may decide that this provision shall apply to new members of the ECAA and their citizens.

4. Notwithstanding paragraph 2, the European Community and its Member States reserves the right to limit investments by US nationals in the voting equity of a Community airline made after the signature of this Agreement to a level equivalent to that allowed by the United States for foreign nationals in US airlines, provided that the exercise of that right is consistent with international law.

*Article 2***Ownership and control of third-country airlines**

1. Neither Party shall exercise any available rights under air services arrangements with a third country to refuse, revoke, suspend or limit authorisations or permissions for any airlines of that third country on the grounds that substantial ownership of that airline is vested in the other Party, its nationals, or both.

2. The United States shall not exercise any available rights under air services arrangements to refuse, revoke, suspend or limit authorisations or permissions for any airline of the Principality of Liechtenstein, the Swiss Confederation, a member of the ECAA as of the date of signature of this Agreement, or any country in Africa that is implementing an Open-Skies air services agreement with the United States as of the date of signature of this Agreement, on the grounds that effective control of that airline is vested in a Member State or States, nationals of such a State or States, or both.

3. The Joint Committee may decide that neither Party shall exercise the rights referred to in paragraph 2 of this Article with respect to airlines of a specific country or countries.

*Article 3***Control of airlines**

1. The rules applicable in the European Community on ownership and control of Community air carriers are currently laid down in Article 4 of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers. Under this Regulation, responsibility for granting an Operating Licence to a Community air carrier lies with the Member States. Member States apply Regulation 2407/92 in accordance with their national regulations and procedures.
  2. The rules applicable in the United States are currently laid down in Sections 40102(a)(2), 41102 and 41103 of Title 49 of the United States Code (USC), which require that licences for a US 'air carrier' issued by the Department of Transportation, whether a certificate, an exemption, or commuter licence, to engage in 'air transportation' as a common carrier, be held only by citizens of the United States as defined in 49 USC §40102(a)(15). That section requires that the president and two-thirds of the board of directors and other managing officers of a corporation be US citizens, that at least 75 % of the voting stock be owned by US citizens, and that the corporation be under the actual control of US citizens. The requirement must be met initially by an applicant, and continue to be met by a US airline holding a licence.
  3. The practice followed by each Party in applying its laws and regulations is set out in the Appendix to this Annex.
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*Appendix to Annex 4*

1. In the United States, citizenship determinations are necessary for all US air carrier applicants for a certificate, exemption, or commuter licence. An initial application for a licence is filed in a formal public docket, and processed 'on the record' with filings by the applicant and any other interested parties. The Department of Transportation renders a final decision by an Order based on the formal public record of the case, including documents for which confidential treatment has been granted. A 'continuing fitness' case may be handled informally by the DOT, or may be set for docketed procedures similar to those used for initial applications.
2. The DOT's determinations evolve through a variety of precedents, which reflect, among other things, the changing nature of financial markets and investment structures and the DOT's willingness to consider new approaches to foreign investment that are consistent with US law. The DOT works with applicants to consider proposed forms of investment and to assist them in fashioning transactions that fully comply with US citizenship law, and applicants regularly consult with DOT staff before finalising their applications. At any time before a formal proceeding has begun, DOT staff may discuss questions concerning citizenship issues or other aspects of the proposed transaction and offer suggestions, where appropriate, as to alternatives that would allow a proposed transaction to meet US citizenship requirements.
3. In making both its initial and continuing citizenship and fitness determinations, the DOT considers the totality of circumstances affecting the US airline, and Department precedents have permitted consideration of the nature of the aviation relationship between the United States and the homeland(s) of any foreign investors. In the context of this Agreement, the DOT would treat investments from EU nationals at least as favourably as it would treat investments from nationals of bilateral or multilateral Open-Skies partners.
4. In the European Union, paragraph 5 of Article 4 of Regulation 2407/92 provides that the European Commission, acting at the request of a Member State, shall examine compliance with the requirements of Article 4 and take a decision if necessary. In taking such decisions the Commission must ensure compliance with the procedural rights recognised as general principles of Community law by the European Court of Justice, including the right of interested parties to be heard in a timely manner.
5. When applying its laws and regulations, each Party shall ensure that any transaction involving investment in one of its airlines by nationals of the other Party is afforded fair and expeditious consideration.

## ANNEX 5

**Concerning franchising and branding**

1. The airlines of each Party shall not be precluded from entering into franchise or branding arrangements, including conditions relating to brand protection and operational matters, provided that: they comply, in particular, with the applicable laws and regulations concerning control; the ability of the airline to exist outside of the franchise is not jeopardised; the arrangement does not result in a foreign airline engaging in cabotage operations; and applicable regulations, such as consumer protection provisions, including those regarding the disclosure of the identity of the airline operating the service, are complied with. So long as those requirements are met, close business relationships and cooperative arrangements between the airlines of each Party and foreign businesses are permissible, and each of the following individual aspects, among others, of a franchise or branding arrangement would not, other than in exceptional circumstances, of itself raise control issues:
  - (a) using and displaying a specific brand or trademark of a franchisor, including stipulations on the geographic area in which the brand or trademark may be used;
  - (b) displaying on the franchisee's aircraft the colours and logo of the franchisor's brand, including the display of such a brand, trademark, logo or similar identification prominently on its aircraft and the uniforms of its personnel;
  - (c) using and displaying the brand, trademark or logo on, or in conjunction with, the franchisee's airport facilities and equipment;
  - (d) maintaining customer service standards designed for marketing purposes;
  - (e) maintaining customer service standards designed to protect the integrity of the franchise brand;
  - (f) providing for licence fees on standard commercial terms;
  - (g) providing for participation in frequent flyer programs, including the accrual of benefits;and
  - (h) providing in the franchise or branding agreement for the right of the franchisor or franchisee to terminate the arrangement and withdraw the brand, provided that nationals of the United States or the Member States remain in control of the US or Community airline, respectively.
2. Franchising and branding arrangements are independent of, but may coexist with, a code-sharing arrangement that requires that both airlines have the appropriate authority from the Parties, as provided for in paragraph 7 of Article 10 of this Agreement.

### Joint Declaration

Representatives of the United States and of the European Community and its Member States confirmed that the Air Transport Agreement initialled in Brussels on 2 March 2007 and envisioned for signature on 30 April 2007 is to be authenticated in other languages, as provided for either by exchange of letters, before signature of the Agreement, or by decision of the Joint Committee, after signature of the Agreement.

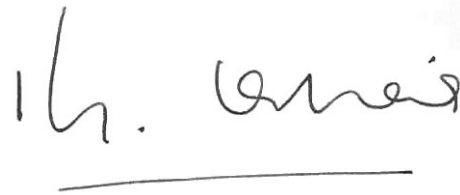
This Joint Declaration is an integral part of the Air Transport Agreement.

For the United States:



Date: 18 April 2007

For the European Community  
and its Member States; *ad referendum*



Date: 18 April 2007

**MEMORANDUM OF CONSULTATIONS**

1. Delegations representing the European Community and its Member States and the United States of America met in Brussels 27 February – 2 March 2007, to complete negotiations of a comprehensive air transport agreement. Delegation lists appear as Attachment A.
2. The delegations reached *ad referendum* agreement on, and initialled the text of, an Agreement (the Agreement, appended as Attachment B). The delegations intend to submit the draft Agreement to their respective authorities for approval, with the goal of its entry into force in the near future.
3. With respect to paragraph 2 of Article 1, the delegations affirmed that the definition of 'air transportation' included all forms of charter air service. Furthermore, they noted that the reference to carriage 'held out to the public' did not prejudice the outcome of ongoing discussions on the issue of fractional ownership.
4. With respect to paragraph 5 of Article 1, the EU delegation noted that flights between Member States are considered as intra-Community flights under Community law.
5. With respect to paragraph 6 of Article 1, the EU delegation noted that nothing in this Agreement affects the distribution of competencies between the European Community and its Member States resulting from the Treaty establishing the European Community.
6. The EU delegation confirmed that the overseas territories to which the Treaty establishing the European Community applies are: the French overseas departments (Guadeloupe, Martinique, Réunion, Guiana), the Azores, Madeira, and the Canary Islands.
7. In response to a question from the US delegation, the EU delegation affirmed that, under European Community legislation, a Community airline must receive both its AOC and its operating licence from the country in which it has its principal place of business. Further, no airline may have an AOC or operating licence from more than one country.
8. With respect to paragraphs 1, 3 and 5 of Article 3, paragraph 3 of Article 1 of Annex 4 and paragraph 2 of Article 2 of Annex 4, and in response to a question from the US delegation, the EU delegation explained that as of the date of signature of the Agreement the members of the European Common Aviation Area comprise, in addition to the Member States of the European Community, the Republic of Albania, Bosnia and Herzegovina, the Republic of Croatia, the Republic of Iceland, the former Yugoslav Republic of Macedonia, the Republic of Montenegro, the Kingdom of Norway, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo.
9. In response to a question from the EU delegation, the US delegation explained that the following countries are implementing Open-Skies air services agreements with the United States as of the date of signature of the Agreement: Burkina Faso, the Republic of Cape Verde, the Republic of Cameroon, the Republic of Chad, the Gabonese Republic, the Republic of The Gambia, the Republic of Ghana, the Federal Democratic Republic of Ethiopia, the Republic of Liberia, the Republic of Madagascar, the Republic of Mali, the Kingdom of Morocco, the Republic of Namibia, the Federal Republic of Nigeria, the Republic of Senegal, the United Republic of Tanzania and the Republic of Uganda. The US delegation also indicated that it intended to treat airlines of the Republic of Kenya in the same way as airlines of States implementing an Open-Skies air services agreement for the purposes of paragraph 2 of Article 2 of Annex 4.



10. With respect to Article 4, the US delegation noted that the Department of Transportation (DOT) would require any foreign air carrier seeking authority to operate services pursuant to the Agreement to indicate the responsible authority that had issued its AOC and operating licence, thus making clear which authority is responsible for safety, security and other regulatory oversight of the carrier.
11. For the purposes of Article 8, 'responsible authorities' refers, on the one hand, to the US Federal Aviation Administration and, on the other hand, to the authorities of the European Community and/or the Member States having responsibility for the issuance or validation of the certificates and licences referenced in paragraph 1 or for the maintenance and administration of the safety standards and requirements referenced in paragraph 2, as is relevant to the matter in question. Furthermore, where consultations are requested pursuant to paragraph 2, the responsible authorities should ensure the inclusion in the consultations of any territorial or regional authorities who, by law or regulation or in practice, are exercising safety oversight responsibility relevant to the matter in question.
12. With respect to Article 9, the delegations affirmed that, to the extent practicable, the Parties intend to ensure the greatest possible degree of coordination on proposed security measures to minimise the threat and mitigate the potentially adverse consequences of any new measures. The delegations further noted that the channels referred to in paragraph 7 of Article 9 are available to consider alternative measures for current and proposed security requirements, in particular the Policy Dialogue on Border and Transport Security and the EU-US Transportation Security Cooperation Group. In addition, the US delegation stated that the US rulemaking process for adopting regulations routinely provides the opportunity for interested parties to comment on, and propose alternatives to, proposed regulations and that such comments are considered in the rulemaking proceeding.
13. During the discussion of paragraph 6 of Article 9, the US delegation explained that the Transportation Security Administration (TSA) must immediately issue a security directive when the TSA determines that emergency measures are necessary to protect transportation security. Such measures are intended to address the underlying security threat and should be limited in scope and duration. Emergency measures of a longer-term nature will be incorporated into TSA requirements using public notice and comment procedures.
14. With respect to the procedure to be established under paragraph 11 of Article 9, the delegations confirmed the need to establish a protocol for the preparation, implementation and conclusions of assessments carried out on the basis of this paragraph.
15. With respect to paragraph 2 of Article 10, the delegations affirmed their willingness to facilitate prompt consideration by the relevant authorities of requests for permits, visas, and documents for the staff referred to in that paragraph, including in circumstances where the entry or residence of staff is required on an emergency and temporary basis.
16. The delegations noted that the reference to 'generally applicable law or regulation' in paragraph 5 of Article 10 includes economic sanctions restricting transactions with specific countries and persons.
17. Both delegations recognised that, under paragraph 7 of Article 10, the airlines of each Party holding the appropriate authority may hold out code-share services, subject to terms and conditions that apply on a non-discriminatory basis to all airlines, to and from all points in the territory of the other Party, at which any other airline holds out international air transportation on direct, indirect, online, or interline flights, provided that such code-share services:
  - (i) are otherwise in compliance with the Agreement;and
  - (ii) meet the requirements of traffic distribution rules at the relevant airport system.

18. The delegations discussed the importance of advising passengers which airline or surface transportation provider will actually operate each sector of services when any code-share arrangement is involved. They noted that each side had regulations requiring such disclosure.
19. With respect to paragraph 7 (c) of Article 10, the delegations expressed their understanding that surface transportation providers shall not be subject to laws and regulations governing air transportation on the sole basis that such surface transportation is held out by an airline under its own name. Moreover, surface transportation providers, just as airlines, have the discretion to decide whether to enter into cooperative arrangements. In deciding on any particular arrangement, surface transportation providers may consider, among other things, consumer interests and technical, economic, space, and capacity constraints.
20. In response to a question from the EU delegation, the US delegation affirmed that, under the current interpretation of US law, the carriage of US Government-financed air transportation (Fly America traffic) by a US carrier includes transportation sold under the code of a US carrier pursuant to a code-share arrangement, but carried on an aircraft operated by a foreign air carrier.
21. The US delegation explained that under Annex 3 to the Agreement, and in the absence of a city-pair contract awarded by the US General Services Administration, a US Government employee or other individual whose transportation is paid for by the US Government (other than an employee, military member, or other individual whose transportation is paid for by the US Department of Defence or military department) may book a flight, including on a Community airline, between the US and the European Community, or between any two points outside the United States, that, at the lowest cost to the Government, satisfies the traveller's needs. The US delegation noted further that the city pairs for which contracts are awarded change from fiscal year to fiscal year. A US Government department, agency or instrumentality, other than the Department of Defence or a military department, may ship cargo on a flight, including on a Community airline, between the US and European Community, or between any two points outside the United States, that, at the lowest cost to the Government, satisfies the agency's needs.
22. The EU delegation explained that the EU does not have a similar programme to Fly America.
23. Both delegations expressed their intentions to explore further possibilities for enhancing access to government procured air transportation.
24. In response to a question from the EU delegation concerning the economic operating authority that Community airlines must obtain from the US Department of Transportation, the US delegation began by noting that, over the years, DOT economic licensing procedures have been streamlined. When foreign airlines are seeking authority provided for in an air services agreement, their applications normally can be processed quickly. The US delegation went on to explain that a Community airline has the option of submitting a single application for all route authority provided for in paragraph 1 of Article 3, which includes both scheduled and charter rights. On August 23, 2005, the DOT announced further expedited procedures under which it is contemplated that foreign air carriers seeking new route authority would file concurrent exemption and permit applications. Assuming that the DOT is in a position to act favourably, based on the record and on the public interest considerations germane to its licensing decisions, the DOT would proceed to issue a single order (1) granting the exemption request for whatever duration would normally have been given, or until the permit authority becomes effective, whichever is shorter, and (2) tentatively deciding (i.e., show-cause) to award a corresponding permit, again for the standard duration that would normally have been given (such as indefinite for agreement regimes). Where carriers have already filed for both exemption and permit authority, and where the record regarding those applications remained current, the DOT has begun to process those applications pursuant to the 23 August approach.

25. If a Community airline wishes to exercise any of the authority through code sharing pursuant to paragraph 7 of Article 10, the code-share partner airlines can file a joint application for the necessary authority. The airline marketing the service to the public needs underlying economic authority from the DOT for whatever type of services (scheduled or charter) is to be sold under its code. Similarly, the airline operating the aircraft needs underlying economic authority from the DOT: charter authority to provide the capacity to the other airline to market its service, and either charter or scheduled authority for the capacity it intends to market in its own right. The operating airline also needs a statement of authorisation to place its partner's code on those flights. An operating airline can request an indefinite duration blanket statement of authorisation for the code-share relationship, identifying the specific markets in which the code-share authority is requested. Additional markets can be added on 30 days' notice to the DOT. A code-share statement of authorisation is airline-specific, and each foreign code-share partnership requires its own statement of authorisation, and, if applicable, a code-share safety audit by the US airline under the DOT's published Guidelines.
26. If, pursuant to paragraph 9 of Article 10, a Community airline wishes to provide an entire aircraft with crew to a US airline for operations under the US airline's code, the Community airline would similarly need to have charter authority from the DOT, as well as a statement of authorisation. The US delegation indicated its belief that virtually all Community airlines that now provide scheduled service to the United States also hold worldwide charter authority from the DOT. Therefore, from an economic licensing perspective, they would only need a statement of authorisation to provide an entire aircraft with crew to US airlines. The US delegation further indicated that it did not anticipate that applications from other Community airlines for charter authority would raise any difficulties.
27. The issuance of a statement of authorisation, whether for code sharing or for the provision of an entire aircraft with crew, requires a DOT finding that the proposed operations are in the public interest. This finding is strongly facilitated by a determination that the proposed services are covered by applicable air services agreements. Inclusion of the rights in an agreement also establishes that reciprocity exists.
28. With respect both to code sharing and to the provision of an entire aircraft with crew under paragraphs 7 and 9 of Article 10, the primary focus of the public interest analysis would be on whether:
- a safety audit has been conducted by the US airline of the foreign airline,
  - the country issuing the foreign carrier's AOC is IASA category 1,
  - the foreign airline's home country deals with US carriers on the basis of substantial reciprocity,
  - approval would give rise to competition concerns.
29. With respect to the provision of aircraft with crew, the public interest analysis would additionally focus on whether:
- the lease agreement provides that operational control will remain with the lessor carrier,
  - the regulatory oversight responsibility remains with the lessor's AOC-issuing authority,
  - approval of the lease will not give an unreasonable advantage to any party in a labour dispute where the inability to accommodate traffic in a market is a result of the dispute.

30. Statements of authorisation for the provision of an entire aircraft with crew will be issued, at least initially, on a limited-term (e.g., six to nine months) or exceptional basis, which is consistent with the approach in the European Union.
  
31. In response to a concern expressed by the EU delegation about the discretion that the DOT has under the 'public interest' standard, the US delegation stated that, in the context of Open-Skies aviation relationships, the DOT has found code-share arrangements to be in the public interest and has consistently issued statements of authorisation with a minimum of procedural delay. The US delegation indicated that, in relation to both code sharing and the provision of aircraft with crew involving only airlines of the Parties, the DOT, unless presented with atypical circumstances, such as those relating to national security, safety or criminality, would focus its analysis of the public interest on the elements described above. Furthermore, in the event that such atypical circumstances exist, the United States would expeditiously inform the other Party.
  
32. In response to a question from the US delegation, the EU delegation affirmed that, under the currently applicable legislation in the EU (Council Regulation (EEC) No 2407/92 of 23 July 1992), aircraft used by a Community airline are required to be registered in the Community. However, a Member State may grant a waiver to this requirement in the case of short-term lease arrangements to meet temporary needs or otherwise in exceptional circumstances. A Community airline that is party to such an arrangement must obtain prior approval from the appropriate licensing authority, and a Member State may not approve an agreement providing aircraft with crew to an airline to which it has granted an operating licence unless the safety standards equivalent to those imposed under Community law or, where relevant, national law are met.
  
33. Both delegations recognised that the failure to authorise airlines to exercise the rights granted in the Agreement or undue delay in granting such authorisation could affect an airline's fair and equal opportunity to compete. If either Party believes that its airlines are not receiving the economic operating authority to which they are entitled under the Agreement, it can refer the matter to the Joint Committee.
  
34. With respect to paragraph 4 of Article 14, the EU delegation recalled that, in accordance with its Article 295, the Treaty establishing the European Community does not prejudice in any way the rules in Member States governing the system of property ownership. The US delegation in response noted its view that government ownership of an airline may adversely affect the fair and equal opportunity of airlines to compete in providing the international air transportation governed by this Agreement.
  
35. With respect to Article 15, the delegations noted the importance of international consensus in aviation environmental matters within the framework of the International Civil Aviation Organisation (ICAO). In this connection, they underscored the significance of the unanimous agreement reached at the 35th ICAO Assembly, which covers both aircraft noise and emissions issues (Resolution A35-5). Both sides are committed to respecting that Resolution in full. In accordance with this Resolution, both sides are committed to applying the 'balanced approach' principle to measures taken to manage the impact of aircraft noise (including restrictions to limit the access of aircraft to airports at particular times) and to ensuring charges for aircraft engine emissions at airport level should be based on the costs of mitigating the environmental impact of those aircraft engine emissions that are properly identified and directly attributed to air transport. Both sides also noted that where relevant legal obligations existed, whether at international, regional, national or local level, they also had to be respected in full; for the United States, the relevant date was 5 October 2001, and for the European Community, the relevant date was 28 March 2002.

36. The delegations further noted the provisions on Climate Change, Energy, and Sustainable Development contained in the 2005 'Gleneagles Communiqué' of the G8 nations as well as the framework for cooperation on air traffic management issues in the Memorandum of Understanding signed by the Federal Aviation Administration and the Commission on July 18, 2006. The delegations noted the intention of the responsible US and EU authorities to enhance technical cooperation, including in areas of climate science research and technology development, that will enhance safety, improve fuel efficiency, and reduce emissions in air transport. Having regard to their respective positions on the issue of emissions trading for international aviation, the two delegations noted that the United States and the European Union intend to work within the framework of the International Civil Aviation Organisation.
37. With regard to the composition of the Joint Committee, the US delegation indicated that it was the US intention to have multi-agency representation, chaired by the Department of State. The EU delegation indicated that the EU would be represented by the European Community and its Member States. The two delegations also indicated that stakeholder participation would be an important element of the Joint Committee process, and that stakeholder representatives would therefore be invited as observers, except where decided otherwise by one or both Parties.
38. With respect to Article 18, the delegations affirmed their intention to hold a preliminary meeting of the Joint Committee not later than 60 days after the date of signature of this Agreement.
39. The Delegations confirmed their understanding that practices such as a first-refusal requirement, uplift ratio, no-objection fee, or any other restriction with respect to capacity, frequency or traffic are inconsistent with the Agreement.
40. The EU delegation suggested that both Parties should understand as clearly as possible the extent to which representatives of the US Department of Transportation (DOT) and the European Commission could exchange information on competition matters covered by Annex 2 to the Agreement under their respective laws, regulations and practices, particularly regarding data and perspectives on issues involving proceedings being actively considered by those authorities.
41. The US delegation indicated that the proceedings covered by Annex 2 to the Agreement are adjudications under US law and are subject to statutory, regulatory and judicial constraints to ensure that the agency decision is based only on the information that is included in the docket of the proceeding, including public information that the DOT has determined is officially noticeable, on which the parties have had an opportunity to comment before final agency decision.
42. The US delegation explained that these constraints do not preclude representatives advising the DOT decision-maker in an active proceeding from discussing with representatives of the Commission such matters as (1) the state of competition in any markets based upon non-confidential data; (2) the impact of existing alliances or other cooperative ventures and the results of previously imposed conditions or other limitations to address competition issues; (3) general approaches to competition analysis or methodology; (4) past cases, including records and decisions; (5) substantive law, policies, and procedures applicable to any cases; (6) issues that might be raised by potential cases that have not been formally initiated, so long as DOT representatives do not 'prejudge' the facts or results of such cases; and (7) in active proceedings, what issues have already been raised by the parties and what non-confidential evidence has been provided for the record, again up to the point of potential 'prejudgment' of the facts and outcome.

43. There are two basic procedural constraints on discussion of ongoing cases. The first applies largely to communications from the Commission to the DOT: the latter's decision cannot be based on any substantive information or argument unavailable to all parties for comment on the record before final decision. Should such information be received, it cannot be considered in the decision unless it is made available. The second constraint involves communications from, rather than to, the DOT: the agency cannot demonstrate or appear to demonstrate 'prejudgment' of the issues — that is, articulating a conclusion before the record in the case is ripe and a final decision has been publicly released. This constraint applies to DOT in any context, whether in discussions with the EU or with any other entity not legitimately part of the US Government's internal decision-making process, interested or not. DOT intends to notify the Commission's representatives immediately whenever, in its experience, prejudgment or decisional input becomes a consideration in discussing a particular topic, so that the representatives can decide how to proceed.
44. The EU delegation requested assurance from the US delegation that the statutory 'public interest' criterion is not used under the US competition regime to prefer the interests of individual US airlines over those of other airlines, US or foreign. The US delegation responded that this criterion and the competition standards that the DOT must use for its decisions are designed and used to protect competition in markets as a whole, not individual airline competitors. Among other considerations, the US delegation noted that the 'public interest' in international air transportation is defined by statute to include equality of opportunity among US and foreign airlines, as well as maximum competition. Moreover, the public interest criterion in the statutes governing DOT approval of, and antitrust immunity for, inter-carrier agreements, is not an 'exception' to the competition analysis that the agency must follow, but rather an additional requirement that must be met before the DOT may grant antitrust immunity. Finally, the US delegation emphasised that all DOT decisions must be consistent with domestic law and international obligations, including civil aviation agreements that uniformly contain the requirement for all Parties to provide a 'fair and equal opportunity to compete' to the airlines of the other Parties.
45. In the context of this discussion, both delegations affirmed that their respective competition regimes are applied in a manner to respect the fair and equal opportunity to compete accorded to all airlines of the Parties, and in accordance with the general principle of protecting and enhancing competition in markets as a whole, notwithstanding possible contrary interests of individual airline competitors.
46. Regarding the European Commission's procedures, the EU delegation explained that the principal limitation on the ability of the European Commission to engage in active cooperation with foreign governmental agencies results from restrictions on the ability to communicate confidential information. Information acquired by the Commission and the authorities of the Member States in the course of an investigation, and which is of the kind covered by professional secrecy, is subject to Article 287 of the EC Treaty and Article 28 of Regulation (EC) No 1/2003. Essentially, this refers to information which is not in the public domain and which may be discovered during the course of an investigation, be communicated in a reply for information or which may be voluntarily communicated to the Commission. This information also includes business or trade secrets. Such information may not be disclosed to any third country agency, save with the express agreement of the source concerned. Therefore, where it is considered appropriate and desirable for the Commission to provide confidential information to a foreign agency(ies), the consent of the source of that information must be obtained by means of a waiver.
47. Information which is related to the conduct of an investigation, or the possible conduct of an investigation, is not submitted to the abovementioned provisions. Such information includes the fact that an investigation is taking place, the general subject-matter of the investigation, the identity of the enterprise(s) being investigated (although this also may, in some circumstances, be protected information), the identity of the sector in which the investigation is being undertaken, and the steps which it is proposed to take in the course of the investigation. This information is normally kept confidential to ensure proper handling of the investigation. However, it may be communicated to the DOT, as the latter is obliged to maintain the confidentiality of the information under the terms of Article 5 of Annex 2 to the Agreement.

48. In response to a question from the EU delegation, the US delegation confirmed that the competent US authorities will provide fair and expeditious consideration of complete applications for antitrust immunity of commercial cooperation agreements, including revised agreements. The US delegation further confirmed that, for Community airlines, the US–EU Air Transport Agreement, being applied pursuant to Article 25 or in force pursuant to Article 26, will satisfy the DOT requirement that, to consider such an application from foreign airlines for antitrust immunity or to continue such immunity, an Open-Skies agreement must exist between the United States and the homeland(s) of the applicant foreign airline(s). The foregoing assurance does not apply to applicants from Ireland until Section 4 of Annex 1 expires.
49. In response to a question from the EU delegation, the US delegation stated that all of the DOT rules on computer reservations systems (CRSs or systems) terminated on 31 July 2004. The DOT, however, retains the authority to prohibit unfair and deceptive practices and unfair methods of competition in the airline and airline distribution industries, and the DOT can use that authority to address apparent anti-competitive practices by a system in its marketing of airline services. In addition, the Department of Justice and the Federal Trade Commission have jurisdiction to address complaints that a system is engaged in conduct that violates the antitrust laws.
50. With respect to Article 25, the EU delegation explained that in some Member States provisional application must be approved first by their parliaments in accordance with their constitutional requirements.
51. Both delegations confirmed that, in the event that one of the Parties decided to discontinue provisional application of the Agreement in accordance with Article 25(2), the arrangements in Section 4 of Annex 1 to the Agreement may continue to apply if the Parties so agree.
52. With respect to Article 26, the EU delegation explained that in some Member States the procedures referred to in this Article include ratification.
53. In response to a question from the US delegation concerning restrictions arising from the residual elements of bilateral air services agreements between Member States, the EU delegation affirmed that any such restrictions affecting the ability of US and Community airlines to exercise rights granted by this Agreement would no longer be applied.
54. The two delegations emphasised that nothing in the Agreement affects in any way their respective legal and policy positions on various aviation-related environmental issues.
55. The two delegations noted that neither side will cite the Agreement or any part of it as a basis for opposing consideration in the International Civil Aviation Organisation of alternative policies on any matter covered by the Agreement.
56. Any air services agreements between the United States and a Member State the applicability of which was in question as of the signing of the Agreement have not been listed in Section 1 to Annex 1 of the Agreement. However, the delegations intend that the Agreement be provisionally applied by the United States and such Member State or States according to the provisions of Article 25 of the Agreement.

*For the Delegation of the European  
Community and its Member States*

Daniel CALLEJA

*For the Delegation of the  
United States of America*

John BYERLY

**Written Declaration to be submitted to the USA by the Presidency upon signing on behalf of the EC and its Member States**

This Agreement will be applied on a provisional basis until its entry into force by the Member States in good faith and in accordance with the provisions of domestic law in force.

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## **E.2 MARITIME TRANSPORT**



## I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

## REGULATIONS

## COUNCIL REGULATION (EC) No 246/2009

of 26 February 2009

**on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)**

(Codified version)

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,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

Whereas:

(1) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) <sup>(2)</sup> has been substantially amended several times <sup>(3)</sup>. In the interests of clarity and rationality the said Regulation should be codified.

(2) Article 81(1) of the Treaty may in accordance with Article 81(3) thereof be declared inapplicable to categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 81(3).

<sup>(1)</sup> Opinion of the European Parliament of 23 April 2008 (not yet published in the Official Journal).

<sup>(2)</sup> OJ L 55, 29.2.1992, p. 3.

<sup>(3)</sup> See Annex I.

(3) Pursuant to Article 83 of the Treaty, the provisions for the application of Article 81(3) of the Treaty should be adopted by way of Regulation or Directive. According to Article 83(2)(b), these provisions must lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent on the other. According to Article 83(2)(d), these provisions are required to define the respective functions of the Commission and of the Court of Justice.

(4) Liner shipping is a capital intensive industry. Containerisation has increased pressures for cooperation and rationalisation. The Community shipping industry should attain the necessary economies of scale in order to compete successfully on the world liner shipping market.

(5) Joint service agreements between liner shipping companies with the aim of rationalising their operations by means of technical, operational and/or commercial arrangements (described in shipping circles as consortia) can help to provide the necessary means for improving the productivity of liner shipping services and promoting technical and economic progress.

(6) Maritime transport is important for the development of the Community's trade and the consortia agreements may play a role in this respect, taking account of the special features of international liner shipping. The legalisation of these agreements is a measure which can make a positive contribution to improving the competitiveness of shipping in the Community;

- (7) Users of the shipping services offered by consortia can obtain a share of the benefits resulting from the improvements in productivity and service, by means of, inter alia, regularity, cost reductions derived from higher levels of capacity utilisation, and better service quality stemming from improved vessels and equipment.
- (8) The Commission should be enabled to declare by way of Regulation that the provisions of Article 81(1) of the Treaty do not apply to certain categories of consortia agreements, decisions and concerted practices, in order to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy. The Commission, in close and constant liaison with the competent authorities of the Member States, should be able to define precisely the scope of these exemptions and the conditions attached to them.
- (9) Consortia in liner shipping are a specialised and complex type of joint venture. There is a great variety of different consortia agreements operating in different circumstances. The scope, parties, activities or terms of consortia are frequently altered. The Commission should therefore be given the responsibility of defining from time to time the consortia to which a group exemption should apply.
- (10) In order to ensure that all the conditions of Article 81(3) of the Treaty are met, conditions should be attached to group exemptions to ensure in particular that a fair share of the benefits will be passed on to shippers and that competition is not eliminated,

HAS ADOPTED THIS REGULATION:

#### Article 1

1. The Commission may by Regulation and in accordance with Article 81(3) of the Treaty, declare that Article 81(1) of the Treaty shall not apply to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices that have as an object to promote or establish cooperation in the joint operation of maritime transport services between liner shipping companies, for the purpose of rationalising their operations by means of technical, operational or commercial arrangements with the exception of price fixing (consortia).

2. Such Regulation adopted pursuant to paragraph 1 of this article shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify

the conditions and obligations under which, pursuant to Article 81(3) of the Treaty, they shall be considered exempted from the application of Article 81(1) of the Treaty.

#### Article 2

1. The Regulation adopted pursuant to Article 1 shall apply for a period of five years, calculated as from the date of its entry into force.

2. The Regulation adopted pursuant to Article 1 may be repealed or amended where circumstances have changed with respect to any of the facts which were basic to its adoption.

#### Article 3

The Regulation adopted pursuant to Article 1 may include a provision stating that it applies with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of entry into force of such Regulation, provided they comply with the conditions established in that Regulation.

#### Article 4

The Regulation adopted pursuant to Article 1 may stipulate that the prohibition contained in Article 81(1) of the Treaty shall not apply, for such a period as fixed by that Regulation, to agreements, decisions and concerted practices already in existence at 1 January 1995, to which Article 81(1) applies by virtue of the accession of Austria, Finland and Sweden and which do not satisfy the conditions of Article 81(3). However, this Article shall not apply to agreements, decisions and concerted practices which, as at 1 January 1995, already fell under Article 53(1) of the EEA Agreement.

#### Article 5

Before adopting the Regulation referred to in Article 1, the Commission shall publish a draft thereof to enable all the persons and organisations concerned to submit their comments within such reasonable time limit as the Commission shall fix, but in no case less than one month.

#### Article 6

Before publishing the draft Regulation and before adopting the Regulation pursuant to Article 1, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions 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 <sup>(1)</sup>.

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

*Article 7*

Regulation (EEC) No 479/92, as amended by the acts listed in Annex I, is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

*Article 8*

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

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

Done at Brussels, 26 February 2009.

*For the Council*

*The President*

I. LANGER

## ANNEX I

**Repealed Regulation with list of its successive amendments**

(referred to in Article 7)

Council Regulation (EEC) No 479/92  
(OJ L 55, 29.2.1992, p. 3)

Council Regulation (EC) No 1/2003  
(OJ L 1, 4.1.2003, p. 1)

Article 42 only

1994 Act of Accession, Article 29 and Annex I, point IIIA.4  
(OJ C 241, 29.8.1994, p. 56)

## ANNEX II

**CORRELATION TABLE**

Regulation (EEC) No 479/92	This Regulation
Articles 1, 2 and 3	Articles 1, 2 and 3
Article 3a	Article 4
Article 4	Article 5
Article 5	Article 6
—	Article 7
Article 7	Article 8
—	Annex I
—	Annex II

**COMMISSION REGULATION (EC) No 906/2009**

**of 28 September 2009**

**on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)**

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) <sup>(1)</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

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

Whereas:

(1) Regulation (EC) No 246/2009 empowers the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices between shipping companies relating to the joint operation of liner shipping services (consortia), which, through the cooperation they bring about between the shipping companies that are parties thereto, are liable to restrict competition within the common market and to affect trade between Member States and may therefore be caught by the prohibition contained in Article 81(1) of the Treaty.

(2) The Commission has made use of its power by adopting Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) <sup>(3)</sup>, which will expire on 25 April 2010. On the basis of the Commission's experience to date it can be concluded that the justifications for a block

exemption for liner consortia are still valid. However, certain changes are necessary in order to remove references to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport <sup>(4)</sup> which allowed liner shipping lines to fix prices and capacity, but has now been repealed. Modifications are also necessary to ensure a greater convergence with other block exemption regulations for horizontal cooperation in force whilst taking into account current market practices in the liner industry.

(3) Consortium agreements vary significantly ranging from those that are highly integrated, requiring a high level of investment for example due to the purchase or charter by their members of vessels specifically for the purpose of setting up the consortium and the setting up of joint operations centres, to flexible slot exchange agreements. For the purposes of this Regulation a consortium agreement consists of one or a set of separate but inter-related agreements between liner shipping companies under which the parties operate the joint service. The legal form of the arrangements is less important than the underlying economic reality that the parties provide a joint service.

(4) The benefit of the block exemption should be limited to those agreements for which it can be assumed with a sufficient degree of certainty that they satisfy the conditions of Article 81(3) of the Treaty. However, there is no presumption that consortia which do not benefit from this Regulation fall within the scope of Article 81(1) of the Treaty or, if they do, that they do not satisfy the conditions of Article 81(3) of the Treaty. When conducting a self-assessment of the compatibility of their agreement with Article 81 of the Treaty, parties to such consortia may consider the specific features of markets with small volumes carried or situations where the market share threshold is exceeded as a result of the presence in the consortium of a small carrier without important resources and whose increment to the overall market share of the consortium is only insignificant.

(5) Consortia, as defined in this Regulation, generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through

<sup>(1)</sup> OJ L 79, 25.3.2009, p. 1.

<sup>(2)</sup> OJ C 266, 21.10.2008, p. 1.

<sup>(3)</sup> OJ L 100, 20.4.2000, p. 24.

<sup>(4)</sup> OJ L 378, 31.12.1986, p. 4.

the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity. For the purpose of establishing and running a joint service, an essential feature inherent in consortia is the ability to make capacity adjustments in response to fluctuations in supply and demand. By contrast, unjustified limitation of capacity and sales as well as the joint fixing of freight rates or market and customer allocation are unlikely to bring any efficiency. Therefore, the exemption provided for in this Regulation should not apply to consortium agreements that involve such activities, irrespective of the market power of the parties.

- (6) A fair share of the benefits resulting from the efficiencies should be passed on to transport users. Users of the shipping services provided by consortia may benefit from the improvements in productivity which consortia can bring about. Those benefits may also take the form of an improvement in the frequency of sailings and port calls, or an improvement in scheduling as well as better quality and personalised services through the use of more modern vessels and other equipment, including port facilities.
- (7) Users can benefit effectively from consortia only if there is sufficient competition in the relevant markets in which the consortia operate. This condition should be regarded as being met when a consortium remains below a given market share threshold and can therefore be presumed to be subject to effective actual or potential competition from carriers that are not members of that consortium. In order to assess the relevant market, account should be taken not only of direct trade between the ports served by a consortium but also of any competition from other liner services sailing from ports which may be substituted for those served by the consortium and, where appropriate, of other modes of transport.
- (8) This Regulation should not exempt agreements containing restrictions of competition which are not indispensable to the attainment of the objectives justifying the grant of the exemption. To that end, severely anti-competitive restraints (hardcore restrictions) relating to the fixing of prices charged to third parties, the limitation of capacity or sales and the allocation of markets or customers should be excluded from the benefit of this Regulation. Other than the activities which are expressly exempted by this Regulation, only ancillary activities which are directly related to the operation of the consortium, necessary for its implementation and proportionate to it should be covered by this Regulation.
- (9) The market share threshold and the other conditions set out in this Regulation, as well as the exclusion of certain conduct from its benefit, should normally ensure that the

agreements to which the block exemption applies do not give the companies concerned the possibility of eliminating competition in a substantial part of the relevant market in question.

- (10) For the assessment of whether a consortium fulfils the market share condition, the overall market shares of the consortium members should be added up. The market share of each member should take into account the overall volumes it carries within and outside the consortium. In the latter case account should be taken of all volumes carried by a member within another consortium or in relation to any service provided individually by the member, be it on its own vessels or on third party vessels pursuant to contractual arrangements such as slot charters.
- (11) In addition, the benefit of the block exemption should be subject to the right of each consortium member to withdraw from the consortium provided that it gives reasonable notice. However, provision should be made for a longer notice period and a longer initial lock-in period in the case of highly integrated consortia in order to take account of the higher investments undertaken to set them up and the more extensive reorganisation entailed in the event of a member leaving.
- (12) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption, on the basis 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<sup>(1)</sup>. In that respect, the negative effects that may derive from the existence of links between the consortium and/or its members and other consortia and/or liner carriers on the same relevant market are of particular importance.
- (13) Furthermore, where agreements 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 block exemption in respect of that territory pursuant to Regulation (EC) No 1/2003.
- (14) This Regulation is without prejudice to the application of Article 82 of the Treaty.
- (15) In view of the expiry of Regulation (EC) No 823/2000, it is appropriate to adopt a new Regulation renewing the block exemption,

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.



HAS ADOPTED THIS REGULATION:

## CHAPTER I

### SCOPE AND DEFINITIONS

#### Article 1

##### Scope

This Regulation shall apply to consortia only in so far as they provide international liner shipping services from or to one or more Community ports.

#### Article 2

##### Definitions

For the purposes of this Regulation the following definitions shall apply:

1. 'consortium' means an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements;
2. 'liner shipping' means the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment;
3. 'transport user' means any undertaking (such as shipper, consignee or forwarder) which has entered into, or intends to enter into, a contractual agreement with a consortium member for the shipment of goods;
4. 'commencement of the service' means the date on which the first vessel sails on the service.

## CHAPTER II

### EXEMPTIONS

#### Article 3

##### Exempted agreements

Pursuant to Article 81(3) of the Treaty and subject to the conditions laid down in this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the following activities of a consortium:

1. the joint operation of liner shipping services including any of the following activities:
  - (a) the coordination and/or joint fixing of sailing timetables and the determination of ports of call;
  - (b) the exchange, sale or cross-chartering of space or slots on vessels;
  - (c) the pooling of vessels and/or port installations;
  - (d) the use of one or more joint operations offices;
  - (e) the provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment;
2. capacity adjustments in response to fluctuations in supply and demand;
3. the joint operation or use of port terminals and related services (such as lighterage or stevedoring services);
4. any other activity ancillary to those referred to in points 1, 2 and 3 which is necessary for their implementation, such as:
  - (a) the use of a computerised data exchange system;
  - (b) an obligation on members of a consortium to use in the relevant market or markets vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties;
  - (c) an obligation on members of a consortium not to assign or charter space to other vessel-operating carriers in the relevant market or markets except with the prior consent of the other members of the consortium.

#### Article 4

##### Hardcore restrictions

The exemption provided for in Article 3 shall not apply to a consortium which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, has as its object:

1. the fixing of prices when selling liner shipping services to third parties;

2. the limitation of capacity or sales except for the capacity adjustments referred to in Article 3(2);
3. the allocation of markets or customers.

## CHAPTER III

## CONDITIONS FOR EXEMPTION

## Article 5

**Conditions relating to market share**

1. In order for a consortium to qualify for the exemption provided for in Article 3, the combined market share of the consortium members in the relevant market upon which the consortium operates shall not exceed 30 % calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units.
2. For the purpose of establishing the market share of a consortium member the total volumes of goods carried by it in the relevant market shall be taken into account irrespective of whether those volumes are carried:
  - (a) within the consortium in question;
  - (b) within another consortium to which the member is a party; or
  - (c) outside a consortium on the member's own or on third party vessels.
3. The exemption provided for in Article 3 shall continue to apply if the market share referred to in paragraph 1 of this Article is exceeded during any period of two consecutive calendar years by not more than one tenth.

4. Where one of the limits specified in paragraphs 1 and 3 of this Article is exceeded, the exemption provided for in Article 3 shall continue to apply for a period of six months following the end of the calendar year during which it was exceeded. That period shall be extended to 12 months if the excess is due to the withdrawal from the market of a carrier which is not a member of the consortium.

## Article 6

**Other conditions**

In order to qualify for the exemption provided for in Article 3, the consortium must give members the right to withdraw without financial or other penalty such as, in particular, an obligation to cease all transport activity in the relevant market or markets in question, whether or not coupled with the condition that such activity may be resumed after a certain period has elapsed. That right shall be subject to a maximum period of notice of six months. The consortium may, however, stipulate that such notice can only be given after an initial period of a maximum of 24 months starting from the date of entry into force of the agreement or, if later, from the commencement of the service.

In the case of a highly integrated consortium the maximum period of notice may be extended to 12 months and the consortium may stipulate that such notice can only be given after an initial period of a maximum of 36 months starting from the date of entry into force of the agreement or, if later, from the commencement of the service.

## CHAPTER IV

## FINAL PROVISIONS

## Article 7

**Entry into force**

This Regulation shall enter into force on 26 April 2010.

It shall apply until 25 April 2015.

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

Done at Brussels, 28 September 2009.

*For the Commission*

Neelie KROES

*Member of the Commission*

## Guidelines on the application of Article 81 of the EC Treaty to maritime transport services

(Text with EEA relevance)

(2008/C 245/02)

### 1. INTRODUCTION

1. These Guidelines set out the principles that the Commission of the European Communities will follow when defining markets and assessing cooperation agreements in those maritime transport services directly affected by the changes brought about by Council Regulation (EC) No 1419/2006 of 25 September 2006, i.e. liner shipping services, cabotage and international tramp services <sup>(1)</sup>.
2. These Guidelines are intended to help undertakings and associations of undertakings operating those services, mainly if operated to and/or from a port or ports in the European Union, to assess whether their agreements <sup>(2)</sup> are compatible with Article 81 of the Treaty establishing the European Community (hereinafter 'the Treaty'). The Guidelines do not apply to other sectors.
3. Regulation (EC) No 1419/2006 extended the scope 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 <sup>(3)</sup> and 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 Treaty <sup>(4)</sup> to include cabotage and tramp vessel services. Consequently, as of 18 October 2006, all maritime transport services sectors are subject to the generally applicable procedural framework.
4. Regulation (EC) No 1419/2006 also repealed Council Regulation (EEC) No 4056/86 of 22 December 1986 on the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport <sup>(5)</sup> containing the liner conference block exemption which allowed shipping lines meeting in liner conferences to fix rates and other conditions of carriage, as the conference system no longer fulfils the criteria of Article 81(3) of the Treaty. The repeal of the block exemption takes effect as of 18 October 2008. Thereafter, liner carriers operating services to and/or from one or more ports in the European Union must cease all liner conference activity contrary to Article 81 of the Treaty. This is the case regardless of whether other jurisdictions allow, explicitly or tacitly, rate fixing by liner conferences or discussion agreements. Moreover, conference members should ensure that any agreement taken under the conference system complies with Article 81 as of 18 October 2008.
5. These Guidelines complement the guidance already issued by the Commission in other notices. As maritime transport services are characterised by extensive cooperation agreements between competing carriers, the Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements <sup>(6)</sup> (the *Guidelines on Horizontal Cooperation*) and the Guidelines on the application of Article 81(3) of the Treaty <sup>(7)</sup> are particularly relevant.
6. Horizontal cooperation agreements in liner shipping regarding the provision of joint services are covered by Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices

<sup>(1)</sup> Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (OJ L 269, 28.9.2006, p. 1).

<sup>(2)</sup> The term 'agreement' is used for agreements, decisions by associations of undertakings and concerted practices.

<sup>(3)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(4)</sup> OJ L 123, 27.4.2004, p. 18.

<sup>(5)</sup> OJ L 378, 31.12.1986, p. 4.

<sup>(6)</sup> OJ C 3, 6.1.2001, p. 2.

<sup>(7)</sup> OJ C 101, 27.4.2004, p. 97.

between liner shipping companies (consortia) <sup>(8)</sup>. It sets out the conditions, pursuant to Article 81(3) of the Treaty, under which the prohibition in Article 81(1) of the Treaty does not apply to agreements between two or more vessel operating carriers (consortia). It will be reviewed following the changes introduced by Regulation (EC) No 1419/2006 <sup>(9)</sup>.

7. These Guidelines are without prejudice to the interpretation of Article 81 of the Treaty which may be given by the Court of Justice or the Court of First Instance of the European Communities. The principles in the Guidelines are to be applied in the light of the circumstances specific to each case.
8. The Commission will apply these Guidelines for a period of five years.

## 2. MARITIME TRANSPORT SERVICES

### 2.1. Scope

9. Liner shipping services, cabotage and tramp services are the maritime transport sectors directly affected by the changes brought about by Regulation (EC) No 1419/2006.
10. Liner shipping involves the transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as a trade. Other general characteristics of liner shipping are that timetables and sailing dates are advertised in advance and services are available to any transport user.
11. Article 1(3)(a) of Regulation (EEC) No 4056/86 defined tramp vessel services as the transport of goods in bulk or in break bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non regularly scheduled or non advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand. It is mostly the unscheduled transport of one single commodity which fills a vessel <sup>(10)</sup>.
12. Cabotage involves the provision of maritime transport services including tramp and liner shipping, linking two or more ports in the same Member State <sup>(11)</sup>. Although these Guidelines do not specifically address cabotage services they nevertheless apply to these services insofar as they are provided either as liner or tramp shipping services.

### 2.2. Effect on trade between Member States

13. Article 81 of the Treaty applies to all agreements which may appreciably affect trade between Member States. In order for there to be an effect on trade it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or conduct may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States <sup>(12)</sup>. The Commission has issued guidance on how it will apply the concept of affectation of trade in its Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty <sup>(13)</sup>.

<sup>(8)</sup> OJ L 100, 20.4.2000, p. 24.

<sup>(9)</sup> Recital 3 of Regulation (EC) 611/2005, cited above in footnote 8.

<sup>(10)</sup> The Commission has identified a series of characteristics specific to specialised transport which render it distinct from liner services and tramp vessel services. They involve the provision of regular services for a particular cargo type. The service is usually provided on the basis of contracts of affreightment using specialised vessels technically adapted and/or built to transport specific cargo. Commission Decision 94/980/EC of 19 October 1994 in Case IV/34.446 — *Trans Atlantic Agreement* (OJ L 376, 31.12.1994, p. 1) (*hereinafter the TAA decision*), paragraphs 47-49.

<sup>(11)</sup> Article 1 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).

<sup>(12)</sup> Case 42/84, *Remia BV and Others v Commission* [1985] ECR 2545, paragraph 22. Case 319/82, *Ciments et Bétons de l'Est v Kerpen & Kerpen* [1983] ECR 4173, paragraph 9.

<sup>(13)</sup> OJ C 101, 27.4.2004, p. 81.

14. Transport services offered by liner shipping and tramp operators are often international in nature linking Community ports with third countries and/or involving exports and imports between two or more Member States (i.e. intra Community trade <sup>(14)</sup>). In most cases they are likely to affect trade between Member States *inter alia* on account of the impact they have on the markets for the provision of transport and intermediary services <sup>(15)</sup>.
15. Effect on trade between Member States is of particular relevance to maritime cabotage services since it determines the scope of application of Article 81 of the Treaty and its interaction with national competition law under Article 3 of Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The extent to which such services may affect trade between Member States must be evaluated on a case by case basis <sup>(16)</sup>.

### 2.3. The relevant market

16. In order to assess the effects on competition of an agreement for the purposes of Article 81 of the Treaty, it is necessary to define the relevant product and geographic market(s). The main purpose of market definition is to identify in a systematic way the competitive constraints faced by an undertaking. Guidance on this issue can be found in the Commission Notice on the definition of the relevant market for the purposes of Community competition law <sup>(17)</sup>. This guidance is also relevant to market definition as regards maritime transport services.
17. The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas <sup>(18)</sup>. A carrier (or carriers) cannot have a significant impact on the prevailing conditions of the market if customers are in a position to switch easily to other service providers <sup>(19)</sup>.

#### 2.3.1. Liner shipping

18. Containerised liner shipping services have been identified as the relevant product market for liner shipping in several Commission decisions and Court judgments <sup>(20)</sup>. Those decisions and judgments related to maritime transport in deep sea trades. Other modes of transport have not been included in the same service market even though in some cases these services may be, to a marginal extent, interchangeable. This was because only an insufficient proportion of the goods carried by container can easily be switched to other modes of transport, such as air transport services <sup>(21)</sup>.

<sup>(14)</sup> The fact that the service is to/from a non EU port does not in itself preclude that trade between Member States is affected. A careful analysis of the effects on customers and other operators within the Community that rely on the services needs to be carried out to determine whether they fall under Community jurisdiction. See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, cited above in footnote 13.

<sup>(15)</sup> Commission Decision 93/82/EEC of 23 December 1992 (Cases IV/32.448 and IV/32.450, CEWAL) (OJ L 34, 10.2.1993, p. 1), paragraph 90, confirmed by the Court of First Instance in Joined Cases T 24/93 to T 26/93 and T 28/93, *Compagnie Maritime Belge and Others v Commission* [1996] ECR II 1201, paragraph 205. TAA decision, cited above in footnote 10, paragraphs 288-296, confirmed by the judgment of the Court of First Instance of 28 February 2002, in Case T 395/94, *Atlantic Container Line and Others v Commission* (hereinafter the TAA judgment), paragraphs 72-74; Commission Decision 1999/243/EC of 16 September 1998 (Case IV/35.134 — *Trans Atlantic Conference Agreement*) (hereinafter the TACA decision) (OJ L 95, 9.4.1999, p. 1), paragraphs 386-396; Commission Decision 2003/68/EC of 14 November 2002 (Case COMP/37.396 — *Revised TACA*) (hereinafter the Revised TACA decision) (OJ L 26, 31.1.2003, p. 53), paragraph 73.

<sup>(16)</sup> For guidance on the application of the effect on trade, see the Commission Guidelines cited above in footnote 13.

<sup>(17)</sup> OJ C 372, 9.12.1997, p. 5.

<sup>(18)</sup> Notice on market definition, cited above in footnote 17, paragraph 8.

<sup>(19)</sup> Notice on market definition, cited above in footnote 17, paragraph 13.

<sup>(20)</sup> Commission Decision 1999/485/EC of 30 April 1999 (Case IV/34.250 — *Europe Asia Trades Agreement*) (OJ L 193, 26.7.1999, p. 23); TAA decision, cited above in footnote 10, and the TACA decision, cited above in footnote 15, paragraphs 60-84. The market definition in the TACA decision was confirmed by the Court of First Instance in its judgment in Joined Cases T 191/98, T 212/98 to T 214/98, *Atlantic Container Line AB and Others v Commission* [2003] ECR II 3275 (hereinafter the TACA judgment), paragraphs 781-883.

<sup>(21)</sup> Paragraph 62 of the TACA decision, cited above in footnote 15 and paragraphs 783-789 of the TACA judgment, cited above in footnote 20.

19. It may be appropriate under certain circumstances to define a narrower product market limited to a particular type of product transported by sea. For example, the transport of perishable goods could be limited to reefer containers or include transport in conventional reefer vessels. While it is possible in exceptional circumstances for some substitution to take place between break bulk and container transport<sup>(22)</sup>, there appears to be no lasting change over from container towards bulk. For the vast majority of categories of goods and users of containerised goods, break bulk does not offer a reasonable alternative to containerised liner shipping<sup>(23)</sup>. Once cargo becomes regularly containerised it is unlikely ever to be transported again as non containerised cargo<sup>(24)</sup>. To date containerised liner shipping is therefore mainly subject to one way substitutability<sup>(25)</sup>.
20. The relevant geographic market consists of the area where the services are marketed, generally a range of ports at each end of the service, determined by ports' overlapping catchment areas. As far as the European end of the service is concerned, to date the geographical market in liner cases has been identified as a range of ports in Northern Europe or in the Mediterranean. As liner shipping services from the Mediterranean are only marginally substitutable for those from Northern European ports, these have been identified as separate markets<sup>(26)</sup>.

### 2.3.2. *Tramp services*

21. The Commission has not yet applied Article 81 of the Treaty to tramp shipping. Undertakings may consider the following elements in their assessment inasmuch as they are relevant to the tramp shipping services they provide.

Elements to take into account when determining the relevant product market from the demand side (demand substitution)

22. The '*main terms*' of an individual transport request are a starting point for defining relevant service markets in tramp shipping since they generally identify the essential elements<sup>(27)</sup> of the transport requirement at issue. Depending on the transport users' specific needs, they will be made up of negotiable and non negotiable elements. Once identified, a negotiable element of the main terms, for example the vessel type or size, may indicate, for instance, that the relevant market with respect to this specific element is wider than laid down in the initial transport requirement.
23. The nature of the service in tramp shipping may differ and there is a variety of transport contracts. It may be necessary, therefore, to ascertain whether the demand side considers the services provided under time charter contracts, voyage charter contracts and contracts of affreightment to be substitutable. Should this be the case they may belong to the same relevant market.
24. Vessel types are usually subdivided into a number of standard industrial sizes<sup>(28)</sup>. Due to considerable economies of scale, a service with a significant mismatch between cargo volume and vessel size may not be able to offer a competitive freight rate. Therefore, the substitutability of different vessel sizes needs to be assessed case by case so as to ascertain whether each vessel size constitutes a separate relevant market.

<sup>(22)</sup> TACA decision, cited above in footnote 15, paragraph 71.

<sup>(23)</sup> TAA judgement, cited above in footnote 15, paragraph 273 and TACA judgment, cited above in footnote 20, paragraph 809.

<sup>(24)</sup> TAA judgment, cited above in footnote 15, paragraph 281. Commission Decision of 29 July 2005 in Case COMP/M.3829 — MAERSK/PONL, paragraph 13.

<sup>(25)</sup> TACA decision, cited above in footnote 15, paragraphs 62-75; TACA judgment, cited above in footnote 21, paragraph 795 and Commission Decision in MAERSK/PONL, cited above in footnote 23, paragraphs 13 and 112-117.

<sup>(26)</sup> TACA decision, cited above in footnote 15, paragraphs 76-83 and Revised TACA decision, cited above in footnote 15, paragraph 39.

<sup>(27)</sup> For voyage charter for instance the essential elements of a transport requirement are the cargo to be carried, the cargo volume, the loading and discharging ports, the laydays or the ultimate date by which the cargo has to arrive and technical details regarding the vessel required.

<sup>(28)</sup> It appears to be the industry's perception that vessel sizes constitute separate markets. The trade press and the Baltic Exchange publish price indexes for each standard vessel size. Consultants' reports divide the market on the basis of vessel sizes.

Elements to take into account when determining the relevant product market from the supply side (supply substitution)

25. The physical and technical conditions of the cargo to be carried and the vessel type provide the first indications as to the relevant market from the supply side <sup>(29)</sup>. If vessels can be adjusted to transport a particular cargo at negligible cost and in a short time frame <sup>(30)</sup>, different tramp shipping service providers are able to compete for the transport of this cargo. In such circumstances, the relevant market from the supply side will comprise more than one type of vessel.
26. However, there are a number of vessel types that are technically adapted and/or specially built to provide specialised transport services. Although specialised vessels may also carry other types of cargo, they may be at a competitive disadvantage. The ability of specialised service providers to compete for the transport of other cargo may, therefore, be limited.
27. In tramp shipping, port calls are made in response to individual demand. Mobility of vessels may however be limited by terminal and draught restrictions or environmental standards for particular vessel types in certain ports or regions.

Additional considerations to take into account when determining the relevant product market

28. The existence of chains of substitution between vessel sizes in tramp shipping should also be considered. In certain tramp shipping markets, vessel sizes at the extreme of the market are not directly substitutable. Chain substitution effects may nevertheless constrain pricing at the extremes and lead to their inclusion in a broader market definition.
29. In certain tramp shipping markets, consideration must be given to whether vessels can be considered as captive capacity and should not be taken into account when assessing the relevant market on a case by case basis.
30. Additional factors such as the reliability of the service provider, security, safety and regulatory requirements may influence supply and demand side substitutability, for example the double hull requirement for tankers in Community waters <sup>(31)</sup>.

Geographic dimension

31. Transport requirements usually contain geographic elements such as the loading and discharging ports or regions. These ports provide the first orientation for the definition of the relevant geographic market from the demand side, without prejudice to the final definition of the relevant geographic market.
32. Certain geographic markets may be defined on a directional basis or may occur only temporarily for instance when climatic conditions or harvest periods periodically affect the demand for transport of particular cargos. In this context, repositioning of vessels, ballast voyages and trade imbalances should be considered for the delineation of relevant geographic markets.

<sup>(29)</sup> For example, liquid bulk cargo cannot be carried on dry bulk vessels or reefer cargo cannot be transported on car carriers. Many oil tankers are able to carry dirty and clean petroleum products. However, a tanker cannot immediately carry clean products after having transported dirty products.

<sup>(30)</sup> Switching a dry bulk vessel from the transport of coal to grain might require only a one day cleaning process that might be done during a ballast voyage. In other tramp shipping markets this cleaning period may be longer.

<sup>(31)</sup> Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94 (OJ L 64, 7.3.2002).

#### 2.4. Market shares

33. Market shares provide useful first indications of the market structure and of the competitive importance of the parties and their competitors. The Commission interprets market shares in the light of the market conditions on a case by case basis. In liner shipping, volume and/or capacity data have been identified as the basis for calculating market shares in several Commission decisions and Court judgments <sup>(32)</sup>.
34. In tramp shipping markets, service providers compete for the award of transport contracts, that is to say, they sell voyages or transport capacity. Depending on the specific services in question, various data may allow operators to calculate their annual market shares <sup>(33)</sup>, for instance:
- (a) the number of voyages;
  - (b) the parties' volume or value share in the overall transport of a specific cargo (between port pairs or port ranges);
  - (c) the parties' share in the market for time charter contracts;
  - (d) the parties' capacity shares in the relevant fleet (by vessel type and size).

### 3. HORIZONTAL AGREEMENTS IN THE MARITIME TRANSPORT SECTOR

35. Cooperation agreements are a common feature of maritime transport markets. Considering that these agreements may be entered into by actual or potential competitors and may adversely affect the parameters of competition, undertakings must take special care to ensure that they comply with the competition rules. In service markets, such as maritime transport, the following elements are particularly relevant for the assessment of the effect an agreement may have in the relevant market: prices, costs, quality, frequency and differentiation of the service provided, innovation, marketing and commercialisation of the service.
36. Three issues are of particular relevance to the services covered by these guidelines: technical agreements, exchanges of information and pools.

#### 3.1. Technical agreements

37. Certain types of technical agreements may not fall under the prohibition set out in Article 81 of the Treaty on the ground that they do not restrict competition. This is the case, for instance, of horizontal agreements the sole object and effect of which is to implement technical improvements or to achieve technical cooperation. Agreements relating to the implementation of environmental standards can also be considered to fall into this category. Agreements between competitors relating to price, capacity, or other parameters of competition will, in principle, not fall into this category <sup>(34)</sup>.

#### 3.2. Information exchanges between competitors in liner shipping

38. An information exchange system entails an arrangement on the basis of which undertakings exchange information amongst themselves or supply it to a common agency responsible for centralizing, compiling and processing it before returning it to the participants in the form and at the frequency agreed.

<sup>(32)</sup> TACA decision, cited above in footnote 15, paragraph 85; Revised TACA decision, cited above in footnote 15, paragraphs 85 and 86 and the TACA judgment, cited above in footnote 20, paragraphs 924, 925 and 927.

<sup>(33)</sup> Depending on the specificities of the relevant tramp shipping market shorter periods may be envisaged, e.g. in markets where contracts of affreightment are tendered for periods of less than one year.

<sup>(34)</sup> Commission Decision 2000/627/EC of 16 May 2000 (Case IV/34.018 — *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)*) (OJ L 268, 20.10.2000, p. 1), paragraph 153. Judgment of the Court of First Instance of 21 October 1997 in Case T 229/94, *Deutsche Bahn AG v Commission* [1997] ECR II 1689, paragraph 37.



39. It is common practice in many industries for aggregate statistics and general market information to be gathered, exchanged and published. This published market information is a good means to increase market transparency and customer knowledge, and thus may produce efficiencies. However, the exchange of commercially sensitive and individualised market data can, under certain circumstances, breach Article 81 of the Treaty. These guidelines are intended to assist providers of liner shipping services in assessing when such exchanges breach the competition rules.
40. In the liner shipping sector, exchanges of information between shipping lines taking part in liner consortia which otherwise would fall under Article 81(1) of the Treaty are permitted to the extent that they are ancillary to the joint operation of liner transport services and the other forms of co operation covered by the block exemption in Regulation (EC) No 823/2000 <sup>(35)</sup>. The present Guidelines do not deal with these information exchanges.

### 3.2.1. *In general*

41. In assessing information exchange systems under Community competition law, the following distinctions must be made.
42. The exchange of information may be a facilitating mechanism for the implementation of an anti competitive practice, such as monitoring compliance with a cartel; where an exchange of information is ancillary to such an anti competitive practice its assessment must be carried out in combination with an assessment of that practice. An exchange of information may even have in itself the object of restricting competition <sup>(36)</sup>. These Guidelines do not address such exchanges of information.
43. However, an exchange of information, in its own right, might constitute an infringement of Article 81 of the Treaty by reason of its effect. This situation arises when the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted <sup>(37)</sup>. Every economic operator must determine autonomously the policy which it intends to pursue on the market. The Court further considered that undertakings are, therefore, precluded from direct or indirect contacts with other operators which influence the conduct of a competitor or reveal their own (intended) conduct if the object or effect of those contacts is to restrict competition, i.e. to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and the volume of the market <sup>(38)</sup>. By contrast, in the wood pulp market, the Court has found that unilateral quarterly price announcements made independently by producers to users constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors and hence, in the absence of any preliminary concerted practice between producers, do not constitute in themselves an infringement of Article 81(1) of the Treaty <sup>(39)</sup>.
44. The case law of the Community Courts provides some general guidance in examining the likely effects of an information exchange. The Court has found that where there is a truly competitive market, transparency is likely to lead to intensification of competition between suppliers <sup>(40)</sup>. However, on a highly concentrated oligopolistic market, on which competition is already greatly reduced, exchanges of precise information on individual sales at short intervals between the main competitors, to the exclusion of other suppliers and of consumers, are likely to impair substantially the competition that exists between suppliers. In such circumstances, the sharing, on a regular and frequent basis, of information concerning

<sup>(35)</sup> Regulation (EC) No 823/2000, cited above in footnote 8, applies to international liner transport services from or to one or more Community ports exclusively for the carriage of cargo chiefly by container — see Articles 1, 2 and Article 3(2)(g) thereof.

<sup>(36)</sup> Judgment of the Court of Justice in Case C 49/92 P, *Commission v Anic Partecipazioni* [1999] ECR I 4125, paragraphs 121 to 126.

<sup>(37)</sup> Judgment of the Court of Justice in Case C 7/95 P, *John Deere v Commission* [1998] ECR I 3111, paragraph 90 and Judgment of the Court of Justice in Case C 194/99 P, *Thyssen Stahl v Commission* [2003] ECR I 10821, paragraph 81.

<sup>(38)</sup> Judgment of the Court of Justice of 23 November 2006 in Case C 238/05, *Asnef Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbank)* [2006] ECR I 11125, paragraph 52 and Judgment of the Court of Justice in Case C 49/92 P, *Commission v Anic Partecipazioni*, [1999] ECR I 4125, cited above in footnote 36, paragraphs 116 and 117.

<sup>(39)</sup> Judgment of the Court of Justice in Joined Cases C 89/85, C 104/85, C 114/85, C 116/85, C 117/85 and C 125/85 to C 129/85, *A. Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I 1307, paragraphs 59 to 65.

<sup>(40)</sup> Judgment in *John Deere v Commission*, Case C 7/95 P, cited above in footnote 37, paragraph 88.

the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors <sup>(41)</sup>. The Court has also found that an information exchange system may constitute a breach of the competition rules even when the market is not highly concentrated but there is a reduction of the undertakings' decision making autonomy resulting from pressure during subsequent discussions with competitors <sup>(42)</sup>.

45. It follows that the actual or potential effects of an information exchange must be considered on a case by case basis as the results of the assessment depend on a combination of factors, each specific to an individual case. The structure of the market where the exchange takes place and the characteristics of the information exchange, are two key elements that the Commission examines when assessing an information exchange. The assessment must consider the actual or potential effects of the information exchange compared to the competitive situation that would result in the absence of the information exchange agreement <sup>(43)</sup>. To be caught by Article 81(1) of the Treaty, the exchange must have an appreciable adverse impact on the parameters of competition <sup>(44)</sup>.
46. The guidance below mainly relates to the analysis of a restriction of competition under Article 81(1) of the Treaty. Guidance on the application of Article 81(3) of the Treaty is to be found in paragraph 58 below and in the general notice on the subject <sup>(45)</sup>.

### 3.2.2. Market structure

47. The level of concentration and the structure of supply and demand on a given market are key issues in considering whether an exchange falls within the scope of Article 81(1) of the Treaty <sup>(46)</sup>.
48. The level of concentration is particularly relevant since, on highly concentrated oligopolistic markets, restrictive effects are more likely to occur and are more likely to be sustainable than in less concentrated markets. Greater transparency in a concentrated market may strengthen the interdependence of firms and reduce the intensity of competition.
49. The structure of supply and demand is also important, notably the number of competing operators and the symmetry and stability of their market shares and the existence of any structural links between competitors <sup>(47)</sup>. The Commission may also analyse other factors such as the homogeneity of services and the overall transparency in the market.

### 3.2.3. Characteristics of the information exchanged

50. The exchange of commercially sensitive data relating to the parameters of competition, such as price, capacity or costs, between competitors, is more likely to be caught by Article 81(1) of the Treaty than other exchanges of information. The commercial sensitivity of information should be assessed taking into account the criteria set out below.

<sup>(41)</sup> Judgment of the Court of First Instance in Case T 35/92, *John Deere Ltd v Commission* [1994] ECR II 957, paragraph 51, upheld on appeal by the Judgment in Case C 7/95 P, *John Deere Ltd v Commission*, cited above in footnote 37, paragraph 89; and more recently, the Judgment in *Asnef Equifax v Ausbanc*, cited above in footnote 38.

<sup>(42)</sup> Judgment of the Court of First Instance in Case T 141/94, *Thyssen Stahl AG v Commission* [1999] ECR II 347, paragraphs 402 and 403.

<sup>(43)</sup> Judgment in Case C 7/95 P, *John Deere Ltd v Commission*, cited above in footnote 37, paragraphs 75-77.

<sup>(44)</sup> Guidelines on the application of Article 81(3), cited above in footnote 7, paragraph 16.

<sup>(45)</sup> Guidelines on the application of Article 81(3), cited above in footnote 7.

<sup>(46)</sup> Guidelines on the application of Article 81(3), cited above in footnote 7, paragraph 25.

<sup>(47)</sup> In liner shipping there are operational and/or structural links between competitors, for example membership of consortia agreements that allow shipping lines to share information for the purposes of providing a joint service. The existence of any such link, will have to be taken into account on a case by case basis when assessing the impact an additional exchange of information has in the market in question.

51. The exchange of information already in the public domain does not in principle constitute an infringement of Article 81(1) of the Treaty <sup>(48)</sup>. However, it is important to establish the level of transparency of the market and whether the exchange enhances information by making it more accessible and/or combines publicly available information with other information. The resulting information may become commercially sensitive and its exchange potentially restrictive of competition.
52. Information may be individual or aggregated. Individual data relates to a designated or identifiable undertaking. Aggregate data combines the data from a sufficient number of independent undertakings so that the recognition of individual data is impossible. The exchange of individual information between competitors is more likely to be caught by Article 81(1) of the Treaty <sup>(49)</sup> than the exchange of aggregated information which, in principle, does not fall within Article 81(1) of the Treaty. The Commission will pay particular attention to the level of aggregation. It should be such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors.
53. However, in liner shipping caution should be used when assessing exchanges of capacity forecasts even in aggregate form, especially when they take place in concentrated markets. In liner markets, capacity data is the key parameter to coordinate competitive conduct and it has a direct effect on prices. Exchanges of aggregated capacity forecasts indicating in which trades capacity will be deployed may be anticompetitive to the extent that they may lead to the adoption of a common policy by several or all carriers and result in the provision of services at above competitive prices. Additionally, there is a risk of disaggregation of the data as it can be combined with individual announcements by liner carriers. This would enable undertakings to identify the market positions and strategies of competitors.
54. The age of the data and the period to which it relates are also important factors. Data can be historic, recent or future. Exchange of historic information is generally not regarded as falling within Article 81(1) of the Treaty because it cannot have any real impact on the undertakings' future behaviour. In past cases, the Commission has considered information which was more than one year old as historic <sup>(50)</sup> whereas information less than one year old has been viewed as recent <sup>(51)</sup>. The historic or recent nature of the information should be assessed with some flexibility taking into account the extent to which data becomes obsolete in the relevant market. The time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual. Exchanges of recent data on volume and capacity are similarly unlikely to be restrictive of competition if the data is aggregated to an appropriate level such that individual shippers' or carriers' transactions cannot be identified either directly or indirectly. Future data relates to an undertaking's view of how the market will develop or to the strategy it intends to follow in that market. The exchange of future data is particularly likely to be problematic, especially when it relates to prices or output. It may reveal the commercial strategy an undertaking intends to adopt in the market. In so doing, it may appreciably reduce rivalry between the parties to the exchange and is thus potentially restrictive of competition.
55. The frequency of the exchange should also be considered. The more frequently the data is exchanged, the more swiftly competitors can react. This facilitates retaliation and ultimately lowers the incentives to initiate competitive actions on the market. So called hidden competition could be restricted.
56. How data is released should also be looked into to assess the effect(s) it may have on the market(s). The more the information is shared with customers, the less likely it is to be problematic. Conversely, if market transparency is improved for the benefit of suppliers only, it may deprive customers of the possibility of getting the advantage of increased 'hidden competition'.

<sup>(48)</sup> TACA judgment, cited above in footnote 20, paragraph 1154.

<sup>(49)</sup> Commission Decision 78/252/EEC of 23 December 1977 in Case IV/29.176 — *Vegetable Parchment* (OJ L 70, 13.3.1978, p. 54).

<sup>(50)</sup> Commission Decision 92/157/EEC of 17 February 1992 in Case IV/31.370 — *UK Agricultural Tractor Registration Exchange* (OJ L 68, 13.3.1992, p. 19), paragraph 50.

<sup>(51)</sup> Commission Decision 98/4/ECSC of 26 November 1997 in Case IV/36.069 — *Wirtschaftsvereinigung Stahl* (OJ L 1, 3.1.1998, p. 10), paragraph 17.

57. In liner shipping, price indexes are used to show average price movements for the transport of a sea container. A price index based on appropriately aggregated price data is unlikely to infringe Article 81(1) of the Treaty, provided that the level of aggregation is such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors. If a price index reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted, it would violate Article 81(1) of the Treaty. In assessing the likely effect of such a price index on a given relevant market, account should be given to the level of aggregation of the data and its historical or recent nature and the frequency at which the index is published. In general it is important to assess all individual elements of any information exchange scheme together, in order to take account of potential interactions, for example between exchange of capacity and volume data on the one hand and of a price index on the other.
58. An exchange of information between carriers that restricts competition may nonetheless create efficiencies, such as better planning of investments and more efficient use of capacity. Such efficiencies will have to be substantiated and passed on to customers and weighed against the anti competitive effects of the information exchange in the framework of Article 81(3) of the Treaty. In this context, it is important to note that one of the conditions of Article 81(3) is that consumers should receive a fair share of the benefits generated by the restrictive agreement. If all four cumulative conditions set out in Article 81(3) are fulfilled, the prohibition of Article 81(1) does not apply <sup>(52)</sup>.

#### 3.2.4. Trade associations

59. In liner shipping, as in any other sector, discussions and exchanges of information can take place in a trade association provided the association is not used as (a) a forum for cartel meetings <sup>(53)</sup>; (b) a structure that issues anti competitive decisions or recommendations to its members <sup>(54)</sup>; or (c) a means of exchanging information that reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted while not fulfilling the Article 81(3) conditions <sup>(55)</sup>. This should be distinguished from the discussions that are legitimately conducted within trade associations, for example on technical and environmental standards.

### 3.3. Pool agreements in tramp shipping

60. The most recurrent form of horizontal cooperation in the tramp shipping sector is the shipping pool. There is no universal model for a pool. Some features do, however, appear to be common to most pools in the different market segments as set out below.
61. A standard shipping pool brings together a number of similar vessels <sup>(56)</sup> under different ownership and operated under a single administration. A pool manager is normally responsible for the commercial management (for example, joint marketing <sup>(57)</sup>, negotiation of freight rates and centralization of incomes and voyage costs <sup>(58)</sup>) and the commercial operation (planning vessel movements and instructing vessels, nominating agents in ports, keeping customers updated, issuing freight invoices,

<sup>(52)</sup> Guidelines on the application of Article 81(3) of the Treaty, cited above in footnote 7.

<sup>(53)</sup> Commission Decision 2004/421/EC of 16 December 2003 in Case COMP/38.240 — *Industrial tubes* (OJ L 125, 28.4.2004, p. 50).

<sup>(54)</sup> Commission Decision 82/896/EEC of 15 December 1982 in Case IV/29.883 — *AROW/BNIC* (OJ L 379, 31.12.1982, p. 1); Commission Decision 96/438/EC of 5 June 1996 in Case IV/34.983 — *Fenex* (OJ L 181, 20.7.1996, p. 28).

<sup>(55)</sup> Decision 92/157/EEC (*UK Agricultural Tractor Registration Exchange*), cited above in footnote 50.

<sup>(56)</sup> This results in the pool being able to attract large contracts of affeighthment, combine various contracts of affeighthment and reduce the number of ballast legs by careful fleet planning.

<sup>(57)</sup> For example, the pool's vessels are marketed as one commercial unit offering transport solutions regardless of which ship performs the actual voyage.

<sup>(58)</sup> For example, the pool's income is collected by the central administration and revenue is distributed to the participants based on a complex weighting system.

ordering bunkers, collecting the vessels' earnings and distributing them under a pre arranged weighting system etc.). The pool manager often acts under the supervision of a general executive committee representing the vessel owners. The technical operation of vessels is usually the responsibility of each owner (safety, crew, repairs, maintenance etc.). Although they market their services jointly, the pool members often perform the services individually.

62. It follows from this description that the key feature of standard shipping pools is joint selling, coupled with features of joint production. The guidance on both joint selling, as a variant of a joint commercialisation agreement, and joint production in the Commission Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements<sup>(59)</sup> is therefore relevant. Given the variation in pools' characteristics, each pool must be analysed on a case by case basis to determine, by reference to its centre of gravity<sup>(60)</sup>, whether it is caught by Article 81(1) and, in the affirmative, if it fulfils the four cumulative conditions of Article 81(3).
63. Pools that fall within the scope of Council Regulation (EC) No 139/2004<sup>(61)</sup> because they are created as a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full function joint ventures, see Article 3(4) of Regulation (EC) No 139/2004) are not directly affected by the changes brought about by Regulation (EC) No 1419/2006 and are not dealt with in these Guidelines. Guidance on full functionality can be found, *inter alia*, in the Commission Consolidated Jurisdictional Notice under Regulation (EC) No 139/2004 on the control of concentrations between undertakings<sup>(62)</sup>. Insofar as such pools have as their object or effect the coordination of the competitive behaviour of their parents, the coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the EC Treaty with a view to establishing whether or not the operation is compatible with the common market<sup>(63)</sup>.

### 3.3.1. Pools that do not fall under Article 81(1) of the Treaty

64. Pool agreements do not fall under the prohibition of Article 81(1) of the Treaty if the participants to the pool are not actual or potential competitors. This would be the case, for instance, when two or more ship owners set up a shipping pool for the purpose of tendering for and performing contracts of affreightment for which as individual operators they could not bid successfully or which they could not carry out on their own. This conclusion is not invalidated in cases where such pools occasionally carry other cargo representing a small part of the overall volume.
65. Pools whose activity does not influence the relevant parameters of competition because they are of minor importance and/or do not appreciably affect trade between Member States<sup>(64)</sup>, are not caught by Article 81(1) of the Treaty.

### 3.3.2. Pools that generally fall under Article 81(1) of the Treaty

66. Pool agreements between competitors limited to joint selling have as a rule the object and effect of coordinating the pricing policy of these competitors<sup>(65)</sup>.

<sup>(59)</sup> Respectively in Section 5 and Section 3 of the Guidelines, cited above in footnote 6.

<sup>(60)</sup> Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, paragraph 12.

<sup>(61)</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

<sup>(62)</sup> OJ C 95, 16.4.2008, p. 1.

<sup>(63)</sup> Article 2(4) of Council Regulation (EC) No 139/2004.

<sup>(64)</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13) and Guidelines on the effect on trade concept, cited above in footnote 13.

<sup>(65)</sup> Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, Section 5. The activities of an independent ship broker when 'fixing a vessel' do not fall under this category.

### 3.3.3. Pools that may fall under Article 81(1) of the Treaty

67. If the pool does not have as its object a restriction of competition, an analysis of its effects in the market concerned is necessary. An agreement is caught by Article 81(1) of the Treaty when it is likely to have an appreciable adverse impact on the parameters of competition on the market such as prices, costs, service differentiation, service quality, and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties <sup>(66)</sup>.
68. Some tramp shipping pools do not involve joint selling but nevertheless entail some degree of coordination on the parameters of competition (e.g. joint scheduling or joint purchasing). Such cases are only subject to Article 81(1) of the Treaty if the parties to the agreement have some degree of market power <sup>(67)</sup>.
69. The pool's ability to cause appreciable negative market effects depends on the economic context, taking into account the parties' combined market power and the nature of the agreement together with other structural factors in the relevant market. It must also be considered whether the pool agreement affects the behaviour of the parties in neighbouring markets closely related to the market directly affected by the cooperation <sup>(68)</sup>. This may be the case for example where the pool's market is that for the transport of forest products in specialised box shaped vessels (market A) and the pool's members also operate ships in the dry bulk market (market B).
70. Concerning the structural factors in the relevant market, if the pool has a low market share, it is unlikely to produce restrictive effects. Market concentration, the position and number of competitors, the stability of market shares over time, multi membership in pools, market entry barriers and the likelihood of entry, market transparency, countervailing buying power of transport users and the nature of the services (for example, homogenous versus differentiated services) should be taken into account as additional factors in assessing the impact of a given pool on the relevant market.
71. With regard to the nature of the agreement, consideration should be given to clauses affecting the pool or its members' competitive behaviour in the market such as clauses prohibiting members from being active in the same market outside the pool (non compete clauses), lock in periods and notice periods (exit clauses) and exchanges of commercially sensitive information. Any links between pools, whether in terms of management or members as well as cost and revenue sharing should also be considered.

### 3.3.4. Applicability of Article 81(3) of the Treaty

72. Where pools are caught by Article 81(1) of the Treaty, the undertakings involved need to ensure that they fulfil the four cumulative conditions of Article 81(3) <sup>(69)</sup>. Article 81(3) does not exclude a priori certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule. This analysis incorporates a sliding scale. The greater the restriction of competition found under Article 81(1), the greater the efficiencies and the pass on to consumers must be.
73. It is up to the undertakings involved to demonstrate that the pool improves the transport services or promotes technical or economic progress in the form of efficiency gains. The efficiencies generated cannot be cost savings that are an inherent part of the reduction of competition but must result from the integration of economic activities.

<sup>(66)</sup> Guidelines on the application of Article 81(3), cited above in footnote 7.

<sup>(67)</sup> Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, paragraph 149.

<sup>(68)</sup> Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, paragraph 142.

<sup>(69)</sup> Guidelines on the application of Article 81(3), cited above in footnote 7.

74. Efficiency gains of pools may for instance result from obtaining better utilisation rates and economies of scale. Tramp shipping pools typically jointly plan vessel movements in order to spread their fleets geographically. Spreading vessels may reduce the number of ballast voyages which may increase the overall capacity utilisation of the pool and eventually lead to economies of scale.
75. Consumers must receive a fair share of the efficiencies generated. Under Article 81(3) of the Treaty, it is the beneficial effects on all consumers in the relevant market that must be taken into consideration, not the effect on each individual consumer <sup>(70)</sup>. The pass on of benefits must at least compensate consumers for any actual or potential negative impact caused to them by the restriction of competition under Article 81(1) <sup>(71)</sup>. To assess the likelihood of a pass on the structure of tramp shipping markets and the elasticity of demand should also be considered in this context.
76. A pool must not impose restrictions that are not indispensable to the attainment of the efficiencies. In this respect it is necessary to examine whether the parties could have achieved the efficiencies on their own. In making this assessment it is relevant to consider, *inter alia*, what is the minimum efficient scale to provide various types of services in tramp shipping. In addition, each restrictive clause contained in a pool agreement must be reasonably necessary to attain the claimed efficiencies. Restrictive clauses may be justified for a longer period or the whole life of the pool or for a transitional period only.
77. Lastly, the pool must not afford the parties the possibility of eliminating competition in respect of a substantial part of the services in question.

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<sup>(70)</sup> Judgment in Case C 238/05, *Asnef Equifax v Ausbanc*, cited above in footnote 38, paragraph 70.

<sup>(71)</sup> Guidelines on the application of Article 81(3), cited above in footnote 7, paragraph 24.





### **E.3 TRANSPORT BY RAIL, ROAD AND INLAND WATERWAYS**



## I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

## REGULATIONS

## COUNCIL REGULATION (EC) No 169/2009

of 26 February 2009

applying rules of competition to transport by rail, road and inland waterway

(Codified version)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

- (3) Rules of competition for those sectors should take account of the distinctive features of transport.

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

- (4) Since the rules of competition for transport derogate from the general rules of competition, it should be made possible for undertakings to ascertain what rules apply in any particular case.

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

- (5) The system of rules on competition for transport should apply equally to the joint financing or acquisition of transport equipment for the joint operation of services by certain groupings of undertakings, and also to certain operations in connection with transport by rail, road or inland waterway of providers of services ancillary to transport.

Having regard to the opinion of the European Economic and Social Committee <sup>(2)</sup>,

Whereas:

- (1) Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway <sup>(3)</sup> has been substantially amended several times <sup>(4)</sup>. In the interests of clarity and rationality the said Regulation should be codified.

- (6) In order to ensure that trade between Member States is not affected or competition within the internal market distorted, it is necessary to prohibit in principle for the three modes of transport specified above all agreements between undertakings, decisions of associations of undertakings and concerted practices between undertakings and all instances of abuse of a dominant position within the internal market which could have such effects.

- (2) Rules of competition for transport by rail, road and inland waterway are part of the common transport policy and of general economic policy.

- (7) Certain types of agreement, decision and concerted practice in the transport sector the object and effect of which is merely to apply technical improvements or to achieve technical cooperation may be exempted from the prohibition on restrictive agreements since they contribute to improving productivity. In the light of experience following application of this Regulation, the Council may, on a proposal from the Commission, amend the list of such types of agreement.

<sup>(1)</sup> OJ C 219 E, 28.8.2008, p. 67.

<sup>(2)</sup> OJ C 161, 13.7.2007, p. 100.

<sup>(3)</sup> OJ L 175, 23.7.1968, p. 1.

<sup>(4)</sup> See Annex I.

- (8) In order that an improvement may be fostered in the sometimes too dispersed structure of the industry in the road and inland waterway sectors, exemption from the prohibition on restrictive agreements should also be granted in the case of those agreements, decisions and concerted practices providing for the creation and operation of groupings of undertakings in these two transport sectors whose object is the carrying on of transport operations, including the joint financing or acquisition of transport equipment for the joint operation of services. Such overall exemption can be granted only on condition that the total carrying capacity of a grouping does not exceed a fixed maximum, and that the individual capacity of undertakings belonging to the grouping does not exceed certain limits so fixed as to ensure that no one undertaking can hold a dominant position within the grouping. The Commission should, however, have power to intervene if, in specific cases, such agreements should have effects incompatible with the conditions under which a restrictive agreement may be recognised as lawful, and should constitute an abuse of the exemption. Nevertheless, the fact that a grouping has a total carrying capacity greater than the fixed maximum, or cannot claim the overall exemption because of the individual capacity of the undertakings belonging to the grouping, does not in itself prevent such a grouping from constituting a lawful agreement, decision or concerted practice if it satisfies the relevant conditions laid down in this Regulation.
- (9) It is for the undertakings themselves, in the first instance, to judge whether the predominant effects of their agreements, decisions or concerted practices are the restriction of competition or the economic benefits acceptable as justification for such restriction and to decide accordingly, on their own responsibility, as to the illegality or legality of such agreements, decisions or concerted practices.
- (10) Therefore, undertakings should be allowed to conclude or operate agreements without declaring them. This exposes such agreements to the risk of being declared void with retroactive effect should they be examined following a complaint or on the Commission's own initiative, but does not prevent their being retroactively declared lawful in the event of such subsequent examination,

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Scope

The provisions of this Regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical cooperation, or the joint financing or acquisition of transport

equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping within the meaning of Article 3 of road or inland waterway transport undertakings, and to the abuse of a dominant position on the transport market. These provisions shall apply also to operations of providers of services ancillary to transport which have any of those objects or effects.

#### Article 2

##### Exception for technical agreements

1. The prohibition in Article 81(1) of the Treaty shall not apply to agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical cooperation by means of:

- (a) the standardisation of equipment, transport supplies, vehicles or fixed installations;
- (b) the exchange or pooling, for the purpose of operating transport services, of staff, equipment, vehicles or fixed installations;
- (c) the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;
- (d) the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view;
- (e) the coordination of transport timetables for connecting routes;
- (f) the grouping of single consignments;
- (g) the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions.

2. The Commission shall, where appropriate, submit proposals to the Council with a view to extending or reducing the list in paragraph 1.

#### Article 3

##### Exemption for groups of small and medium-sized undertakings

1. Agreements, decisions and concerted practices as referred to in Article 81(1) of the Treaty shall be exempt from the prohibition in that Article where their purpose is:

- (a) the constitution and operation of groupings of road or inland waterway transport undertakings with a view to carrying on transport activities;
- (b) the joint financing or acquisition of transport equipment or supplies, where these operations are directly related to the provision of transport services and are necessary for the joint operations of the aforesaid groupings;

always provided that the total carrying capacity of any grouping does not exceed:

- (i) 10 000 metric tons in the case of road transport;
- (ii) 500 000 metric tons in the case of transport by inland waterway.

The individual capacity of each undertaking belonging to a grouping shall not exceed 1 000 metric tons in the case of road transport or 50 000 metric tons in the case of transport by inland waterway.

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.

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

Done at Brussels, 26 February 2009.

*For the Council*  
*The President*  
I. LANGER

#### Article 4

##### Repeal

Regulation (EEC) No 1017/68, as amended by the Regulation listed in Annex I, Part A, is 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 1 May 2004 until the date of expiration of those decisions.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

#### Article 5

##### Entry into force, existing agreements

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

2. The prohibition in Article 81(1) of the Treaty shall not apply to agreements, decisions and concerted practices which were in existence at the date of accession of Austria, Finland and Sweden or at the date of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and which, by reason of accession, fall within the scope of Article 81(1) of the Treaty if, within six months from the date of accession, they are so amended that they comply with the conditions laid down in Article 3 of this Regulation. This paragraph does not apply to agreements, decisions and concerted practices which at the date of accession already fall under Article 53(1) of the EEA Agreement.

## ANNEX I

## PART A

**Repealed Regulation with its successive amendment**

(referred to in Article 4)

Regulation (EEC) No 1017/68 of the Council                      except Article 13(3)  
(OJ L 175, 23.7.1968, p. 1)

Council Regulation (EC) No 1/2003                                      Article 36 only  
(OJ L 1, 4.1.2003, p. 1)

## PART B

**Non repealed successive amendments**

1972 Act of Accession  
1979 Act of Accession  
1994 Act of Accession  
2003 Act of Accession

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## ANNEX II

## CORRELATION TABLE

Regulation (EEC) No 1017/68	This Regulation
Article 1	Article 1
Article 3	Article 2
Article 4(1), first subparagraph, first introductory phrase, first indent	Article 3(1), first subparagraph, first introductory phrase, (a)
Article 4(1), first subparagraph, first introductory phrase, second indent	Article 3(1), first subparagraph, first introductory phrase, (b)
Article 4(1), first subparagraph, second introductory phrase, first indent	Article 3(1), first subparagraph, second introductory phrase, (i)
Article 4(1), first subparagraph, second introductory phrase, second indent	Article 3(1), first subparagraph, second introductory phrase, (ii)
Article 4(1), second subparagraph	Article 3(1), second subparagraph
Article 4(2)	Article 3(2)
—	Article 4
Article 30(1)	Article 5(1)
Article 30(3), second subparagraph	Article 5(2)
Article 31	—
—	Annex I
—	Annex II





## **E.4 INFRASTRUCTURE**



## **Clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects**

*Official Journal C 298 , 30/09/1997 P. 0005 - 0009*

Clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects (97/C 298/05)

(Text with EEA relevance)

### Introduction

1. Accelerating the implementation of the trans-European transport network is one of the Community's objectives for developing competitiveness and growth in Europe. The high-level group on public-private partnership financing of trans-European network transport projects has stressed the need to create a legal environment that facilitates public-private partnerships.

2. Application of the competition rules is often seen as a factor of uncertainty that impedes the investment of private capital into trans-European network transport projects at an early stage. This is because, in applying the competition rules, the specific features of each project have to be taken into consideration and a case-by-case analysis carried out, in particular where individual exemptions are to be granted within the meaning of Article 85 (3).

3. So as to ensure that all the parties involved in creating such infrastructures are better informed, the Commission has already presented to the Council and the European Parliament recommendations on the application of the competition rules to transport infrastructure projects (see the annual report drawn up in December 1995, COM(95) 571, published on 30 May 1996, and in particular Annex II to the chapter on the trans-European transport network).

4. As a follow-up to the conclusions of the high-level group, which underlined the usefulness of clarifying those recommendations, the Commission in this communication further explains the application of the competition rules, in particular as regards:

- the general objectives that are being pursued in this field,
- the procedure for examining trans-European network transport projects,
- the conditions for exemption of capacity reservation agreements,

and attempts to reconcile the need to maximize the financial viability of rail projects with the provision of free and non-discriminatory access to infrastructure.

The objectives that are being pursued

5. In order to promote competitiveness and job-creation, the Commission's policy is to ensure effective competition and the development of intra-Community trade, while at the same time ensuring that the measures proposed or adopted are compatible with the tasks in the general economic interest performed by public services.

6. The various Community policies relating to the development of competition in the transport sector are interrelated, in particular through implementation of the principle of freedom to provide services, application of the competition rules laid down in the Treaty and the rules governing the award of contracts.

7. Public-private partnership projects must in all cases take account of the general framework provided by the common transport policy and, as regards rail projects in particular, the Commission's White Paper published in December 1992 (COM(92) 494).

8. The integration process involved in the establishment of the single market shapes the economic context in which competition policy is applied. The principle of freedom to provide transport services, laid down in the Treaty, is implemented through the establishment of the common transport policy.

9. For example, with regard to railways, Directive 91/440/EEC gives railway undertakings and international groupings of railway undertakings, subject to certain conditions, right of access to Member States' railway networks in providing international rail transport services. Directive 91/440/EEC establishes a legal framework within which the rules on competition between undertakings can operate. Within this legal framework, undertakings can conclude agreements, whose lawfulness has to be assessed in the light of the competition rules.

10. A distinction should be made here between the competition rules and the rules governing public procurement, which are often confused: the Community's competition rules as laid down in the Treaty, particularly Articles 85 and 86, do not contain any specific provisions on procedures for calls for tenders in public procurement.

11. As pointed out in the Commission's December 1995 annual report and the final report of the high-level group on public-private partnership financing of trans-European network transport projects, two distinct sets of rules governing public procurement apply at Community level to transport infrastructure work, namely Directive 93/37/EEC, which concerns the award of public works contracts, and Directive 93/38/EEC, which concerns entities operating in the water, electricity, transport and telecommunications sectors.

12. This Communication does not set out to deal with the application of the rules governing the award of public works contracts to trans-European network transport projects. It sets out only to clarify the Commission's recommendations regarding the application of the competition rules laid down in Articles 85 and 86 of the Treaty to trans-European network transport projects.

13. Competition policy comprises three main areas, namely restrictive agreements and practices (anti-trust), the regulated or monopoly sectors and State aid. The Commission has a whole range of interdependent instruments at its disposal in implementing competition policy. The rules governing restrictive agreements and abuses of dominant positions, the provisions on merger control and State aid and the rules on market liberalization all have the same objective: preventing distortions of competition within the single market.

14. In implementing the Community competition rules, the Commission is particularly vigilant to ensure that firms do not try to neutralize the pro-competitive effects of the single market through agreements that introduce or maintain market partitioning. Such practices include certain types of vertical agreements and/or distribution systems and unjustified refusals to allow third parties non-discriminatory access to essential infrastructure.

15. The Commission pursues its policy here through application of the rules governing restrictive agreements and abuses of dominant positions, i.e. Articles 85 and 86 of the Treaty.

16. Article 85 of the Treaty prohibits anti-competitive agreements between firms which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

17. However, this prohibition may be declared inapplicable to agreements which fulfil each of the following four conditions:

- they contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- they allow consumers a fair share of the resulting benefit,
- they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- they do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

18. Article 86 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States. In contrast to Article 85 of the Treaty, Article 86 does not provide for any exemption from this prohibition.

19. The Commission is prepared to help make more information available to all parties involved in infrastructure projects (the public authorities, transport companies, banks and private investors). Project promoters are therefore invited to contact the Commission if they require any information and advice. The Commission will examine the projects in full confidentiality. If they wish to obtain any information on the competition rules, projects leaders may contact Directorate-General IV in the Commission or the Commission's 'One-stop help desk' (fax: 32-2 295 65 04).

20. Project promoters should also contact their national competition authorities who will be able to provide them with all necessary information on the competition rules.

The procedure for examining projects

21. In the conclusions to its report, the high-level group on public-private partnership financing of trans-European network transport projects stressed the importance of a legal environment that encourages the development of public-private partnerships.

22. In this perspective and in respecting the application of the competition rules, the Commission takes account of the specific features of each project on the basis of a case-by-case assessment.

23. A large number of trans-European network transport projects require participation agreements from the outset that bring together a large number of operators. Projects involving new railway infrastructure call for particular attention because of developments in the railways sector and the financing difficulties associated with projects having a low level of profitability.

24. Participants in any project requiring large amounts of investment require particular legal certainty regarding their commitments as from the very outset of the project. This is why project promoters would like to have the Commission's formal position on the eligibility of their project within a reasonable period of time.

25. The Commission departments, and in particular Directorate-General IV, which is responsible for competition policy, encourage parties to contact them early on, when the project is at the discussion and planning stage and before any agreements are signed. This should prevent difficulties arising after the notification of the agreements and thereby slowing down the processing of applications. It will also ensure that the Commission departments are fully informed about projects from the very start and are therefore able to process the applications more rapidly, in particular with a view to an exemption pursuant to Article 85 (3) of the Treaty.

26. So that parties are able to predict when they can expect to receive a reply from the Commission, the latter in its December 1995 recommendations stated that it would do its utmost to take a final decision within a maximum period of six months of the notification of agreements, provided the parties had contacted it before finalizing the agreements and provided that it had all the necessary information for assessing the project.

#### Reconciling financial profitability and freedom of access to infrastructure

27. The information obtained by the Commission from railway infrastructure project promoters indicates a number of issues regarding the application of the competition rules and the financial profitability of projects. The main issues are taking account of the different competing modes of transport, the question of infrastructure access, and the prices charged for such access.

##### (a) Taking account of the different competing modes of transport

28. The in-depth analysis of a project requires a definition of the relevant market. Such a definition naturally means that the different modes of transport are taken into account to establish their substitutability or their complementarity (see in particular the night services Decision of 21 September 1994 OJ L 259, 7. 10. 1994, p. 20, points 19, et seq.).

##### (b) Access to infrastructure

29. Application of the competition rules, taking due account of the specific rules applicable to the rail transport sector, is intended to prevent market partitioning through anti-competitive practices such as unjustified refusals to allow third parties non-discriminatory access to facilities which they need in order to carry on their activity.

30. A clear distinction should be drawn between two concepts: firstly, the concept of freedom of access deriving from the principle of freedom to provide services and, secondly, the concept of capacity reservation agreement for operational requirements planned over a reasonable period.

31. The issuing of access rights to railway companies is the responsibility of the public authorities, which act in accordance with the Community and national rules in force (in particular, as regards railways, Article 10 of Directive 91/440/EEC and Directive 95/19/EC). One of the objectives of these provisions is to ensure competition and the development of intra-Community trade without jeopardizing the public services' performance of their tasks in the general economic interest.

32. The reservation of infrastructure capacity for an operator providing transport services planned in advance represents an agreement concluded between the infrastructure manager or the entity responsible for capacity allocation and the transport undertaking. Any such

agreement differs from the issuing of a right of access by the competent public authority. Moreover, it may be caught by Article 85 or Article 86 of the Treaty.

33. In the consultations carried out in drawing up the Commission's December 1995 recommendations and the report of the high-level group on public-private partnership financing of trans-European network transport projects, the participants stressed that the infrastructure manager must be able, if he so wishes, to reserve at least part of the capacity for transport companies, which contribute to the financial equilibrium of the project. There is also the question of the use of the transport equipment purchased by companies which are also project promoters.

34. The infrastructure in question requires a high level of investment, repayable over very long periods, and with a generally low level of profitability. Project promoters should therefore be able to obtain certain guarantees as regards the utilization of the new infrastructure and the payment of user charges.

35. Project promoters nevertheless recognize that the reservation of capacity over a long period is contrary to the principles of freedom of access to infrastructure and of competition.

36. Where there is congestion on the infrastructure, capacity reservation agreements that are not essential to the operation of transport services may become a means of prohibiting access to other transport companies that have the necessary rights of access. The competition rules do not allow such practices. It must be ensured that specific agreements concluded by participants in an infrastructure project do not prevent infrastructure access for transport services authorized to have such access within the meaning of the provisions of Directive 91/440/EEC and Directive 95/19/EC.

37. In addition, allowing infrastructure access to various users providing competing transport services or services on separate markets can facilitate the financing of the infrastructure by ensuring greater revenue from its use. For example, if several transport companies providing freight transport services on one and the same line or different transport services such as freight and passenger services are allowed access to one and the same rail infrastructure, this will mean that a larger number of user charges will be paid.

38. For these reasons, the recommendations put forward by the Commission in December 1995 are based on the following general criteria:

(i) if infrastructure operator wishes to give transport companies the opportunity of reserving capacity from the very start of the project, this opportunity should be offered to all Community undertakings that may be interested;

(ii) the capacity reserved for a company should be proportional to the direct or indirect financial commitments entered into by that company and should correspond to the operational requirements planned over a reasonable period;

(iii) a new infrastructure is generally not congested as soon as soon as it is put into service. A company, or a group of companies within the meaning of Article 3 of Directive 91/440/EEC, should therefore not have all the capacity available reserved for it. Some of the capacity should remain available so as to allow competing services to be operated by other companies;

(iv) the companies awarded user rights may not object to these rights being withdrawn if they are not used;

(v) the duration of capacity reservation agreements must not exceed a reasonable period of time, to be agreed in each particular instance.

39. These recommendations do not take the place of case-by-case assessment of projects, in accordance with the procedural rules laid down for this purpose.

40. So as to clarify the scope of the December 1995 recommendations, it is none the less useful to make the following specific points:

- the recommendations are without prejudice to the rules applicable to the award of contracts, and in particular the provisions of Directives 93/37/EEC and 93/38/EEC. Consequently, they do not create any new obligation as regards tendering, but are simply intended to make project promoters aware of the advantages of providing prior information to potential users. Such an approach makes it possible to attract the largest number of infrastructure users and to decrease the risk of complaints on the part of transport operators, who might feel discriminated against if sufficient information were not provided,

- in principle, capacity reservation agreements that are justified by operational requirements do not pose any difficulty under the competition rules as long as the infrastructure is not congested, since no entry barrier is created,

- if there is congestion, an agreement reserving capacity that is essential for the effective operation of transport services planned over a reasonable period may justify the granting of an exemption pursuant to Article 85 (3), where all the conditions laid down therein are fulfilled.

41. The purpose of the recommendations is to inform infrastructure project promoters of the need to provide for capacity systems that are sufficiently flexible over time and do not create distortions of competition between users, while at the same time safeguarding over a reasonable period the legitimate interests of each of the users, and in particular those who have supported the project from the outset.

42. A clear separation of responsibilities for the allocation of capacity may facilitate examination of notified projects. For example, the following separations may prevent conflicts of interest as regards capacity allocation:

- the infrastructure manager is responsible for allocating capacity on a non-discriminatory basis and does not himself operate transport services on the infrastructure

- the manager operates transport services on the infrastructure (or controls users), but an independent body is responsible for allocating capacity on a non-discriminatory basis.

(c) The prices charged for access to infrastructure

43. As regards the prices charged for access to infrastructure, the infrastructure manager may pursue the aim of attracting the largest possible number of users from the outset by charging low prices during an initial period. In principle, the competition rules do not oppose any such commercial policy on the part of the infrastructure manager provided that the prices charged apply, over one and the same period, in a non-discriminatory manner to all competing users. The competition rules laid down in the Treaty do not allow the application of dissimilar



conditions to equivalent transactions, since this creates distortions of competition that may affect trade between Member States.

44. If project promoters require any further information on these questions, they should contact the Commission and, in particular, Directorate-General IV, which is responsible for competition policy (see point 19).

**COMMISSION DIRECTIVE 2002/77/EC**  
**of 16 September 2002**  
**on competition in the markets for electronic communications networks and services**  
**(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Whereas:

- (1) Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services <sup>(1)</sup>, as last amended by Directive 1999/64/EC <sup>(2)</sup>, has been substantially amended several times. Since further amendments are to be made, it should be recast in the interest of clarity.
- (2) Article 86 of the Treaty entrusts the Commission with the task of ensuring that, in the case of public undertakings and undertakings enjoying special or exclusive rights, Member States comply with their obligations under Community law. Pursuant to Article 86(3), the Commission can specify and clarify the obligations arising from that Article and, in that framework, set out the conditions which are necessary to allow the Commission to perform effectively the duty of surveillance imposed upon it by that paragraph.
- (3) Directive 90/388/EEC required Member States to abolish special and exclusive rights for the provision of telecommunications services, initially for other services than voice telephony, satellite services and mobile radiocommunications, and then it gradually established full competition in the telecommunications market.
- (4) A number of other Directives in this field have also been adopted under Article 95 of the Treaty by the European Parliament and the Council aiming, principally, at the establishment of an internal market for telecommunications services through the implementation of open network provision and the provision of a universal service in an environment of open and competitive markets. Those Directives should be repealed with effect from 25 July 2003 when the new regulatory framework for electronic communications networks and services is applied.
- (5) The new electronic communications regulatory framework consists of one general Directive, Directive 2002/21/EC of the European Parliament and of the Council of

7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) <sup>(3)</sup> and four specific Directives: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) <sup>(4)</sup>, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) <sup>(5)</sup>, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) <sup>(6)</sup>, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications (Directive on privacy and electronic communications) sector <sup>(7)</sup>.

- (6) In the light of the developments which have marked the liberalisation process and the gradual opening of the telecommunications markets in Europe since 1990, certain definitions used in Directive 90/388/EEC and its amending acts should be adjusted in order to reflect the latest technological developments in the telecommunications field, or replaced in order to take account of the convergence phenomenon which has shaped the information technology, media and telecommunications industries over recent years. The wording of certain provisions should, where possible, be clarified in order to facilitate their application, taking into account, where appropriate, the relevant Directives adopted under Article 95 of the Treaty, and the experience acquired through the implementation of Directive 90/388/EEC as amended.
- (7) This Directive makes reference to 'electronic communications services' and 'electronic communications networks' rather than the previously used terms 'telecommunications services' and 'telecommunications networks'. These new definitions are indispensable in order to take account of the convergence phenomenon by bringing together under one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, cable television, satellite networks). Thus, the transmission and broadcasting of radio and television

<sup>(1)</sup> OJ L 192, 24.7.1990, p. 10.

<sup>(2)</sup> OJ L 175, 10.7.1999, p. 39.

<sup>(3)</sup> OJ L 108, 24.4.2002, p. 33.

<sup>(4)</sup> OJ L 108, 24.4.2002, p. 21.

<sup>(5)</sup> OJ L 108, 24.4.2002, p. 7.

<sup>(6)</sup> OJ L 108, 24.4.2002, p. 51.

<sup>(7)</sup> OJ L 201, 31.7.2002, p. 37.

programmes should be recognised as an electronic communication service and networks used for such transmission and broadcasting should likewise be recognised as electronic communications networks. Furthermore, it should be made clear that the new definition of electronic communications networks also covers fibre networks which enable third parties, using their own switching or routing equipment, to convey signals.

- (8) In this context, it should be made clear that Member States must remove (if they have not already done so) exclusive and special rights for the provision of all electronic communications networks, not just those for the provision of electronic communications services and should ensure that undertakings are entitled to provide such services without prejudice to the provisions of Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC. The definition of electronic communications networks should also mean that Member States are not permitted to restrict the right of an operator to establish, extend and/or provide a cable network on the ground that such network could also be used for the transmission of radio and television programming. In particular, special or exclusive rights which amount to restricting the use of electronic communications networks for the transmission and distribution of television signals are contrary to Article 86(1), read in conjunction with Article 43 (right of establishment) and/or Article 82(b) of the EC Treaty insofar as they have the effect of permitting a dominant undertaking to limit 'production, markets or technical development to the prejudice of consumers'. This is, however, without prejudice to the specific rules adopted by the Member States in accordance with Community law, and, in particular, in accordance with Council Directive 89/552/EEC of 3 October 1989 <sup>(1)</sup>, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council <sup>(2)</sup>, governing the distribution of audiovisual programmes intended for the general public.
- (9) Pursuant to the principle of proportionality, Member States should no longer make the provision of electronic communications services and the establishment and provision of electronic communications networks subject to a licensing regime but to a general authorisation regime. This is also required by Directive 2002/20/EC, according to which electronic communications services or networks should be provided on the basis of a general authorisation and not on the basis of a license. An aggrieved party should have the right to challenge a decision preventing him from providing electronic communications services or networks before an independent body and, ultimately, before a court or a tribunal. It is a fundamental principle of Community law that an individual is entitled to effective judicial protection whenever a

State measure violates rights conferred upon him by the provisions of a Directive.

- (10) Public authorities may exercise a dominant influence on the behaviour of public undertakings, as a result either of the rules governing the undertaking or of the manner in which the shareholdings are distributed. Therefore, where Member States control vertically integrated network operators which operate networks which have been established under special or exclusive rights, those Member States should ensure that, in order to avoid potential breaches of the Treaty competition rules, such operators, when they enjoy a dominant position in the relevant market, do not discriminate in favour of their own activities. It follows that Member States should take all measures necessary to prevent any discrimination between such vertically integrated operators and their competitors.
- (11) This Directive should also clarify the principle derived from Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EC with regard to mobile and personal communications <sup>(3)</sup>, by providing that Member States should not grant exclusive or special rights of use of radio frequencies and that the rights of use of those frequencies should be assigned according to objective, non-discriminatory and transparent procedures. This should be without prejudice to specific criteria and procedures adopted by Member States to grant such rights to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law.
- (12) Any national scheme pursuant to Directive 2002/22/EC, serving to share the net cost of the provision of universal service obligations shall be based on objective, transparent and non-discriminatory criteria and shall be consistent with the principles of proportionality and of least market distortion. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.
- (13) Where rights and obligations arising from international conventions setting up international satellite organisations are not compatible with the competition rules of the Treaty, Member States should take, in accordance with Article 307 of the EC Treaty, all appropriate steps to eliminate such incompatibilities. This Directive should clarify this obligation because Article 3 of Directive 94/46/EC <sup>(4)</sup>, merely required Member States to 'communicate to the Commission' the information they possessed on such incompatibilities. Article 11 of this Directive should clarify the obligation on Member States to remove any restrictions which could still be in force because of those international conventions.

<sup>(1)</sup> OJ L 298, 17.10.1989, p. 23.

<sup>(2)</sup> OJ L 202, 30.7.1997, p. 60.

<sup>(3)</sup> OJ L 20, 26.1.1996, p. 59.

<sup>(4)</sup> OJ L 268, 19.10.1994, p. 15.

- (14) This Directive should maintain the obligation imposed on Member States by Directive 1999/64/EC, so as to ensure that dominant providers of electronic communications networks and publicly available telephone services operate their public electronic communication network and cable television network as separate legal entities.
- (15) This Directive should be without prejudice to obligations of the Member States concerning the time limits set out in Annex I, Part B, within which the Member States are to comply with the preceding Directives.
- (16) Member States should supply to the Commission any information which is necessary to demonstrate that existing national implementing legislation reflects the clarifications provided for in this Directive as compared with Directives 90/388/EC, 94/46/EC, 95/51/EC <sup>(1)</sup>, 96/2/EC, 96/19/EC <sup>(2)</sup> and 1999/64/EC.
- (17) In the light of the above, Directive 90/388/EC should be repealed,

HAS ADOPTED THIS DIRECTIVE:

#### Article 1

##### Definitions

For the purposes of this Directive the following definitions shall apply:

1. 'electronic communications network' shall mean transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit — and packet — switched, including Internet) and mobile terrestrial networks, and electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;
2. 'public communications network' shall mean an electronic communications network used wholly or mainly for the provision of public electronic communications services;
3. 'electronic communications services' shall mean a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting but exclude services providing or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services as defined in Article 1 of Directive 98/34/EC which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

<sup>(1)</sup> OJ L 256, 26.10.1995, p. 49.

<sup>(2)</sup> OJ L 74, 22.3.1996, p. 13.

4. 'publicly available electronic communications services' shall mean electronic communications services available to the public;
5. 'exclusive rights' shall mean the rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide an electronic communications service or to undertake an electronic communications activity within a given geographical area;
6. 'special rights' shall mean the rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:
  - (a) designates or limits to two or more the number of such undertakings authorised to provide an electronic communications service or undertake an electronic communications activity, otherwise than according to objective, proportional and non-discriminatory criteria, or
  - (b) confers on undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same electronic communications service or to undertake the same electronic communications activity in the same geographical area under substantially equivalent conditions;
7. 'satellite earth station network' shall mean a configuration of two or more earth stations which interwork by means of a satellite;
8. 'cable television networks' shall mean any mainly wire-based infrastructure established primarily for the delivery or distribution of radio or television broadcast to the public.

#### Article 2

##### Exclusive and special rights for electronic communications networks and electronic communications services

1. Member States shall not grant or maintain in force exclusive or special rights for the establishment and/or the provision of electronic communications networks, or for the provision of publicly available electronic communications services.
2. Member States shall take all measures necessary to ensure that any undertaking is entitled to provide electronic communications services or to establish, extend or provide electronic communications networks.
3. Member States shall ensure that no restrictions are imposed or maintained on the provision of electronic communications services over electronic communications networks established by the providers of electronic communications services, over infrastructures provided by third parties, or by means of sharing networks, other facilities or sites without prejudice to the provisions of Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC.

4. Member States shall ensure that a general authorisation granted to an undertaking to provide electronic communications services or to establish and/or provide electronic communications networks, as well as the conditions attached thereto, shall be based on objective, non-discriminatory, proportionate and transparent criteria.

5. Reasons shall be given for any decision taken on the grounds set out in Article 3(1) of Directive 2002/20/EC preventing an undertaking from providing electronic communications services or networks.

Any aggrieved party should have the possibility to challenge such a decision before a body that is independent of the parties involved and ultimately before a court or a tribunal.

#### Article 3

### Vertically integrated public undertakings

In addition to the requirements set out in Article 2(2), and without prejudice to Article 14 of Directive 2002/21/EC, Member States, shall ensure that vertically integrated public undertakings which provide electronic communications networks and which are in a dominant position do not discriminate in favour of their own activities.

#### Article 4

### Rights of use of frequencies

Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law:

1. Member States shall not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services.
2. The assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria.

#### Article 5

### Directory services

Member States shall ensure that all exclusive and/or special rights with regard to the establishment and provision of directory services on their territory, including both the publication of directories and directory enquiry services, are abolished.

#### Article 6

### Universal service obligations

1. Any national scheme pursuant to Directive 2002/22/EC, serving to share the net cost of the provision of universal service obligations shall be based on objective, transparent and non-discriminatory criteria and shall be consistent with the principle of proportionality and of least market distortion. In

particular, where universal service obligations are imposed in whole or in part on public undertakings providing electronic communications services, this shall be taken into consideration in calculating any contribution to the net cost of universal service obligations.

2. Member States shall communicate any scheme of the kind referred to in paragraph 1 to the Commission.

#### Article 7

### Satellites

1. Member States shall ensure that any regulatory prohibition or restriction on the offer of space segment capacity to any authorised satellite earth station network operator are abolished, and shall authorise within their territory any space-segment supplier to verify that the satellite earth station network for use in connection with the space segment of the supplier in question is in conformity with the published conditions for access to such person's space segment capacity.

2. Member States which are party to international conventions setting up international satellite organisations shall, where such conventions are not compatible with the competition rules of the EC Treaty, take all appropriate steps to eliminate such incompatibilities.

#### Article 8

### Cable television networks

1. Each Member State shall ensure that no undertaking providing public electronic communications networks operates its cable television network using the same legal entity as it uses for its other public electronic communications network, when such undertaking:

- (a) is controlled by that Member State or benefits from special rights; and
- (b) is dominant in a substantial part of the common market in the provision of public electronic communications networks and publicly available telephone services; and
- (c) operates a cable television network which has been established under special or exclusive right in the same geographic area.

2. The term 'publicly available telephone services' shall be considered synonymous with the term 'public voice telephony services' referred to in Article 1 of Directive 1999/64/EC.

3. Member States which consider that there is sufficient competition in the provision of local loop infrastructure and services in their territory shall inform the Commission accordingly.

Such information shall include a detailed description of the market structure. The information provided shall be made available to any interested party on demand, regard being had to the legitimate interest of undertakings in the protection of their business secrets.

4. The Commission shall decide within a reasonable period, after having heard the comments of these parties, whether the obligation of legal separation may be ended in the Member State concerned.

5. The Commission shall review the application of this Article not later than 31 December 2004.

*Article 9*

Member States shall supply to the Commission not later than 24 July 2003 such information as will allow the Commission to confirm that the provisions of this Directive have been complied with.

*Article 10*

**Repeal**

Directive 90/388/EC, as amended by the Directives listed in Annex I, Part A, is repealed with effect from 25 July 2003, without prejudice to the obligations of the Member States in respect of the time limits for transposition laid down in Annex I, Part B.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

*Article 11*

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

*Article 12*

This Directive is addressed to the Member States.

Done at Brussels, 16 September 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

## ANNEX I

## PART A

**List of Directives to be repealed**

- Directive 90/388/EEC (OJ L 192, 24.7.1990, p. 10)  
 Articles 2 and 3 of Directive 94/46/EC (OJ L 268, 19.1.1994, p. 15)  
 Directive 95/51/EC (OJ L 256, 26.10.1995, p. 49)  
 Directive 96/2/EC (OJ L 20, 26.1.1996, p. 59)  
 Directive 96/19/EC (OJ L 74, 22.3.1996, p. 13)  
 Directive 1999/64/EC (OJ L 175, 10.7.1999, p. 39)

## PART B

**Transposition dates for the above Directives**

- Directive 90/388/EEC: transposition date: 31 December 1990  
 Directive 94/46/EC: transposition date: 8 August 1995  
 Directive 95/51/EC: transposition date: 1 October 1996  
 Directive 96/2/EC: transposition date: 15 November 1996  
 Directive 96/19/EC: transposition date: 11 January 1997  
 Directive 1999/64/EC: transposition date: 30 April 2000

## ANNEX II

**Correlation table**

This Directive	Directive 90/388/EEC
Article 1 (Definitions)	Article 1
Article 2 (withdrawal of exclusive/special rights)	Article 2
Article 3 (vertically integrated public undertakings)	Article 3(a)(ii)
Article 4 (rights of use of radio frequencies)	Article 3(b)
Article 5 (directory services)	Article 4(b)
Article 6 (universal service obligations)	Article 4(c)
Article 7 (satellites)	Article 3 of Directive 94/46/EC
Article 8 (cable networks)	Article 9