

REGULATION No 17

First Regulation implementing Articles 85 and 86 of the Treaty

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the Economic and Social Committee;

Having regard to the Opinion of the European Parliament;

Whereas, in order to establish a system ensuring that competition shall not be distorted in the common market, it is necessary to provide for balanced application of Articles 85 and 86 in a uniform manner in the Member States;

Whereas in establishing the rules for applying Article 85 (3) account must be taken of the need to ensure effective supervision and to simplify administration to the greatest possible extent;

Whereas it is accordingly necessary to make it obligatory, as a general principle, for undertakings which seek application of Article 85 (3) to notify to the Commission their agreements, decisions and concerted practices;

Whereas, on the one hand, such agreements, decisions and concerted practices are probably very numerous and cannot therefore all be examined at the same time and, on the other hand, some of them have special features which may make them less prejudicial to the development of the common market;

Whereas there is consequently a need to make more flexible arrangements for the time being in respect of certain categories of agreement, decision and concerted practice without prejudging their validity under Article 85;

Whereas it may be in the interest of undertakings to know whether any agreements, decisions or practices

to which they are party, or propose to become party, may lead to action on the part of the Commission pursuant to Article 85 (1) or Article 86;

Whereas, in order to secure uniform application of Articles 85 and 86 in the common market, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying those Articles;

Whereas for this purpose the Commission must have the co-operation of the competent authorities of the Member States and be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations as are necessary to bring to light any agreement, decision or concerted practice prohibited by Article 85 (1) or any abuse of a dominant position prohibited by Article 86;

Whereas, in order to carry out its duty of ensuring that the provisions of the Treaty are applied, the Commission must be empowered to address to undertakings or associations of undertakings recommendations and decisions for the purpose of bringing to an end infringements of Articles 85 and 86;

Whereas compliance with Articles 85 and 86 and the fulfilment of obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand, and it must be ensured that wide publicity is given to decisions taken;

Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty; whereas it is moreover desirable to confer upon the Court of Justice, pursuant to Article 172, unlimited jurisdiction in respect of decisions under

which the Commission imposes fines or periodic penalty payments;

Whereas this Regulation may enter into force without prejudice to any other provisions that may hereafter be adopted pursuant to Article 87;

HAS ADOPTED THIS REGULATION:

Article 1

Basic provision

Without prejudice to Articles 6, 7 and 23 of this Regulation, agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty and the abuse of a dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, no prior decision to that effect being required.

Article 2

Negative clearance

Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice.

Article 3

Termination of infringements

1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

- (a) Member States;
- (b) natural or legal persons who claim a legitimate interest.

3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

Article 4

Notification of new agreements, decisions and practices

1. Agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85 (3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85 (3) may be taken.

2. Paragraph 1 shall not apply to agreements, decisions or concerted practices where:

- (1) the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States;
- (2) not more than two undertakings are party thereto, and the agreements only:
 - (a) restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods which he has obtained from the other party to the contract may be resold; or
 - (b) impose restrictions on the exercise of the rights of the assignee or user of industrial property rights—in particular patents, utility models, designs or trade marks—or of the person entitled under a contract to the assignment, or grant, of the right to use a method of manufacture or knowledge relating to the use and to the application of industrial processes;
- (3) they have as their sole object:
 - (a) the development or uniform application of standards or types; or
 - (b) joint research for improvement of techniques, provided the results are accessible to all parties thereto and may be used by each of them.

These agreements, decisions and practices may be notified to the Commission.

Article 5

Notification of existing agreements, decisions and practices

1. Agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty which are in existence at the date of entry into force of this Regulation and in respect of which the parties

seek application of Article 85 (3) shall be notified to the Commission before 1 August 1962.

2. Paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4 (2); these may be notified to the Commission.

Article 6

Decisions pursuant to Article 85 (3)

1. Whenever the Commission takes a decision pursuant to Article 85 (3) of the Treaty, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.

2. The second sentence of paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4 (2) and Article 5 (2), nor to those falling within Article 5 (1) which have been notified within the time limit specified in Article 5 (1).

Article 7

Special provisions for existing agreements, decisions and practices

1. Where agreements, decisions and concerted practices in existence at the date of entry into force of this Regulation and notified before 1 August 1962 do not satisfy the requirements of Article 85 (3) of the Treaty and the undertakings or associations of undertakings concerned cease to give effect to them or modify them in such manner that they no longer fall within the prohibition contained in Article 85 (1) or that they satisfy the requirements of Article 85 (3), the prohibition contained in Article 85 (1) shall apply only for a period fixed by the Commission. A decision by the Commission pursuant to the foregoing sentence shall not apply as against undertakings and associations of undertakings which did not expressly consent to the notification.

2. Paragraph 1 shall apply to agreements, decisions and concerted practices falling within Article 4 (2) which are in existence at the date of entry into force of this Regulation if they are notified before 1 January 1964.

Article 8

Duration and revocation of decisions under Article 85 (3)

1. A decision in application of Article 85 (3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.

2. A decision may on application be renewed if the requirements of Article 85 (3) of the Treaty continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

- (a) where there has been a change in any of the facts which were basic to the making of the decision;
- (b) where the parties commit a breach of any obligation attached to the decision;
- (c) where the decision is based on incorrect information or was induced by deceit;
- (d) where the parties abuse the exemption from the provisions of Article 85 (1) of the Treaty granted to them by the decision.

In cases to which subparagraphs (b), (c) or (d) apply, the decision may be revoked with retroactive effect.

Article 9

Powers

1. Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty.

2. The Commission shall have power to apply Article 85 (1) and Article 86 of the Treaty; this power may be exercised notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.

3. As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.

Article 10

Liaison with the authorities of the Member States

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85 (3).

2. The Commission shall carry out the procedure set out in paragraph 1 in close and constant liaison with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure.

3. An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85 (3) of the Treaty.

4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official to represent it who, if prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 11

Requests for information

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15 (1) (b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons,

companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15 (1) (b) and Article 16 (1) (c) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

Article 12

Inquiry into sectors of the economy

1. If in any sector of the economy the trend of trade between Member States, price movements, inflexibility of prices or other circumstances suggest that in the economic sector concerned competition is being restricted or distorted within the common market, the Commission may decide to conduct a general inquiry into that economic sector and in the course thereof may request undertakings in the sector concerned to supply the information necessary for giving effect to the principles formulated in Articles 85 and 86 of the Treaty and for carrying out the duties entrusted to the Commission.

2. The Commission may in particular request every undertaking or association of undertakings in the economic sector concerned to communicate to it all agreements, decisions and concerted practices which are exempt from notification by virtue of Article 4 (2) and Article 5 (2).

3. When making inquiries pursuant to paragraph 2, the Commission shall also request undertakings or groups of undertakings whose size suggests that they occupy a dominant position within the common market or a substantial part thereof to supply to the Commission such particulars of the structure of the undertakings and of their behaviour as are requisite to an appraisal of their position in the light of Article 86 of the Treaty.

4. Article 10 (3) to (6) and Articles 11, 13 and 14 shall apply correspondingly.

*Article 13***Investigations by the authorities of the Member States**

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 14 (1), or which it has ordered by decision pursuant to Article 14 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorisation in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorisation shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, the officials of the Commission may assist the officials of such authorities in carrying out their duties.

*Article 14***Investigating powers of the Commission**

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorised by the Commission are empowered:

- (a) to examine the books and other business records;
- (b) to take copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises; land and means of transport of undertakings.

2. The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 15 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorised officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of

the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15 (1) (c) and Article 16 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorised by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

*Article 15***Fines**

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5000 units of account where, intentionally or negligently:

- (a) they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Articles 4 or 5; or
- (b) they supply incorrect information in response to a request made pursuant to Article 11 (3) or (5) or to Article 12, or do not supply information within the time limit fixed by a decision taken under Article 11 (5); or
- (c) they produce the required books or other business records in incomplete form during investigations under Article 13 or 14, or refuse to submit to an investigation ordered by decision issued in implementation of Article 14 (3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the

undertakings participating in the infringement where, either intentionally or negligently:

- (a) they infringe Article 85 (1) or Article 86 of the Treaty; or
- (b) they commit a breach of any obligation imposed pursuant to Article 8 (1).

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

3. Article 10 (3) to (6) shall apply.

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

5. The fines provided for in paragraph 2 (a) shall not be imposed in respect of acts taking place:

- (a) after notification to the Commission and before its decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification;

- (b) before notification and in the course of agreements, decisions or concerted practices in existence at the date of entry into force of this Regulation, provided that notification was effected within the time limits specified in Article 5 (1) and Article 7 (2).

6. Paragraph 5 shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

Article 16

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

- (a) to put an end to an infringement of Article 85 or 86 of the Treaty, in accordance with a decision taken pursuant to Article 3 of this Regulation;
- (b) to refrain from any act prohibited under Article 8 (3);
- (c) to supply complete and correct information which it has requested by decision taken pursuant to Article 11 (5);
- (d) to submit to an investigation which it has ordered by decision taken pursuant to Article 14 (3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 10 (3) to (6) shall apply.

Article 17

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 18

Unit of account

For the purposes of applying Articles 15 to 17 the unit of account shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 19

Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

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

3. Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85 (3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 20***Professional secrecy**

1. Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation.
2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.
3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

*Article 21***Publication of decisions**

1. The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.
2. 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.

*Article 22***Special provisions**

1. The Commission shall submit to the Council proposals for making certain categories of agreement, decision and concerted practice falling within Ar-

ticle 4 (2) or Article 5 (2) compulsorily notifiable under Article 4 or 5.

2. Within one year from the date of entry into force of this Regulation, the Council shall examine, on a proposal from the Commission, what special provisions might be made for exempting from the provisions of this Regulation agreements, decisions and concerted practices falling within Article 4 (2) or Article 5 (2).

*Article 23***Transitional provisions applicable to decisions of authorities of the Member States**

1. Agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty to which, before the entry into force of this Regulation, the competent authority of a Member State has declared Article 85 (1) to be inapplicable pursuant to Article 85 (3) shall not be subject to compulsory notification under Article 5. The decision of the competent authority of the Member State shall be deemed to be a decision within the meaning of Article 6; it shall cease to be valid upon expiration of the period fixed by such authority but in any event not more than three years after the entry into force of this Regulation. Article 8 (3) shall apply.
2. Applications for renewal of decisions of the kind described in paragraph 1 shall be decided upon by the Commission in accordance with Article 8 (2).

*Article 24***Implementing provisions**

The Commission shall have power to adopt implementing provisions concerning the form, content and other details of applications pursuant to Articles 2 and 3 and of notifications pursuant to Articles 4 and 5, and concerning hearings pursuant to Article 19 (1) and (2).

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

Done at Brussels, 6 February 1962.

For the Council

The President

M. COUVE DE MURVILLE