

Supplement to

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SECRETARIAT OF THE COMMISSION OF THE
EUROPEAN ECONOMIC COMMUNITY

REGULATION 17⁽¹⁾

First implementing regulation pursuant to Articles 85 and 86 of the Treaty

The Council of the European Economic Community,

NOTING the provisions of the Treaty establishing the European Economic Community and especially Article 87 thereof:

NOTING the Commission's proposal,

NOTING the opinion of the Economic and Social Committee,

NOTING the opinion of the European Parliament,

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

CONSIDERING that in determining the particulars of the application of Article 85, paragraph 3, due account must be taken of the need, on the one hand, of ensuring effective supervision and, on the other hand, of simplifying administrative control to the greatest possible extent;

CONSIDERING that it therefore appears necessary to make it in principle obligatory for enterprises wishing to invoke Article 85, paragraph 3, to notify the Commission of their agreements, decisions and concerted practices;

CONSIDERING however that such agreements, decisions and concerted practices are probably very numerous and cannot therefore all be examined at the same time and that a number of them have special features which may make them less of a threat to the development of the Common Market;

CONSIDERING that there is consequently a need to establish provisionally a more flexible system for certain categories of agreements, decisions and concerted practices, without prejudging, however, the question of their validity under Article 85;

CONSIDERING, moreover, that it may be in the interest of enterprises to know whether the agreements, decisions or concerted practices in which they participate, or are contemplating participation, are likely to lay them open to action by the Commission under Article 85, paragraph 1, or Article 86;

CONSIDERING that in order to secure the uniform application of Articles 85 and 86 in the Common Market, it is necessary to fix the rules under which the Commission, working in close and constant liaison with the competent authorities in the Member States, can take the measures necessary for the application of the said Articles;

CONSIDERING that, for this purpose, the Commission must have the co-operation of the competent authorities in the Member States and be empowered, over the whole Common Market area, to require information and take the necessary steps to bring to light the existence of any agreement, decision or concerted practice prohibited by Article 85, paragraph 1, or of any abuse of a dominant position prohibited by Article 86;

CONSIDERING that if the Commission is to carry out its task of watching over the implementation of the Treaty it must be empowered to address to enterprises

⁽¹⁾ Published in the official gazette of the European Communities, No. 13/62, p. 204.

or associations of enterprises recommendations and decisions designed to put an end to any infringement of Articles 85 and 86;

CONSIDERING that compliance with Articles 85 and 86 and the fulfilment of obligations imposed on enterprises and associations of enterprises under the present Regulation must be enforceable by means of fines and penalties;

CONSIDERING that it is desirable to confirm the right of the enterprises concerned to be heard by the Commission, that it is desirable to give third parties whose interests may be affected by a decision the prior opportunity to submit their comments, and that it is desirable to ensure that the decisions taken be published to a substantial extent;

CONSIDERING that all decisions taken by the Commission under the present Regulation will be subject to review by the Court of Justice under the conditions defined in the Treaty, and that it is moreover desirable to confer on the Court of Justice, under Article 172, full jurisdiction in respect of decisions by which the Commission imposes fines or penalties;

CONSIDERING that the present Regulation can enter into force without prejudice to any other provisions which may be adopted later under Article 87;

has approved the present Regulation :

Article 1

Basic provision

The agreements, decisions and concerted practices referred to in Article 85, paragraph 1, of the Treaty and any abuse of a dominant position on the market within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to this effect being required; Articles 6, 7 and 23 of the present Regulation shall not be affected by this provision.

Article 2

Negative clearance

At the request of the enterprises or associations of enterprises concerned, the Commission may find that, according to the information it has obtained, there are, under Article 85, paragraph 1, or Article 86 of the Treaty, no grounds for it to intervene with respect to an agreement, decision or practice.

Article 3

Ending of infringements

(1) If, acting on request or *ex officio*, the Commission finds that an enterprise or association of enterprises is infringing Article 85 or Article 86 of the Treaty, it can by means of a decision oblige the enterprises or associations of enterprises concerned to put an end to such infringement.

(2) A request to this effect may be submitted by :

a) Member States;

b) Natural and legal persons and associations of persons, who show a justified interest.

(3) Without prejudice to the other provisions of the present Regulation, the Commission, before taking the decision mentioned in paragraph 1, may address to the enterprises or associations of enterprises concerned recommendations designed to put an end to the infringement.

Article 4

Notification of new agreements, decisions and practices

(1) The Commission shall be notified of any agreements, decisions or concerted practices referred to in Article 85, paragraph 1, of the Treaty which have come into being after the entry into force of the present Regulation and for which those concerned wish to invoke Article 85, para-

graph 3. As long as such notification has not taken place, no decision to issue a declaration under Article 85, paragraph 3, may be rendered.

(2) Paragraph 1 shall not be applicable to agreements, decisions and concerted practices where :

i) enterprises of only one Member State take part and where such agreements, decisions and practices involve neither imports nor exports between Member States;

ii) only two enterprises take part and the sole effect of these agreements is :

a) to restrict the freedom of one party to the contract to fix prices or conditions of trading in the resale of goods which have been acquired from the other party to the contract, or

b) to impose restraint on the rights of any person acquiring or using industrial property rights — particularly patents, utility models, registered designs or trade marks — or on the rights of any person entitled, under a contract, to acquire or use manufacturing processes or knowledge relating to the utilisation or application of industrial techniques.

iii) their sole object is :

a) the development or the uniform application of standards and types,

b) joint research to improve techniques, provided that the result is accessible to all parties and that each of them can exploit it.

The Commission may be notified of such agreements, decisions and practices.

Article 5

Notification of existing agreements, decisions and practices

(1) The Commission must be notified before August 1, 1962, of any agreements, decisions and concerted practices referred to in Article 85, paragraph 1, of the Treaty

which are already in existence at the date of entry into force of the present Regulation and in respect of which those concerned wish to invoke Article 85, paragraph 3, of the Treaty.

(2) Paragraph 1 is not applicable where the said agreements, decisions and concerted practices fall within the categories referred to in paragraph 2 of Article 4; the Commission may be notified of these.

Article 6

Decisions to issue a declaration under Article 85, paragraph 3

(1) When the Commission decides to issue a declaration under Article 85, paragraph 3, it shall indicate the date from which the decision shall take effect. This date shall not be prior to the date of notification.

(2) The second sentence of paragraph 1 shall not be applicable to the agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2, nor to those which are referred to in Article 5, paragraph 1, and of which the Commission has been notified within the time-limit fixed therein.

Article 7

Special provisions for existing agreements, decisions and practices

(1) Where agreements, decisions and concerted practices already in existence at the date of the entry into force of the present Regulation and of which the Commission has been notified before August 1, 1962, do not meet the requirements of Article 85, paragraph 3, of the Treaty, and where the enterprises and associations of enterprises concerned put an end to them or modify them so that they no longer fall under the prohibition laid down in Article 85, paragraph 1, or so that they then meet the requirements of Article 85, paragraph 3, the prohibition laid down in Article 85, paragraph 1, shall be applicable only for a period fixed by the Commission. A deci-

sion by the Commission pursuant to the foregoing sentence cannot be invoked against enterprises or associations of enterprises which have not given their express assent to the notification.

(2) Paragraph 1 shall be applicable to agreements, decisions and concerted practices which are already in existence at the date of the entry into force of the present Regulation and which fall within the categories referred to in Article 4, paragraph 2, provided that notification shall have taken place before January 1, 1964.

Article 8

Period of validity and revoking of decisions to issue a declaration under Article 85, paragraph 3

(1) A decision to issue a declaration under Article 85, paragraph 3, of the Treaty shall be valid for a specified period and may have certain conditions and stipulations attached.

(2) The decision may be renewed on request provided that the conditions laid down in Article 85, paragraph 3, of the Treaty continue to be fulfilled.

(3) The Commission may revoke or alter its decision or prohibit those concerned from taking certain courses of action :

a) where the *de facto* situation has changed with respect to a factor essential in the granting of the decision;

b) where those concerned infringe a stipulation attached to the decision;

c) where the decision is based on false information or has been obtained fraudulently; or

d) where those concerned abuse the exemption from the provisions of Article 85, paragraph 1, of the Treaty granted to them by the decision.

In the cases covered by sub-paragraphs *b)*, *c)* and *d)*, the decision can also be revoked with retroactive effect.

Article 9

Competence

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

(2) The Commission shall have competence to apply Article 85, paragraph 1, and Article 86 of the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7, paragraph 2, have not expired.

(3) As long as the Commission has not initiated any procedure pursuant to Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85, paragraph 1, and Article 86 in accordance with Article 88 of the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7 have not expired.

Article 10

Liaison with the authorities of the Member States

(1) The Commission shall transmit without delay to the competent authorities of the Member States copies of the requests, applications and notifications together with copies of the most important documents which have been sent to it with the purpose of establishing the existence of infringements of Article 85 or Article 86 of the Treaty, or with the purpose of obtaining negative clearance or a decision to issue a declaration under Article 85, paragraph 3.

(2) It shall carry out the procedures mentioned in paragraph 1 in close and constant liaison with the competent authorities of the Member States; and these authorities may submit their views on the said procedures.

(3) A Consultative Committee on Cartels and Monopolies shall be consulted prior to any decision consequent upon a course of procedure referred to in paragraph 1 and prior to any decision concerning the renewal, the alteration or the revocation of a decision to issue a declaration under Article 85, paragraph 3, of the Treaty.

(4) The Consultative Committee shall be composed of officials competent in the field of cartels and monopolies. Each Member State shall appoint one official to represent it, who, if he is prevented from attending, may be replaced by another official.

(5) The consultation shall take place at a joint meeting called by the Commission; the session shall take place fourteen days at the earliest after dispatch of the convocation letter. This letter shall be accompanied by an exposition of the case to be considered, indicating the most important documents, and a preliminary draft of the decision shall be enclosed.

(6) The Consultative Committee may render an opinion even if some members are absent and have not been replaced by another official. The result of the consultation shall be set out in a written statement which shall be attached to the draft of the decision. It shall not be made public.

Article 11

Requests for information

(1) In the execution of the duties assigned to it by Article 89 and by provisions pursuant to Article 87 of the Treaty, the Commission shall have power to seek all necessary information from the Governments and competent authorities of the Member States as well as from enterprises and associations of enterprises.

(2) When sending a request for information to an enterprise or association of enterprises, the Commission shall at the same time address a copy of this request to the

competent authority in the Member State in the territory of which the principal place of business of the enterprise or the association of enterprises is situated.

(3) In its request the Commission shall indicate the legal basis and the purpose of the same, and the penalties for supplying false information laid down in Article 15, paragraph 1, sub-paragraph *b*).

(4) Information must be supplied on request by the owners of the enterprises or by their representatives and, in the case of legal persons, of companies or of associations without legal personality, by the persons responsible for representing them according to the law or the memorandum or articles of association.

(5) Where the enterprise or association of enterprises does not supply the information required within the time-limit set by the Commission, or supplies incomplete information, the Commission's request for information shall be made by means of a decision. This decision shall specify the information requested, fix an appropriate time-limit within which it is to be supplied and specify the sanctions applicable under Article 15, paragraph 1, sub-paragraph *b*), and under Article 16, paragraph 1, sub-paragraph *c*), and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.

(6) The Commission shall at the same time send a copy of its decision to the competent authority of the Member State in the territory of which the principal place of business of the enterprise or association of enterprises is situated.

Article 12

Enquiries by economic sectors

(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 enquiry in the course of which it may request enterprises in the sector concerned to supply the information necessary for giving effect to the principles laid down in Articles 85 and 86 of the Treaty and for carrying out the tasks entrusted to the Commission.

(2) The Commission may in particular request any enterprise or group of enterprises in the sector concerned to communicate to it all agreements, decisions and concerted practices which are exempted from notification by virtue of Article 4, paragraph 2, and Article 5, paragraph 2.

(3) When making enquiries as provided for in paragraph 2, the Commission shall also request enterprises or groups of enterprises whose size suggest that they occupy a dominant position within the Common Market or within a substantial part thereof to supply any particulars relating to the structure of the enterprises and to the conduct of their affairs necessary to appraise their situation in the light of Article 86 of the Treaty.

(4) Article 10, paragraphs 3 to 6, and Articles 11, 13 and 14 shall be applied *mutatis mutandis*.

Article 13

Investigations by authorities of the Member States

(1) At the request of the Commission, the competent authorities of the Member States shall carry out the investigations which the Commission considers necessary under Article 14, paragraph 1, or which it has ordered by a decision taken pursuant to Article 14, paragraph 3. The servants of the competent authorities of the Member States carrying out this investigation shall exercise their powers on production of a written warrant issued by the competent authority of the Member State in the territory of which the investigation is to

be carried out. This warrant shall indicate the subject and the purpose of the enquiry.

(2) The servants of the Commission may, at its request or at that of the competent authority of the Member State in the territory of which the investigation is to be made, assist the servants of this authority in the execution of their duties.

Article 14

Investigating powers of the Commission

(1) In execution of the duties assigned to it by Article 89 and by provisions laid down pursuant to Article 87 of the Treaty, the Commission may conduct all necessary investigations into the affairs of enterprises and associations of enterprises.

To this end the servants authorized by the Commission shall be vested with the following powers :

a) to examine the books and other business documents;

b) to make copies of, or extracts from the same;

c) to ask for verbal explanations on the spot;

d) to have access to all premises, land and vehicles of enterprises.

(2) The servants authorized by the Commission for these investigations shall exercise their powers on production of a written warrant stating the nature and purpose of the enquiry and the fines provided for in Article 15, paragraph 1, sub-paragraph c), in the event of incomplete submission of the books or other business documents required. The Commission shall in good time advise the competent authority of the Member State in the territory of which the investigation is to take place, of this investigation, stating the name and office of the authorized servant.

(3) The enterprises and associations of enterprises must submit to the investigations

ordered by a decision of the Commission. The decision shall state the subject and purpose of the enquiry, fix the date when it is to begin and call attention to the sanctions provided for under Article 15, paragraph 1, sub-paragraph *c*), and Article 16, paragraph 1, sub-paragraph *d*), and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.

(4) Before taking the decisions referred to in paragraph 3, the Commission shall consult the competent authority of the Member State in the territory of which the investigation is to be carried out.

(5) The servants of the competent authority of the Member State in the territory of which the investigation is to be carried out may, at the request of this authority or of the Commission, lend assistance to the Commission's servants in the execution of their duties.

(6) Where an enterprise resists an investigation ordered pursuant to the present Article, the Member State concerned shall lend the servants authorized by the Commission the assistance necessary to enable them to carry out their investigation. The Member State shall, after consulting the Commission, take the necessary measures for this purpose before October 1, 1962.

Article 15

Fines

(1) The Commission may by means of a decision impose on enterprises and associations of enterprises fines of from one hundred to five thousand units of account where, wilfully or through negligence :

a) they supply false or misleading information in an application submitted pursuant to Article 2 or in a notification made pursuant to Articles 4 and 5;

b) they supply false information in reply to a request made pursuant to Article 11, paragraph 3 or 5, or to Article 12, or do

not supply information within a time-limit fixed by a decision taken under Article 11, paragraph 5; or

c) they submit in incomplete form, on the occasion of investigations carried out under Article 13 or Article 14, the books or other business documents required, or decline to submit to an investigation ordered by means of a decision taken pursuant to Article 14, paragraph 3.

(2) The Commission may by means of a decision impose on enterprises and associations of enterprises fines of from one thousand to one million units of account; this last figure may be increased to 10 % of the turnover of the preceding business year of each of the enterprises having taken part in the infringement where these enterprises, wilfully or through negligence :

a) have infringed the provisions of Article 85, paragraph 1, or of Article 86 of the Treaty, or

b) have infringed a stipulation made under Article 8, paragraph 1.

In determining the amount of the fine the duration of the infringement shall be considered in addition to its gravity.

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

(4) The decisions taken under paragraphs 1 and 2 shall have no penal character.

(5) The fines provided for in paragraph 2, sub-paragraph *a*), may not be imposed for actions taking place :

a) after the notification to the Commission and prior to its decision regarding the application of Article 85, paragraph 3, of the Treaty, in so far as these actions do not go beyond the limits of the activity described in the notification;

b) prior to the notification of and within the framework of the agreements, decisions and concerted practices existing at the date of entry into force of the present Regulation, provided that this notification has been made within the time-limits laid down

in Article 5, paragraph 1, and Article 7, paragraph 2.

(6) Paragraph 5 shall not apply once the Commission has informed the enterprises concerned that after a preliminary examination it considers that the conditions of Article 85, paragraph 1, of the Treaty have been fulfilled and that application of Article 85, paragraph 3, is not warranted.

Article 16

Penalties

(1) The Commission may by means of a decision impose on enterprises or associations of enterprises penalties of from fifty to one thousand units of account per day of delay, reckoned from the date fixed in its decision, in order to oblige them:

a) to put an end to an infringement of Article 85 or Article 86 of the Treaty in conformity with a decision taken pursuant to Article 3;

b) to discontinue any action prohibited under Article 8, paragraph 3;

c) to supply completely and truthfully any information which it has requested by a decision taken under Article 11, paragraph 5;

d) to submit to any investigation it has ordered by a decision taken pursuant to Article 14, paragraph 3.

(2) When the enterprises or associations of enterprises have fulfilled the obligation which it was the object of the penalty to enforce, the Commission may fix the final amount of the penalty at a figure lower than that which would result from the initial decision.

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

Article 17

Review by the Court of Justice

The Court of Justice shall have full jurisdiction within the meaning of Article 172

of the Treaty to adjudicate on proceedings instituted against the decisions by which the Commission has fixed a fine or a penalty; it may cancel, reduce or increase the fine or the penalty imposed.

Article 18

Unit of account

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

Article 19

Hearing of the parties concerned and of third parties

(1) Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the enterprises or associations of enterprises concerned an opportunity to express their views on the points objected to which have been taken into consideration by the Commission.

(2) So far as the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons or associations of persons. If natural or legal persons or associations of persons who show that they have a sufficient interest ask to be heard, their request shall be granted.

(3) When the Commission intends to give negative clearance pursuant to Article 2 or to render a decision applying Article 85, paragraph 3, of the Treaty, it shall publish the essential content of the application or notification, inviting all interested third parties to submit their observations within a time-limit which it shall fix and which shall not be less than one month. Publication shall respect the justified interest of enterprises that their business secrets should not be divulged.

Article 20

Professional secrets

(1) Information gathered pursuant to Articles 11, 12, 13 and 14 may not be used for any purpose other than that for which it was requested.

(2) Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States as well as their officials and other employees may not disclose matters which have come to their knowledge through the application of the present Regulation and which by their nature are professional secrets.

(3) The provisions of paragraphs 1 and 2 shall not hinder the publication of general surveys or reviews not containing information relating to particular enterprises or associations of enterprises.

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 name the parties concerned and give the essential content of the decisions; the justified interest of the enterprises that their business secrets should not be divulged shall be respected.

Article 22

Special provisions

(1) The Commission shall submit to the Council proposals for making certain categories of agreements, decisions and concerted practices such as are referred to in Article 4, paragraph 2, and Article 5, paragraph 2, subject to the notification provided for in Articles 4 and 5.

(2) Within one year from the entry into force of the present Regulation the Council shall examine, on a proposal of the Commission, any special provisions which could

be made in derogation from the provisions contained in this Regulation with respect to the agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2.

Article 23

Transitional system applicable to decisions taken by authorities of Member States

(1) Agreements, decisions and concerted practices referred to in Article 85, paragraph 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, paragraph 1, to be inapplicable pursuant to Article 85, paragraph 3, shall not be subject to the notification provided for in Article 5. The decision of the competent authority of the Member State shall be considered a decision within the meaning of Article 6; its validity shall expire at the latest on the date which the said authority has fixed, but may not exceed a duration of three years reckoned from the entry into force of the present Regulation. Article 8, paragraph 3 shall apply.

(2) Applications for renewal of the decisions referred to in paragraph 1 shall be settled by the Commission in accordance with Article 8, paragraph 2.

Article 24

Implementing provisions

The Commission shall have authority to lay down implementing provisions concerning the form, content and other details of applications submitted pursuant to Articles 2 and 3 and of the notification provided for in Articles 4 and 5, and to lay down those concerning the hearings provided for in Article 19, paragraphs 1 and 2.

The present Regulation shall be binding in every respect and directly applicable in each Member State.

