

Competition co-operation and enforcement

INVENTORY OF CO-OPERATION AGREEMENTS



EUROPEAN COMPETITION NETWORK (ECN)

This document contains the European Competition Network (ECN) taken from the 2015 Inventory of Co-operation Agreements prepared by the OECD Competition Committee. This document includes a list of regulation on: notification of new cases and of envisaged enforcement decisions; exchange of information; investigative assistance and work-sharing mechanisms and “well-placed” agency.

The full inventory, the OECD Recommendation and accompanying documents can be found online at www.oecd.org/competition/inventory-competition-agreements.htm.

In Europe, the notable regional platform is the European Competition Network (ECN), established among member countries of the European Union (EU) with the adoption of Regulation 1/2003.¹ It consists of the competition authorities of the EU Member States and the European Commission and its members apply the same competition rules, namely Article 101 and 102 of the Treaty for the Functioning of the European Union (TFEU). The ECN is designed to serve as a platform for close co-operation of European competition authorities in cases where Article 101 and 102 of TFEU are applied.

The ECN includes several innovative mechanisms of enforcement co-operation, such as informing each member of the network of new cases and envisaged enforcement decisions, exchanging evidence and other information, helping each other with investigations, and flexible work sharing. These mechanisms are provided in Regulation 1/2003 and the joint statement of the Council and the Commission on the functioning of the European Competition Network. A European Commission Notice on cooperation within the Network of Competition Authorities (Network Notice)² includes further details.

¹ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty (Official Journal L 1, 04.01.2003, p.1-25).

² Commission Notice on cooperation with the Network of Competition Authorities (Official Journal C 101, 27.04.2004, p.43-53).

Notification of new cases and of envisaged enforcement decisions. Regulation 1/2003 lays down an obligation for national competition authorities (NCAs) to inform each other of all cases that they investigate under Article 101 or Article 102 of TFEU at an early stage of the investigations. This allows the members of the network to detect multiple procedures and start co-operating at an early stage. They inform each other of cases by means of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case³. NCAs are obliged to inform the European Commission of an envisaged enforcement decision at least 30 days before adopting it and the information may be shared with other members of the network.

Box 1. Regulation 1/2003

CHAPTER IV COOPERATION

Article 11 Cooperation between the Commission and the competition authorities of the Member States

3. The competition authorities of the Member States shall, when acting under Article [101] or Article [102] of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article [101] or Article [102] of the Treaty.

³ Network Notice Article 17.

Exchange of information. Regulation 1/2003 gives all competition authorities the power to exchange and use confidential information, including documents, statements and digital information, for efficient and effective co-operation.

Box 2. Regulation 1/2003

CHAPTER IV COOPERATION

Article 12 Exchange of information

1. For the purpose of applying Articles [101] and [102] of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article [101] or Article [102] of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article [101] or Article [102] of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Investigative Assistance. Regulation 1/2003 also provides that an NCA may ask another NCA to carry out any inspection or other fact finding measures to collect information on its behalf. Similarly, the European Commission can ask an NCA to carry out an inspection on its behalf.

Box 3. Regulation 1/2003

CHAPTER V POWERS OF INVESTIGATION

Article 22 Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article [101] or Article [102] of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Work-sharing mechanisms and “well-placed” agency. The ECN is based on a system of parallel competences and establishes flexible work sharing rules to let a “well-placed” agency handle a case. These principles are indicative and non-binding and provided in the Network Notice. According to the Network Notice, a case may be re-allocated to a well-placed agency where the authority receiving a complaint considers that it was not well-placed or where other authorities also considered themselves well placed. When re-allocation takes place, re-allocation to a single competition authority is preferred. The Network notice sets out criteria and examples to choose a well-placed agency. The criteria focus on whether a material link between the infringement and the territory of a Member State exists.

Box 4. Network Notice

2. Division of Work

2.1. Principles of allocation

5. The Council Regulation is based on a system of parallel competences in which all competition authorities have the power to apply Articles [101] or [102] of the Treaty and are responsible for an efficient division of work with respect to those cases where an investigation is deemed to be necessary. At the same time each network member retains full discretion in deciding whether or not to investigate a case. Under this system of parallel competences, cases will be dealt with by:

- a single NCA, possibly with the assistance of NCAs of other Member States; or
- several NCAs acting in parallel; or
- the Commission.

6. In most instances the authority that receives a complaint or starts an ex-officio procedure will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure (see paragraph 18 below) where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act (see paragraphs 8 to 15 below).

7. Where re-allocation is found to be necessary for an effective protection of competition and of the Community interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible. In any event, re-allocation should be a quick and efficient process and not hold up ongoing investigations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17. The Council Regulation creates a mechanism for the competition authorities to inform each other in order to ensure an efficient and quick re-allocation of cases. Article 11(3) of the Council Regulation lays down an obligation for NCAs to inform the Commission when acting under Article [101] or [102] of the Treaty before or without delay after commencing the first formal investigative measure. It also states that the information may be made available to other NCAs. The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case. Information should therefore be provided to NCAs and the Commission before or just after any step similar to the measures of investigation that can be undertaken by the Commission under Articles 18 to 21 of the Council Regulation. The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. Network members will inform each other of pending cases by means of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case. They will also provide each other with updates when a relevant change occurs.

18. Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months, starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation. During this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action.

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