

Public consultation on Regulations 1/2003 and 773/2004 setting out the procedures for applying EU antitrust rules

We welcome the public consultation on Regulations 1/2003 and 773/2004, initiated by the European Commission, and would like to submit the following proposals for consideration. Almost twenty years have passed since the reform of EU competition law, and we are of the opinion that certain provisions, in particular on the cooperation between, on one hand, national courts and competition authorities and, on the other hand, the European Commission, are worth reviewing in light of the past experiences.

I. No formal framework for the agreement of the Commission with the statement of objections of national competition authorities

Pursuant to Article 11(4) of Regulation 1/2003, 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.

When the national competition authority sends its statement of objections / decision to the Commission, the latter is not required to approve it formally. The Commission prefers telephone calls to written communication (for example, e-mail correspondence) when it comes to approving SOs / decisions.

The objective of the cooperation between the Commission and national competition authorities is to ensure the coherent and unified application of EU competition law (Articles 101 and 102 TFEU), despite the decentralised enforcement system. As a consequence of this, the „support and agreement” by the Commission – practically – means that the decision of the acting national competition authority is (will be) in accordance with the case law of the European Union which includes not only the decisions of the European Commission but also the judgment of the EU courts. Formal approval by the Commission, therefore, could enhance the legitimacy of the decisions of national competition authorities.

Furthermore, if the competition authority could demonstrate that its factual and legal assessment of the case enjoys the formal approval of the European Commission, the agreement

of the Commission could have quasi evidentiary nature before the national court in case the undertaking(s) concerned appeal against the decision of the competition authority.

We propose that the cooperation between the Commission and national competition authorities be more formal in cases when the latter (also) act on EU legal basis, in particular when the competition authority sends its SO/decision to the Commission to „obtain” its agreement. The best solution would be to require the Commission with a binding provision inserted into Regulation 1/2003 to express its agreement in written form in all cases, which later could be used before the national court to prove that the Commission also finds the decision of the competition authority being in line with settled EU case law. The agreement of the Commission may prove to be useful also for the court itself, because it may increase the possibility to refer the case for a preliminary ruling.

II. No transparency of decisions when the Commission aims to act as amicus curiae before a national court

Pursuant to Article 15(3) of Regulation 1/2003, where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations. For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

The regulation distinguishes between written observations, which the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court.

The decision of the Commission to submit observations depends on the prerequisite whether the coherent application of Articles 101 or 102 TFEU requires to step up before the national court.

Any party can inform the Commission about a pending case and can request that the Commission submit observations to the national court (which is registered and passed on to Unit A1), but this does not oblige the Commission to act.

Although there are detailed rules in the DG Comp’s Antitrust Manual of Procedures as to how it is decided whether the Commission submits observations, no provisions mention that the Commission should inform the notifying party about the underlying reasons why it has decided to act or not to act. Given that there is no obligation for the Commission to inform the requesting party about whether it submits or does not submit amicus curiae observations, the party has no knowledge of such activity, which makes the system opaque.

We propose that if a party (e.g. the undertaking or the competition authority concerned) requests the Commission to submit observations to the national court, the grounds underpinning its decision whether it acts or does not act could be known by the requesting party within the framework a brief formal reasoning.

III. More detailed rules when the Commission carries out dawn raids in Member States

Pursuant to Article 20 of Regulation 1/2003, officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection. If the assistance requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

In good time before the inspection, the Commission must give notice of the inspection to the national competition authority of the Member State in whose territory it is to be conducted. Advance consultation is needed with the Member State in whose territory the inspection is to be conducted; in case the officials of the Member State in question did not assist the Commission, the Commission shall also send information after the inspection.

As can be seen, there are quite lax rules (for example, in good time) concerning the dawn raids of the Commission in Member States.

We propose that in connection the Commission's on-site inspections in a Member State, more exact rules should be formulated on the cooperation between the national competition authority and the Commission, in particular the deadlines determined before and after the Commission's inspections. It would be reasonable to determine that the Commission must give notice of the inspection to the national competition authority at least 3 days before the inspection. Furthermore, as can be seen from the provision itself, it is possible for the Commission not to ask for assistance from the national competition authority, and when there is no assistance from the national competition authority to the inspection of the Commission, the Commission shall send information after the inspection. We propose that asking for assistance from the concerned national competition authority should be made obligatory for the Commission, because the national competition authority knows better the local circumstances and legal regulation in the

Member State how to conduct on-site inspections. Furthermore, the formal rules of the advance consultation between the Commission and the national competition authority should be determined in more detail with binding rules in order that the national competition authority could prepare for the assistance.

Budapest, 30 August 2022