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MFE-MEDIAFOREUROPE N.V.

RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON THE COUNCIL REGULATION (EC) NO 1/2003 OF 16 DECEMBER 2002 ON THE IMPLEMENTATION OF THE RULES ON COMPETITION

1. MFE-MEDIAFOREUROPE N.V. ("**MFE**") welcomes the opportunity to contribute to the consultation ("**Consultation**") for the assessment of the performance of the current antitrust procedural framework for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") consisting of Regulation (EC) No 1/2003 ("**Regulation**") and Regulation 773/2004 ("**Implementing Regulation**", together also "**Antitrust Procedural Regulations**").

2. Since its entry into force the Regulation has significantly improved antitrust enforcement in terms of efficiency and uniform application across the Union. That's why in general the operation of the Regulation so far can be considered a success.

3. In addition, Member States alone would not be able to tackle in an effective way conducts which simultaneously affects several Member States – or, often all of them. Thus, there is a clear "EU added value" in having an EU-wide set of rules for the enforcement of Articles 101 and 102 TFEU.[1] Likewise, it is clear that the power to issue fines has been an essential part of an effective enforcement of the competition provisions.[2]

4. However, MFE believes that that a number of changes are necessary to make the Antitrust Procedural Regulations "*truly fit for the digital age*".[3]

   - First, while the Digital Markets Act ("**DMA**") is set to address a number of concerns for which previously there was an enforcement gap, it is clear that the DMA remains limited compared to the scope of the antitrust rules. Thus, the challenge for the coming years will be to coordinate the enforcement of antitrust rules with that of the DMA, taking into account that the objectives pursued by the two are complementary.
   - Second, while data gathering tools such as requests for information and inspections have proved effective (within the limits provided in the case law to respect the right of defence and proportionality), the pace with which digital markets evolve along with business and consumer behaviour cast doubt on the effectiveness of **market investigations into sectors of the economy**. Instead of passively relying on the answers provided by the interviews, the Commission could set up special task forces to collect data on an ongoing basis, thus building specific expertise on certain markets and practices.
   - Third, in digital markets the length of proceedings risks skewing the scales in favour of defendants. Thus, the **handling of complaints** could be improved in terms of procedure and substance. In particular, the introduction of binding time limits for a decision on the in-depth investigation of complaints, beyond the current four-month indicative timeframe ,[4] could

[1] For this reason, the answer to questions 13, 18, 31 related to this criterion is positive.

[2] For this reason, the answer to questions from 32 to 39 under section E is positive.

[3] The reference is to the speech given by Margrethe Vestager on 31 March 2022, during which the revision of the Regulation was announced (https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2203).

[4] See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, § 61.

further promote undertakings' willingness to file a complaint. On substance, the grounds for dismissing complaints could be interpreted more narrowly. For instance, like some NCAs, the Commission could publish a list of priorities, which would carry a presumption of Union interest in case of a complaint relevant for such priorities. Finally, efficiency-enhancing measures include allowing joint complaints and improving the procedure for access to file through so called "confidentiality rings" of people forming essentially a clean team.

- Fourth, as regards the type of decisions, in **commitments procedure** the Commission should favour setting targets rather than specific behaviours, to allow investigated undertakings and competitors to better adapt their business models according to changing markets.
- Fifth, **the limited use of interim measures** is out of sync with digital markets, calling for a substantial improvement. For instance, complainants should have a bigger role (currently interim measures may only be adopted at the initiative of the Commission). Also, *inaudita altera parte* procedures in cases of extreme urgency should be possible (as it is the case in some Member States). Finally, the standard for harm and irreparable harm should be adjusted: harm to consumers or to a sector of the economy, even if it can be redressed through financial compensation, should be considered. The practice of several NCAs – and France in particular, is worth careful consideration.
- Sixth, the power to issue decisions **finding that Article 101 or 102 TFEU is not applicable** to a specific case is a useful guiding instrument. However, to date the Commission has not made use of this tool. This is a serious shortcoming because of the lack of guidance for EU undertakings, especially when they seek to engage in cooperation to better withstand competition from non-EU undertakings in the digital sector.
- Seventh, the **cooperation between the Commission and National Competition Authorities** ("**NCAs**") should be further strengthened to avoid conflicting outcomes. The "Lead agency model", where joint investigation teams, made by experts in certain enforcement matters drawn from the Commission and NCAs, could be useful model. Also, the Commission should exercise a stronger leadership, building on the expertise acquired through enforcing the DMA.

A. General questions (Question 1-13)

- *Effectiveness*

5. In its two decades of application, the Regulation has proved its usefulness with respect to the intended purpose, namely, to ensure an effective and uniform application of Articles 101 and 102 TFEU within the territory of the Union.

6. First, the Regulation strengthened the Commission's powers, allowing it, for example, to close proceedings by making the commitments proposed by the parties legally binding, to conduct an inspection at the private premises of the company's employees, to ask questions about facts or documents during inspections in business premises, to interview legal and natural persons with their consent.

7. More importantly, the Regulation enabled the direct application of the EU competition rules in their entirety by NCAs and the national courts – the system of "parallel enforcement", while creating a system of close cooperation between these national institutions and the Commission – the European Competition Network (the "**Network**").

8. As shown in the chart below, between 2004 and 2021, there have been 2,944 proceedings, of which 2,515 were handled by NCAs.

Figure 1 – Total number of antitrust cases[5]

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
-of which COM cases	102	22	21	10	9	22	13	26	6	5	23	43	18	29	31	19	12	18	**429**
-of which NCA cases	200	181	143	140	149	129	157	137	104	115	173	135	127	120	133	119	126	127	**2515**
Total number of case investigations of which the Network has been informed	**302**	**203**	**164**	**150**	**158**	**151**	**170**	**163**	**110**	**120**	**196**	**178**	**145**	**149**	**164**	**138**	**138**	**145**	2944

9. By its very nature, the parallel enforcement system may pose a risk of uneven application of antitrust law within the EU. For this reason, the Regulation has provided certain safeguards, such as the obligation to apply EU law in parallel with national law for agreements affecting trade between Member States or abusive conducts prohibited by Article 102 TFEU (Article 3.1. of the Regulation), the prohibition of applying national law in a more restrictive sense than provided in Article 101(1) and (3) (Article 3.2. of the Regulation), the prohibition for NCAs to take decisions contrary to decisions taken by the Commission (Article 16 of the Regulation), the cooperation measures provided for in Article 11 of the Regulation, and in particular the obligation to inform the Commission of the initiation of proceedings or the adoption of a decision (Article 11.3 and 11.4 of the Regulation).

10. NCAs have made extensive use of the cooperation tools offered by the Regulation. The total number of cases in which an envisaged decision has been submitted by NCAs pursuant to Article 11.4 of the Regulation since its entry into force is 1,336 (see figure 2) with Italy, France and

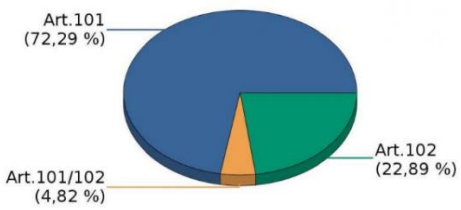
[5] https://competition-policy.ec.europa.eu/european-competition-network/statistics_en.

Germany being the most active in this regard,[6] and Article 101 TFUE being the most used legal basis for the envisaged decisions submitted by the NCAs (figure 3).

Figure 2 – Envisaged decisions submitted by NCAs[7]

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
Cases in which an envisaged decision has been submitted by NCAs during the period indicated	27	68	64	71	59	70	91	81	85	48	102	94	77	79	71	82	84	83	**1336**

Figure 3 – Statistics by type of suspected infringement 2021[8]



11. According to Article 11.6 of the Regulation, once the Commission has been informed, it can decide to act on the case, pre-empting NCAs from applying Article 101 and 102 TFEU. This can happen during the initial allocation period (two months) or even after under the following circumstances: (*i*) network members envisage conflicting decisions in the same case, (*ii*) network members envisage a decision which is obviously in conflict with consolidated case law, (*iii*) network members are unduly drawing out proceedings in the case, (*iv*) there is a need to adopt a Commission decision to develop Community competition policy, (*v*) the NCAs concerned do not object.[9]

12. The record shows that the Commission has seldom used this power, preferring cooperation with national authorities. In fact, in some cases the Commission has itself restricted its action. For instance, in the ongoing Amazon Buy Box case,[10] the Commission is investigating all EU Members States except Italy, given that the Italian NCA started a case – and brought it to an end in December 2021.[11]

[6] With 178, 173 and 128 envisaged decisions submitted respectively.

[7] https://competition-policy.ec.europa.eu/european-competition-network/statistics_en.

[8] https://competition-policy.ec.europa.eu/european-competition-network/statistics_en.

[9] Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03, §54.

[10] The Commission opened the proceedings by decision on the 10.11.2020 under case AT.40703 - *Amazon - Buy Box.*

[11] Decision of 30.11.2021 in case A528 – *FBA Amazon.*

For these reasons, the answer to questions 1 - 5 (reproduced below) is positive.

1. *In your view, has Regulation 1/2003 achieved its objective of an effective and uniform application of Article 101 TFEU in the EU?*
2. *In your view, has Regulation 1/2003 achieved its objective of an effective and uniform application of Article 102 TFEU in the EU?*
3. *In your view, has the system of parallel enforcement of Article 101 TFEU by the European Commission and the National Competition Authorities introduced by Regulation 1/2003 led to increased and more effective enforcement across the EU?*
4. *In your view, has the system of parallel enforcement of Article 102 TFEU by the European Commission and the National Competition Authorities introduced by Regulation 1/2003 led to increased and more effective enforcement across the EU?*
5. *In your view, has Regulation 773/2004 been effective in empowering the Commission to regulate certain aspects of proceedings for the application of Articles 101 and 102 TFEU (notably concerning the initiation of proceedings, the Commission's powers of investigation, the handling of complaints, the exercise of the right to be heard, access to the file, the limitations to the use of information obtained and time-limits)?*

- *Efficiency*

13. As clarified in the *Notice on NCA cooperation*,[12] the allocation of competences between the Commission and the NCAs is informed by the principle according to which cases should be allocated to the "well placed" Authority.

14. Therefore, NCAs in those Member States where the effects of the infringement take place may be considered better placed, while the Commission is particularly well placed if one or several agreement(s) or practice(s) have effects on competition in more than three Member States.

15. This principle delivers an efficient allocation of competences because it lets NCAs that are closer to the affected markets take action.

16. The abolition of the previous system based on the notification for agreements and the Commission's exclusive power over exemptions under Article 101.3 TFEU (replacing *ex ante* control over the legality of agreements with a system based on self-assessment by stakeholders), also deserves positive assessment.

17. For a start, the Commission has been able to allocate its resources more effectively, thus focusing on those sectors that are most critical from a competitive standpoint.

18. As highlighted in the *Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003*,[13] the Commission has adopted "*34 decisions imposing fines in cartel cases since the entry into application of Regulation 1/2003 until 31 March 2009, compared with 27 in the period from 1 January 2000 to 30 April 2004*" and "*27 decisions enforcing Articles 81 and 82 (final decisions on substance) outside the field of cartels in the period since 1 May 2004*", compared

[12] *Commission Notice on cooperation within the Network of Competition Authorities*, 2004/C 101/03.

[13] Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council - *Report on the functioning of Regulation 1/2003*, {COM(2009)206 final.

to the 17 prohibition decision in the period from 1 January 2000 until 30 April 2004.

For these reasons, the answer to questions 6 - 8 (reproduced below) is positive.

6. *In your view, has the system of parallel enforcement of Articles 101 and 102 TFEU by the European Commission and the National Competition Authorities introduced by Regulation 1/2003 led to more efficient enforcement across the EU, compared to the previous centralised system set up by Regulation No 17?*
7. *In your view, has the removal of the system of notification of business agreements to the Commission resulted in a more efficient application of Article 101 TFEU?*
8. *In your view, have the procedures set up in Regulation 1/2003 and Regulation 773/2004 generally contributed to a timely and efficient enforcement of Articles 101 and 102 TFEU?*

- *Relevance*

19. The objective of an effective and uniform application of Articles 101 and 102 TFEU posed by the Regulation is more relevant than ever. However, the digitalization of markets has put strains on the current procedural framework.

20. The different conclusions reached by some national authorities (French, Swedish, Italian, English and German) regarding the lawfulness of the narrow best-price clauses applied by Booking since 2013 were a powerful indication that the model needed rethinking.

21. To some extent, the DMA has provided a reply to this issue. As explicitly acknowledged in the accompanying Explanatory Memorandum, the legal basis for the adoption of the DMA is Article 114 TFEU precisely because of the objective of ensuring greater harmonisation in a context where "*given the intrinsic cross-border nature of the core platform services provided by gatekeepers, regulatory fragmentation will seriously undermine the functioning of the Single Market for digital services as well as the functioning of digital markets at large*".

22. Furthermore, Article 1.5 of the DMA prevents Member States from imposing on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets. Finally, Article 1.7 of the DMA directs NCAs to refrain from taking decisions that would run counter to a decision adopted by the Commission under the DMA. Thus, national legislation such as Section 19a of the German Act against Restraints of Competition would need rethinking.

23. However, the DMA remains limited to certain well-defined practices. Effective enforcement of Articles 101 and 102 TFEU remains more relevant than ever in the digital space. Thus, the need for more coordinated action should also permeate the way in which the Antitrust Procedural Regulations are applied. It is clear that the system of parallel enforcement should remain. But there has to be a clearer leadership to sharpen the Commission's and NCAs' powers in the coming years. We develop this point in reply to questions under Section F.

For these reasons, the answer to questions 9 – 10 (reproduced below) is positive, but the answer to question 11 is negative.

9. *In your view, are the objectives of an effective and uniform application of Article 101 TFEU of Regulation 1/2003 still relevant?*
10. *In your view, are the objectives of an effective and uniform application of Article 102 TFEU of Regulation 1/2003 still relevant?*
11. *In your view, is the procedural framework established by Regulations 1/2003 and 773/2004 still relevant in light of the developments of the global and European economy, e.g. digitisation and the move towards sustainable development? If you reply in the negative, please explain which developments have affected the relevance of the procedural framework in your view.*

- *Coherence*

24. According to its Article 1.6, the DMA is without prejudice to the application of antitrust law by both the Commission and the NCAs. Thus, the Antitrust Procedural Regulations and the rules governing the application of the DMA will be complementary, and antitrust will continue to play a crucial role in (*i*) detecting new forms of anticompetitive behavior not covered by the DMA, (*ii*) enforcing competition rules for digital services not covered by Core Platform Services, and (*iii*) enforcing competition rules for digital players providing core platform services, but falling short of the thresholds for gatekeepers, and (iv) for core platform services of the gatekeeper not subject to the DMA obligations.

For these reasons, the answer to question 12 (reproduced below) is positive.

12. *In your view, are Regulations 1/2003 and 773/2004 overall coherent with other EU legislation and EU policies?*

B. Powers of investigation (Questions 14 - 18)

25. According to Article 17 of the Regulation, the Commission can carry out an **investigation into a sector of the economy** or a type of agreement if there appears to be a restriction or distortion of competition. At the end of this procedure, the Commission may publish a report and invite third parties to provide their comments.

26. According to Article 18 of the Regulation, the Commission may require undertakings and associations of undertakings to provide it with all necessary information by request or decision ("**Request for information**" or "**RFI**"). Article 19 of the Regulation provides the Commission with the power to interview any natural or legal person who has given consent to do so to collect information useful for the investigation. Finally, Article 20 of the Regulation deals with the power of inspection, through which the Commission can, by agreement or by surprise, enter any premises, land and means of transport of undertakings, examine the books and other records related to the business, take copies, seal the premises and ask any member of the undertaking, during the inspection, explanations on facts or documents relating to the subject-matter and purpose of the inspection.

27. This section focuses on market investigations, RFIs and the power to conduct inspections to assess the efficiency of these tools.

- *Market investigations*

28. The market investigations so far focused on media, roaming, leased lines, local loop, energy, financial services, pharmaceuticals, e-commerce and the "Internet of Things". In performing market investigations, the Commission can also make use of inspections, including dawn raids (Article 17.2 of the Regulation).[14]

29. The pace with which digital markets evolve along with business and consumer behaviour cast doubt on the effectiveness of this tool, which, based on past experience, takes a long time and, therefore, is at risk of delivering an obsolete picture by the time it is complete.

30. Given this shortcoming, the proposal put forward in the report 'Competition 4.0' of 2018 of the German Federal Minister for Economic Affairs and Energy, which suggests "*the introduction of a new instrument based on the model of the British "market investigation"*, should be given serious consideration.[15]

31. According to this proposal, market investigations should collect "*data about specific situations and markets to be gathered systematically over longer periods of time in order to gain insights into the mode of operation and functional deficits of markets and to develop proposals on how the operation of these markets could be improved*".

32. In addition, the proposal advocates a cross-sector approach: "[i]*n contrast with the instrument of sectoral investigation under Article 17 Regulation 1/2003, it should also be possible to use this instrument in cooperation between different directorates and without its being limited to a narrow*

[14] See for example the unannounced inspections that opened the market investigation into pharmaceuticals: https://ec.europa.eu/commission/presscorner/detail/en/IP_08_49.

[15] Report by the Commission Competition Law 4.0 of the German Federal Minister for Economic Affairs and Energy, "*A new competition framework for the digital economy*", of 30.9.2019.

competition law perspective".

33. Building on this proposal, the Commission could set up special task forces with the necessary expertise to understand the dynamics specific to each market with the role of continuously monitoring antitrust compliance.

34. With such a solution, the Commission would not passively rely on the answers provided by the interviewed parties, but would play a more active role in the supervision of those markets that seem prone to anticompetitive practices.

For these reasons, the answer to questions 14.a, 15.a and 16.a (reproduced below) is negative.

14. *In your view, do the following investigative tools provided by Regulation 1/2003 provide for an effective means to detecting and investigating potential infringements of Articles 101 or 102 TFEU?*
    a. *Investigations into sectors of the economy and into types of agreements (Article 17 of Regulation 1/2003).*
15. *In your view, are the following investigative tools provided by Regulation 1/2003 an efficient means to collect evidence related to potential anti-competitive conduct prohibited by Articles 101 and 102 TFEU?*
    a. *Investigations into sectors of the economy and into types of agreements (Article 17 of Regulation 1/2003).*
16. *In your view, do the following investigative tools provided by Regulation 1/2003 continue to be relevant when it comes to detecting and investigating potential infringements of Articles 101 or 102 TFEU, notably in light of the increasing trend towards a more digitised economy?*
    a. *Investigations into sectors of the economy and into types of agreements (Article 17 of Regulation 1/2003).*

- *Requests for information*

35. RFIs are routine in antitrust proceedings. In terms of effectiveness, RFIs constitute a very flexible tool as they can be employed for a variety of purposes, including requesting explanations on pieces of evidence acquired during an inspection, obtaining the views of third parties, requesting information from entities that are outside the EEA and thus cannot be subject to inspection.

36. The Courts have provided useful guidance, indicating that the request should be limited to information that are "necessary".[16] In addition, the RFI needs to be proportionate, while an overly general formulation may lead to the annulment of the Commission's decision.[17] Also, RFIs must

[16] See, for example, paragraph 15 of the judgment of the Court of Justice of 18 October 1989 in case 374/87 - *Orkem v Commission*: "*Even if it already has evidence, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to request further information to enable it better to define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved*".

[17] See the judgment of the Court of Justice of 10 March 2016 in case C-247/14 P – *HeidelbergCement v. Commission.*

remain subject to the right protecting against self-incrimination.[18] Finally, undertakings may refuse to provide, in response to an RFI, documents that are covered by legal privilege within the limits established by case law of the EU Courts.[19]

37. Thus, with the clarifications provided in the case-law, RFI remain a useful tool for the Commission's investigations in the future.

For these reasons, the answer to questions 14.b, 15.b and 16.b (reproduced below) is positive.

14. *In your view, do the following investigative tools provided by Regulation 1/2003 provide for an effective means to detecting and investigating potential infringements of Articles 101 or 102 TFEU?*
    b. Requests for information (Article 18 of Regulation 1/2003).
15. *In your view, are the following investigative tools provided by Regulation 1/2003 an efficient means to collect evidence related to potential anti-competitive conduct prohibited by Articles 101 and 102 TFEU?*
    b. Requests for information (Article 18 of Regulation 1/2003).
16. *In your view, do the following investigative tools provided by Regulation 1/2003 continue to be relevant when it comes to detecting and investigating potential infringements of Articles 101 or 102 TFEU, notably in light of the increasing trend towards a more digitised economy?*
    b. Requests for information (Article 18 of Regulation 1/2003).

- *Inspections*

38. Surprise inspections are an effective data-gathering tool, although they are invasive as regards the freedoms of the investigated companies, whose operations may even be compromised for the time necessary to complete the operations.[20] The case law on the right of defence, however, provides enough safeguards. For instance, the Court of Justice has clarified that the Commission cannot undertake fishing expeditions during an inspection and that "*a search may be made only for those documents coming within the scope of the subject matter of the inspection*".[21]

39. The right of undertakings subject to inspection also finds protection in light of the European Convention of Human Rights, whose Article 8 establishes that "*everyone has the right to respect for his private and family life, his home and his correspondence*". For instance, in the *Vinci Construction* case,[22] the European Court of Human Rights found a violation of Article 8 of the ECHR

[18] As provided for by Recital 23 of the Regulation, "*when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement*".

[19] Judgment of the Court of Justice of 18 May 1982 in case 155/79 - *AM & S Europe v. Commission.*

[20] See, for example, the Judgement of the General Court of 26 November 2014 in case T-272/12, *Energetický a průmyslový holding v. Commission*, dismissing the appeal brought against the decision of the Commission sanctioning two undertakings for obstructing a Commission inspection by failing to block an email account and diverting incoming emails.

[21] Judgment of the Court of Justice of 18 January 2015, in case Case C 583/13 P, *Deutsche Bahn AG and others v European Commission*, §60.

[22] Decision of the ECHR of 2.4.2015, *Vinci Construction and GMT genie civil and services v. France* (applications no. 63629/10 and 60567/10).

due to the acquisition by the French NCA of documents covered by legal privilege.

40. Thus, inspections remain an effective enforcement tool, provided that they remain within the boundaries drawn up by the Courts.

For these reasons, the answer to questions 14.d, 15.d and 16.d (reproduced below) is positive.

14. *In your view, do the following investigative tools provided by Regulation 1/2003 provide for an effective means to detecting and investigating potential infringements of Articles 101 or 102 TFEU?*
    c. Power to take statements (Article 19 of Regulation 1/2003).
15. *In your view, are the following investigative tools provided by Regulation 1/2003 an efficient means to collect evidence related to potential anti-competitive conduct prohibited by Articles 101 and 102 TFEU?*
    c. Power to take statements (Article 19 of Regulation 1/2003).
16. *In your view, do the following investigative tools provided by Regulation 1/2003 continue to be relevant when it comes to detecting and investigating potential infringements of Articles 101 or 102 TFEU, notably in light of the increasing trend towards a more digitised economy?*
    c. Power to take statements (Article 19 of Regulation 1/2003).

C. Procedural rights of parties and third parties, handling of complaints (Questions 19 – 25)

41. This section focuses on the handling of complaints. Experience shows that this is an extremely effective tool for effective antitrust enforcement. To make it truly future proof, however, a number of improvements could be considered in terms of effectiveness and efficiency.

- *Effectiveness*

42. In digital markets the length of proceedings risks skewing the scales in favour of defendants, as infringing undertakings are in the position to accurately calculate costs and benefits of prolonging the infringement. As a result, the damages to the very structure of the concerned market may become irreparable.

43. Against this background, the introduction of binding time limits for a decision on the in-depth investigation of complaints, beyond the current four-month indicative timeframe,[23] could further promote undertakings' willingness to file a complaint. Reasonable and binding time limits can encourage a constructive dialogue between the Commission and harmed undertakings.

44. Also, the grounds for dismissing complaints should be interpreted more narrowly. In particular, Article 7 of Regulation 773/2004, whereby the limited probability of finding a violation can be a ground for rejection for "lack of Union interest", often acts as a deterrent for complainants, also given the Court's case-law.[24]

45. In this regard, the practice of some NCAs publishing a list of priorities whose analysis will be fast tracked, is noteworthy. Instead of gleaning the Commission's priorities from public statements of Commissioners and officials, the Commission could publish a list of priorities, which would carry a presumption of Union interest in case of a complaint relevant for such priorities.

For these reasons, the answer to question 19 is negative, as the current proceedings do not sufficiently take into account the risk that proceedings' duration could favour the parties to the investigation, while the answer to question 20 is positive.

19. *In your view, are the provisions of Regulations 1/2003 and 773/2004 adequate to effectively protect the procedural rights of all participants in the Commission's proceedings, i.e. both parties to investigations and other interested parties?*
20. *In your view, does the role of the Hearing Officer and the availability of oral hearings contribute to the effective protection of procedural rights of the participants in the Commission's proceedings?*

[23] See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, § 61.

[24] See the judgment of the Court of Justice of 30 June 2022 in case C-149/21 P *Fakro sp. z o.o. v European Commission*, § 65.

- *Efficiency*

46. A joint complaint procedure could further create efficiencies in the complaint process. The level of concentration has on average increased across all markets, hitting especially high thresholds in some digital markets. Thus, relevant conducts carried out by a single market player are likely to affect simultaneously a large number of players. Allowing undertakings in a similar position to file a joint complaint could be an efficiency-enhancing system: undertakings could save costs, and the Commission would avoid having to open parallel cases. In addition, joint complaints could provide a wider range of data.

47. Also, as regards access to file, a case could be made for increasing the scope of confidentiality rings and/or for simplifying access to documents. One of the causes of the length of proceedings can be identified in the vast amount of editing needed to provide non-confidential versions of documents.

48. An enhanced requirement to provide sets of non-confidential documents, which must be readily available to interested parties, could decrease the time required to provide access to case files. Further, expansive use of confidentiality rings is likely to diminish proceedings' duration even further, while, at the same time, providing adequate protection for business interests.

For these reasons, the answer to questions 21, 22 and 23 is negative.

21. *In your view, does the procedural framework provided by Regulations 1/2003 and 773/2004 (e.g. statement of objections, access to file, oral hearing) ensure the efficient exercise of the right to be heard?*
22. *In your view, does the procedural framework provided by Regulations 1/2003 and 773/2004 that grants addressees of statements of objections adopted by the Commission access to the file strike the right balance between, on the one hand, the effort required by the Commission and by undertakings in relation to this process and, on the other hand, the ability of undertakings to effectively exercise their rights of defence?*
23. *In your view, does the procedural framework provided by Regulations 1/2003 and 773/2004 for the handling of formal complaints allow for the efficient handling of these complaints?*

D. Commission Decisions (Questions 26 – 31)

- *The imposition of remedies*

49. In *Microsoft*,[25] the General Court held that remedies are for the "*re-establishment of compliance with the rules infringed*". In fast-changing markets such as the digital ones, where exclusionary practices may have irreversible effects, remedies should be forward-looking, requiring offending undertakings to comply with obligations aimed at ensuring greater market opening, such as technical interoperability or data access.

50. A high degree of flexibility would also make commitments more effective in rapidly changing markets. Setting targets rather than specific behaviours would leave the possibility for companies to adapt their business models according to changing markets. Notably, in the *Google Shopping* case,[26] the Commission recognized that "[a]*s there is more than one way in conformity with the Treaty of bringing that infringement effectively to an end, it is for Google and Alphabet to choose between those various ways [..]*", thus leaving the parties some discretion as to the implementation of the most appropriate remedies.

For these reasons, the answer to questions 26.a, 26.b, 28.a, 28.b, 29.a and 29.b (reproduced below) is positive.

26. In your view, are the following decisional powers granted to the Commission by Regulation 1/2003 adequate to ensure the effective application of Articles 101 and 102 TFEU?
- *a. To require undertakings and associations of undertakings to bring an infringement to an end*
- *b. To impose behavioural or structural remedies on undertakings and associations of undertakings*

28. In your view, are the following decisional powers of the Commission adequate to ensure in an efficient manner full compliance with Articles 101 and 102 TFEU?
- *a. To require undertakings and associations of undertakings to bring an infringement to an end*
- *b. To impose behavioural or structural remedies on undertakings and associations of undertakings*

29. In your view, are the following decisional powers granted to the Commission by Regulation 1/2003 still necessary to ensure the effective application of Articles 101 and 102 TFEU?
- *a. To require undertakings and associations of undertakings to bring an infringement to an end*
- *b. To impose behavioural or structural remedies on undertakings and associations of undertakings*

[25] Judgement of the General Court of 17 September 2007, T-201/04 – *Microsoft*, §1276.

[26] Commission decision of 27.6.2017, in case AT.39740 – *Google Search (Shopping)*, §698.

- *Interim measures*

51. Since the adoption of the Regulation, the Commission has for the first time imposed interim measures in 2019 on Broadcom, world leader in the supply of chipsets for TV set-top boxes and modems, considering strong *prima facie* evidence of abuse of dominant position in violation of Article 102 TFEU.[27] However, the limited use of interim measures is out of sync with digital markets, calling for a substantial improvement.

52. First, complainants should play a greater role. Currently, Article 8 of the Regulation is too limited, providing that interim measures may only be adopted at the initiative of the Commission. In France, for example, interim measures can be both *ex officio* and upon request.

53. Second, faster procedures are in order. At present, the Commission must (i) issue a statement of objections, (ii) give the addressee the opportunity to submit a response, (iii) grant access to the file, as well as an (iii) oral hearing (Article 27 of the Regulation). By contrast, aligning with the practice of those Member States, *inaudita altera parte* procedures in cases of extreme urgency should be possible.

54. Third, the requirement of "serious and irreparable damage to competition" has been interpreted very narrowly, with *Camera Care* remaining the leading case in this space, even if it dates back to 1980.[28] Looking at national practices, there seem to be different standards with reference to this criterion. Some countries, for example, require proof of harm to competition while others require harm to certain interested parties. In France, interim relief can be provided in case of harm to complainants, consumers or a sector of the economy.

55. As regards the standard of proof for irreparability of harm, France again has a different standard, allowing interim measures even in case the harm can be redressed through financial compensation.[29]

56. The practice of the NCAs – and France in particular – should be carefully considered to expand the use of this instrument, which could be of paramount importance in digital markets.

[27] Commission decision of 16.10.2019, in case AT.40608 – *Broadcom.*

[28] Judgment of the Court of Justice of 17 January 1980, in case Case 792/79 R - *Camera Care Ltd v Commission.*

[29] On these distinctions, see the OECD Competition Policy Roundtable Background Note on "*Interim Measures in Antitrust Investigations*".

For these reasons, the answer to questions 26.c, 28.c, 29.c (reproduced below) is negative.

26. In your view, are the following decisional powers granted to the Commission by Regulation 1/2003 adequate to ensure the effective application of Articles 101 and 102 TFEU?
c. To order interim measures
28. In your view, are the following decisional powers of the Commission adequate to ensure in an efficient manner full compliance with Articles 101 and 102 TFEU?
c. To order interim measures
29. In your view, are the following decisional powers granted to the Commission by Regulation 1/2003 still necessary to ensure the effective application of Articles 101 and 102 TFEU?
c. To order interim measures

- *Finding of inapplicability*

57. According to Recital 14 of the Regulation, in "*exceptional cases where the public interest of the Community so requires*", the Commission can issue a decision pursuant to Article 10 of the Regulation, thus declaring Article 101 or 102 TFEU not applicable to a specific case, "*with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice*".

58. In a system such as the one introduced by the Regulation, which is based on self-assessment by the undertakings concerned as to the compatibility of their agreements with antitrust law, Article 10 of the Regulation is a useful guiding instrument. However, to date the Commission has not made use of this tool. This is a serious shortcoming because of the lack of guidance for EU undertakings, especially when they seek to engage in cooperation to better withstand competition from non-EU undertakings.

For these reasons, the answer to questions 26.e, 28.e, 29.e (reproduced below) is negative.

26. In your view, are the following decisional powers granted to the Commission by Regulation 1/2003 adequate to ensure the effective application of Articles 101 and 102 TFEU?
e. To find that Article 101 and/or Article 102 TFEU are not applicable to a specific case
28. In your view, are the following decisional powers of the Commission adequate to ensure in an efficient manner full compliance with Articles 101 and 102 TFEU?
e. To find that Article 101 and/or Article 102 TFEU are not applicable to a specific case
29. In your view, are the following decisional powers granted to the Commission by Regulation 1/2003 still necessary to ensure the effective application of Articles 101 and 102 TFEU?
e. To find that Article 101 and/or Article 102 TFEU are not applicable to a specific case

F. Cooperation between the Commission and NCAs and courts[30]

- *Cooperation between the Commission and NCAs*

59. Recital 15 of the Regulation promotes close cooperation between the Commission and the NCAs trough arrangements for information and consultation within the context of the Network. Recital 21 of the Regulation emphasises the importance of cooperation also between the Commission and the national courts. Finally, Recital 22 of the Regulation highlights the need for legal certainty and the uniform application of competition law in a system of parallel powers. On this basis, the Commission has issued the *Notice on cooperation within the network of competition authorities* and the *Notice on cooperation between the Commission and courts of the EU Member States in the application of Article 101 and 102 TFEU*.

60. However, the cooperation system should be further strengthened to avoid conflicting outcomes *à la Booking* case. In order to preserve the function of the NCAs and to reduce the risk of conflicting decisions, several solutions were analysed in the OECD Competition Policy Roundtable Background Note of 2022, "*Thinking out of the competition box: enforcement co-operation in other policy areas*".[31]

61. The establishment of joint investigation teams, made by experts in certain enforcement matters, that "*could enable very close case co-ordination and synchronised investigations, as well as direct sharing of confidential information and case related evidence*" (p. 22) is particularly noteworthy. Within these joint investigation teams, a specific national authority could assume a coordinating function in terms of investigative approach and harmonised outcomes, in line with a "Lead agency model" (see §3.4.2 of the OECD Note).

62. Building on the expertise that will be acquired through the enforcement of the DMA, the Commission should be more active within the Network. The Commission's role within the Network is of paramount importance also because NCAs are often precluded from making use of the preliminary reference procedure before EU Courts.[32]

[30] This Paper follows the structure of the questionnaire, focusing on the questions concerning the articles deemed of greatest interest. As explained in the opening, Section E of the questionnaire is not covered because it is widely recognized that the power to issue fines has played a key role in an effective enforcement of the competition provisions.

[31] https://www.oecd.org/daf/competition/thinking-out-of-the-competition-box-enforcement-cooperation-in-other-policy-areas-2022.pdf.

[32] See judgment of the Italian Constitutional Court n. 13/2019, in case *Consiglio Notarile di Milano;* and judgment of the Court of Justice of 16 September 2020 in case C-462/19 – *Anesco.*

For these reasons, the answer to questions 40, 42, 44 and 46 (reproduced below) is negative.

40. In your view, are the provisions regarding the cooperation between the Commission and the National Competition Authorities effective in ensuring the uniform application and enforcement of Articles 101 and 102 TFEU across the EU?
42. In your view, are the provisions on the cooperation between the Commission and the National Competition Authorities adequate to ensure in an efficient manner the uniform application and enforcement of Articles 101 and 102 TFEU across the EU?
44. In your view, are the provisions regarding the cooperation between the Commission and the National Competition Authorities still relevant for the uniform application and enforcement of Articles 101 and 102 TFEU across the EU?
46. In your view, are the provisions regarding the cooperation between the Commission and the National Competition Authorities for the uniform application and enforcement of Articles 101 and 102 TFEU coherent with other EU legislation and EU policies?

- *Cooperation between Commission and national courts*

63. National courts are becoming increasingly important for the enforcement of competition law. In the *Schijndel* case, [33] the Court of Justice ruled that competition rules are among the "*binding rules, directly applicable in the national legal order*" and that therefore national courts are obliged to analyse *ex officio* points of EU competition law whenever the system recognises their duty to consider binding domestic rules even if not raised by the parties.

64. Article 15 of the Regulation allows national courts to request opinions or information held by the Commission for the purposes of applying Articles 101 and 102 TFEU. The opinion given to the Commission is not binding on the national courts and does not preclude them from addressing a request for preliminary ruling to the Court of Justice.

65. Furthermore, paragraph 3 of the same Article provides that the NCAs, acting on their own initiative, may submit written or oral observations to the national courts of their Member State ("*amicus curiae observations*"). This power is also granted to the Commission, but only "*where the coherent application of Article* [101] *or Article* [102] *of the Treaty so requires*".

66. Article 15.2 of the Regulation requires Member States to forward to the Commission a copy of any written judgment of national courts deciding on the application of Articles 101 or 102 "*without delay after the full written judgment is notified to the parties*".

67. However, the use of these tools in practice has been rather limited. According to the Commission's website, the last opinions issued under Article 15.1 of the Regulation date back to 2019 (2) and before that to 2017 (2).[34] The database containing the opinions notified under Article 15.2 also seems to be not updated.[35] Likewise, the *amicus curiae* observations for which consent to

[33] Judgment of the Court of Justice of 14 December 1995, C-430/93 – *Schijndel,* §13.

[34] https://competition-policy.ec.europa.eu/antitrust/national-courts/requests-information-or-opinion_en.

[35] https://ec.europa.eu/competition/elojade/antitrust/nationalcourts/.

publication has been given appear to be very limited in number. [36]

68. Also in view of the increasing importance of private enforcement, the instruments provided by the Regulation for cooperating with the courts need strengthening.

For these reasons, the answer to questions 41, 43, 45 and 47 (reproduced below) is negative.

41. In your view, are the provisions regarding the cooperation between the Commission and the national courts effective in ensuring the uniform application and enforcement of Articles 101 and 102 TFEU across the EU?

43. In your view, are the provisions on the cooperation between the Commission and national courts adequate to ensure in an efficient manner the uniform application and enforcement of Articles 101 and 102 TFEU across the EU?

45. In your view, are the provisions regarding the cooperation between the Commission and the national courts still relevant for the uniform application and enforcement of Articles 101 and 102 TFEU across the EU?

47. In your view, are the provisions regarding the cooperation between the Commission and national courts for the uniform application and enforcement of Articles 101 and 102 TFEU coherent with other EU legislation and EU policies?

MFE, N.V., 5 October 2022

[36] https://competition-policy.ec.europa.eu/antitrust/national-courts/amicus-curiae-observations_en.