Freshfields Bruckhaus Deringer

RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON REGULATIONS 1/2003 AND 773/2004 ON PROCEDURES FOR APPLYING EU ANTITRUST RULES

6 October 2022

1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to respond to the European Commission's (the ***Commission***) public consultation on Regulations 1/2003 (***Regulation 1/2003***) and 773/2004 (***Regulation 773/2004***) (together, the ***Regulations***) on the procedures for applying EU antitrust rules.

1.2 This response is based on our significant experience of advising a wide variety of clients on a broad range of antitrust issues and investigations across numerous jurisdictions.

1.3 The response is submitted on behalf of the Firm and does not necessarily represent the views of any of the Firm's clients. Likewise, it does not necessarily in all respects represent the personal views of every partner in the Firm.

1.4 We are providing this document in addition to responding to the questionnaire, because there are some issues that we would like to set out in more detail than is possible in the questionnaire.

2. SUMMARY

2.1 The Regulations generally provide an enforcement framework which is fit for purpose and provides for an effective and efficient means of enforcing EU antitrust rules. However, in certain aspects they could usefully be amended or further developed, and our suggestions to this end are set out below.

2.2 Also included below are certain suggestions for improvements which do not require any, or significant, change to the Regulations, but rather change to the way they are implemented in day-to-day practice.

2.3 Key suggestions are:

(a) Narrower and <u>better targeted requests for information</u> and document requests, as well as reduced use of Article 18(3)[1] decisions, would speed up investigations and increase efficiency;

(b) A clear timetable for investigations, with some <u>fixed deadlines</u>, would reduce the length of proceedings, and increase transparency and efficiency (the EU Merger Regulation can provide a model);

(c) Clarity at an early stage in investigations on the Commission's <u>concerns/theory of harm</u> would facilitate and make quicker identification of relevant information and documents;

[1] All references to Articles refer to Regulation 1/2003 unless otherwise stated.

(d) Extension of the range of documents protected from disclosure by legal professional privilege would simplify the disclosure process and facilitate in-house access to legal advice;

(e) More clarity and consistency in the rules on access to file, and deadlines for resolving disputes, would increase the efficiency and effectiveness of this process;

(f) Avoiding requiring non-confidential versions of documents produced by the party under investigation before it is clear that access will be required by a third party would reduce workload and make proceedings quicker;

(g) The Commission's enforcement action would be more effective if it were clarified that it has the power to impose measures to restore the market affected by an infringement to a position the companies would have been in without the anti-competitive behaviour; and

(h) Increased transparency and predictability in case allocation as between the European Commission (the Commission) and national competition authorities (NCAs), as well as more consistency of approach as between the Commission and the various NCAs, would benefit parties and (potential) complainants.

3. RESPONSE TO CONSULTATION

The Commission's powers of investigation

This section covers our responses to Questions 14 to 18 of the Commission's consultation.

3.1 The Commission's investigation powers are broadly appropriate and effective, but the following changes should be considered.

Better targeted requests for information (RFIs) and less frequent use of Article 18(3) decisions

3.2 Document requests are often too broad, and frequently it is unclear what the Commission requires, with different case teams taking different views. These issues are exacerbated where an Article 18(3) decision is issued instead of an informal request under Article 18(2).

RFIs and document requests should be narrower and better targeted

3.3 Broad terms such as "all documents concerning X", "all documents including the terms Y or Z" or generic and simple search terms often produce a disproportionate number of documents, including wholly irrelevant and privileged documents. In one case, for example, we produced around 3 million documents in response to an Article 18(3) decision, as a result of including many custodians including predecessors and successors and over a 12 year period.

3.4 This means not only that the Commission has many irrelevant documents on its file, but it leads to unnecessary requests for non-confidential versions of these documents if access to file is required by a third party.

3.5 If the Commission would like the parties to answer a given question using search terms, this should be clear in the question itself. Otherwise, a selection of the most relevant documents should be acceptable.

3.6 The number of custodians must also be considered. Inclusion of all predecessors and successors can increase numbers considerably and cause issues where company structure and functions have changed over time.

3.7 At present, interpretation of an RFI, and adherence to these principles, can vary depending on which case team is dealing with the matter, and explicit codification of principles could remove or at least reduce this inconsistency and make the process more efficient.

Article 18(3) should only be used where there is clear justification for not using the less formal Article 18(2)

3.8 The issues mentioned above become particularly problematic where a document request is issued via an Article 18(3) decision under Regulation 1/2003, given that Article 23(1)(b) provides for sanctions where an Article 18(3) response is "*incorrect, incomplete or misleading*". In practice, this requirement places a disproportionate and unnecessary burden on parties, given that there is no objective criterion to determine whether a response to a document request is "*complete*".

3.9 Provided the response is not misleading, companies should not be at risk of fines for "completeness" where they have taken all reasonable steps to respond to the RFI. For example, it should not be necessary to perform a search for local copies saved on company hardware or mobile devices if standard company practice is to save all final versions on a server/in the cloud or all relevant attachments would have been sent by email and would therefore be caught by server searches.

3.10 In some cases it may be appropriate to agree on a process that can be considered to result in "complete" information. Such an agreement would state that if the parties take certain specified steps, the Commission will deem the information "complete".

Any Article 18(3) decisions should provide for sufficient scoping flexibility

3.11 Allowing for greater flexibility when designing or scoping an Article 18(3) decision will enable parties to align its contents with the principles suggested in 3.5 to 3.8 above, providing for a smoother and more proportionate investigative process.

3.12 Currently parties have limited ability to discuss the reasonableness of an Article 18(3) request with the Commission, although this varies across case teams. Contesting the decision in court is frequently not a viable option, due to the lengthy duration of court proceedings.[2] The threat of fines for incompleteness

[2] Despite the fact that appeals are frequently impracticable, that option needs to remain available, to ensure fundamental rights of defence, and to provide an important check on the Commission.

forces parties to be over inclusive when responding, especially as very short deadlines are often imposed, even for very broad requests.

3.13 This effect is exacerbated by the threat of potentially increased fines for lack of cooperation. Thus, only companies with deep pockets which can assume the additional financial risks are likely to protect their legal rights. This would seem unacceptable in light of the rights of defence guaranteed by Union law.

3.14 An Article 18(3) decision should first be presented to parties in draft form, giving them the opportunity to comment on it before it is made binding, as is the practice in merger cases. For example, where the Commission's search terms will result in a large number of documents, there should be the possibility to discuss appropriate search terms. This would result in a better targeted set of documents being produced, thereby increasing efficiency and reducing the resources needed for all involved.

The use of virtual data rooms should be facilitated to avoid inclusion of irrelevant documents on the Commission's file

3.15 A virtual data room can allow the Commission to review a broad set of documents and only request the documents it actually needs to keep on file, thereby limiting the number of documents on the file.

3.16 Ensuring the Commission's file only includes relevant documents will have benefits for both the Commission and the parties under investigation.

3.17 However, the use of a virtual data room and the selection by the Commission of pertinent documents, does not change the fact that the original request should be proportionate, as parties will still need to conduct a review for relevance and remove privileged and private materials across the documents that are placed in the virtual data room. This review is needed to ensure the Commission will not access documents which it is not entitled to have access to, or that otherwise fall outside the scope of its investigation. The Commission must not use virtual data rooms to carry out fishing expeditions.

3.18 Similarly, where documents have been excluded for privacy reasons, the Commission could have a cursory look at documents in a virtual data room to confirm the categorisation of these documents as "private" but agree not to include such documents on the Commission file.[3]

Preservation orders

3.19 The introduction of a power for the Commission to impose preservation orders, which would be the digital equivalent of the existing powers to physically seal rooms, filing cabinets etc. would be useful. It would reduce the need for RFIs by Article 18(3) decisions and, where they are used, reduce concerns around incompleteness of responses to them. Safeguards would of course be needed to minimise disruption to day-to-day business.

[3] See Case T-452/20 R for an example of a case in which the Court allowed use of a virtual data room to protect sensitive personal data from disclosure.

Extended powers to interview individuals

3.20 Extended powers to interview individuals would be desirable provided they are framed so as to help make the investigative process more efficient, and in particular lead to better scoped and narrower RFIs. Individuals should have the right to request the presence of a lawyer during the interview.

The procedural rights of parties and third parties

This section covers our responses to Questions 19 to 25 of the Commission's consultation.

Introduction of deadlines and procedural steps (using the EU Merger Regulation as a model)

3.21 The introduction of deadlines by which certain steps in an investigation must be taken would improve predictability and efficiency of investigations and help avoid them becoming overlong.

Deadlines should be set for key procedural milestones in Commission investigations

3.22 We consider that a number of important improvements could be made to the timing of key procedural milestones in Commission antitrust investigations. In particular it would be valuable to have formal deadlines for the following procedural steps:

(a) Adoption of a decision to initiate proceedings;

(b) Adoption of a Statement of Objections (***SO***); and

(c) Adoption of a final decision.

3.23 Currently, parties are often left unclear about the scope of the Commission's concern or the applicable theory of harm for too long. Early clarity on the Commission's concerns, facilitated by concrete deadlines, would allow faster resolution of cases, and may also facilitate parties' ability to offer Article 9 commitments and/or stop the offending behaviour more quickly, thereby minimising market harm and possibly facilitating settlement or the taking of commitments.

3.24 Any deadlines for the above procedural milestones could be triggered by the following procedural events:

(a) In the case of adopting a decision to initiate proceedings, from (i) a complete response to all RFIs or (ii) any on-site inspection if applicable and if no subsequent RFI has been issued; and

(b) In the case of adopting an SO or a final decision, from the submission of the response to the decision to initiate proceedings (with the possibility to stop the clock if the investigated party does not respond to any subsequent RFI in a timely manner).

Framework for implementing additional procedural deadlines in practice

3.25 The decision initiating proceedings would be less detailed than an SO and would not need to include all evidence which the Commission might cite in a final decision. However, the parties would be:

(a) Notified of the Commission's main concerns and its theory of harm (as in a preliminary assessment under Article 9); and

(b) Provided with the key documents (as happens after the first settlement meeting in cartel cases).

3.26 In some ways this decision initiating proceedings would be similar to an Article 6(1)(c) decision under the EU Merger Regulation, with the complete response to all RFIs being the equivalent of a complete notification. The decision would be relatively formal in that it would take the form of a formal Commission decision, but it would leave open whether the case is to be resolved by informal settlement, closure of the file, or an Article 7, Article 9 or Article 10 decision.

3.27 Following the decision initiating proceedings, the investigated parties would have the opportunity to respond by a written submission.

3.28 Such an approach would ensure that any subsequent RFIs are properly targeted and allow parties to defend themselves more quickly and effectively.

3.29 The decision could also include conditions which the company must respect pending a final decision, introducing a sort of standstill obligation, as exists under the EU Merger Regulation. This would serve the same purpose as interim measures but with a lower procedural burden and burden of proof as the deadline for a final decision will be clearer.

3.30 The possibility of interim measures would remain, although shorter timelines might in some cases remove the need for interim measures. In other cases interim measures could be used to help accelerate timelines, and there is scope to make the process of imposing them faster and simpler, while retaining sufficient formality to safeguard rights of defence.

3.31 The formal decisions proposed above could usefully be accompanied by State of Play meetings at which more explanations and clarifications can be made, or e.g. to initiate settlement proposals but it is important that in each case the main points also be set out formally in a decision.

Scope of legal professional privilege

Range of documents protected from disclosure by legal professional privilege

3.32 The definition of documents protected from disclosure to the Commission by legal professional privilege should be extended to include documents containing legal advice:

(a) Produced by EU in-house lawyers who are members of their national Bar;

(b) Produced by third country qualified lawyers who are members of their national Bar; and

(c) Relating to areas outside the subject matter of the investigation.

3.33 There does not appear any justification for the Commission refusing to extend legal professional privilege to in-house lawyers or non-EEA qualified lawyers where such lawyers are members of a bar and thus required to meet the required professional standards. Furthermore, a client needs to be able to obtain legal advice from its lawyers, with the confidence that such advice is privileged and will not be disclosed to authorities. The privileged nature of such advice should not depend on whether the correspondence falls strictly within the subject matter of the investigation. To avoid protracted discussions as to whether advice is outside the subject matter of the investigation or not, it appears more efficient to simply exclude the document on the basis of privilege. In any event, if the legal advice is outside the subject matter of the investigation, one would expect the correspondence to be irrelevant and therefore outside the scope of the Commission's investigation.

Access to file

More clarity and consistency in the rules is required.

3.34 Clear and consistently applied rules should be set out on:

(a) The use to which information can be put where restricted access is given (e.g. data room or DVD limited to a confidentiality ring);

(b) Access to documents: there is currently inconsistency between Regulation 1/2003 and Transparency Regulation 1049/2001. It does not make sense that a party cannot gain access to documents held by DG Competition and relevant to its defence under Regulation 1/2003, but that such documents can be obtained under the Transparency Regulation 1049/2001[4];

(c) The right to additional access to file later if further information is added to the file; and

(d) The requirement to resolve access to file issues before the period for response to the SO starts to run.

Deadlines should be set for resolving disputes.

3.35 Deadlines should be set for DG Comp and the Hearing Officer to deal with disputes on access to file. The Hearing Officer may require additional resources in order to deal quickly with requests.

Provision of non-confidential versions of documents should not be required before it is clear to whom the documents will be disclosed and the timing of such disclosure.

3.36 The redactions required for the preparation on a non-confidential version of a document will differ depending on the identity of the third party to whom the

[4] For example, Visa, a party under investigation, under Regulation 1/2003 was refused access to certain documents concerning the *MasterCard* settlement but did – after significant time - get access after making an application under the Transparency Regulation.

document will be disclosed. For example, correspondence involving a particular third party will clearly not be confidential vis-à-vis that third party. Accordingly, the identity of the party to whom the documents will be disclosed to should be provided, together with the possibility of providing different non-confidential versions for different parties.

3.37 It is not necessary and reasonable to ask parties under investigation to provide non-confidential versions of the requested internal documents long before it is clear whether anybody will ever have access to these documents. When parties have to submit a large number of internal documents to the Commission the creation of non-confidential versions is extremely time-consuming, burdensome, and costly. Therefore, it should be kept to the absolute minimum.

3.38 The proposed timing of disclosure of information will also impact the extent of the information considered confidential. Accordingly requesting non-confidential versions of documents at an early stage of an investigation, before any disclosure is required may have little purpose and will not facilitate the identification of confidential information contained in the Commission's final decision. Information considered confidential during a preliminary stage of the Commission's investigation may no longer be confidential once the Commission has issued its final decision – either due to the passage of time or because information on the Commission's final position disclosed in the press announcement renders the information less commercially sensitive.

Confidentiality rings

3.39 Increased use of confidentiality rings would reduce the burden of the access to file process on all parties involved. In particular it would be useful to narrow down what documents are relevant and for which ones non-confidential versions need to be created. This would in many cases significantly speed up the process and prevent spending resources on creating non-confidential versions of documents which are ultimately found by all parties to be of little relevance.

3.40 Where following review within the confidentiality ring, a document is found to be relevant, a non-confidential version could be requested. It would also assist in appropriate cases in agreeing a non-confidential summary which fully ensures parties' rights of defence without disclosing commercially sensitive information.

Complaints

3.41 The Regulations should make clear that both a complainant and the party which is the subject of a complaint have a legal right to have an investigation finalised within a certain timeframe or after a certain procedural point.

Commission decisions

This section covers our responses to Questions 26 to 31 of the Commission's consultation.

Remedies imposed with a prohibition decision

3.42 The wording of a prohibition decision needs to be such as to ensure that the company cannot circumvent the decision by adopting alternative behaviour which restricts competition in a slightly different but similar way. The current practice of stating in a prohibition decision that measures which have an "equivalent object or effect" does not seem to be effective. The meaning of the term "equivalent object or effect" is subject to interpretation and often raises more questions than it solves.

3.43 Furthermore, the Regulations should be amended to make it clear that the Commission has the power to impose measures to restore the market affected by an infringement to a position the companies would have been in without the anti-competitive behaviour. It is often not enough to protect a competitive environment to bring an infringement to an end if the damage has already been done and market has already tipped. This is of particular concern in the case of Article 102 TFEU infringements.

Fines and limitation periods

This section covers our responses to Questions 32 to 39 of the Commission's consultation.

3.44 We do not suggest any changes to the Commission's fining powers or to the limitation rules.

Cooperation between the Commission and national competition authorities

This section covers our responses to Questions 40 to 47 of the Commission's consultation.

Case allocation and consistency of approach as between the Commission and national competition authorities (NCAs)

Transparency and predictability in case allocation as between the Commission and NCAs should be increased.

3.45 Case allocation as between the Commission and NCAs is unpredictable, and it is sometimes hard to understand why a particular decision has been made. For example, the Commission did not take up a complaint against the Polish railway company PKP after the Polish authority declined to take action against a State-owned company.[5] On the other hand, it has taken a case concerning the Czech mobile phone network markets.[6] Another example is the division of labour between the Italian NCA and the Commission in handling the Aspen price abuse case.[7]

3.46 Parties and (potential) complainants would benefit from a clearer understanding of when and why the Commission takes action or not. This could be provided both by updating the relevant Commission Notice, but also by providing

[5] Commission decision, 12 August 2019 (not available in English).

[6] Press release, 11 July 2022 (decision not published).

[7] Commission decision, 10 February 2021.

periodic reports, perhaps as part of the Annual Report of activity, explaining decisions taken in particular situations.

There should be more consistency of approach as between the Commission and the various NCAs.

3.47 Similarly, priority setting, and approach vary considerably across the different authorities. For example, the German *Bundeskartellamt* hardly ever imposes fines in Article 102 TFEU cases, in contrast to the Commission and other NCAs. Also, policies on when to use settlement with remedies, rather than fines, could be made more consistent across authorities.