Public consultation: Evaluation of Regulations 1/2003 and 773/2004

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1. Introduction

We welcome the opportunity to respond to the consultation of the European Commission on the evaluation of Regulations 1/2003 and 773/2004. The comments in this position paper focus on questions 5, 19, 24, 25 that relate to the handling of complaints and the protection of the rights of interested third parties in antitrust investigations and proceedings conducted by the European Commission. These questions essentially ask whether the Regulations 1/2003 and 773/2004 (together the 'Procedural Regulations') have allowed for (1) the effective and efficient handling of formal antitrust complaints by the Commission and (2) the adequate (effective, efficient, coherent) protection of the procedural rights of all participants in the Commission's proceedings, including other interested parties. The paper also reflects on the question whether the system of parallel enforcement of Articles 101 and 102 TFEU have led to more effective enforcement across the EU.

The paper draws on insights from our (empirical) research into the rules and practices that govern the handling and rejecting of antitrust complaints by the European Commission and the national competition authorities (NCAs), offered in Consumers' access to EU competition law procedures: Outer and inner limits (2014) 51 Common Market Law Review (2) 483-521 and The European Commission's Handling of Non-priority Antitrust Complaints: An Empirical Assessment' (2022) 45 World Competition (2) 265–294.

2. The nature of the Commission's antitrust proceedings

The procedures for the enforcement of Articles 101 and 102 TFEU have traditionally been conceived along a strictly bilateral structure that opposes the European Commission and the undertaking targeted by its investigations. All other natural or legal persons concerned by the procedure are considered *third parties*, either as holders of a "legitimate interest" or a "sufficient interest". Third parties intervene in different procedural qualities.

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The undertakings or associations of undertakings under investigation have a right to be heard before the decision concerning them is adopted. This right is today enshrined in the Procedural Regulations and is protected by the *audi alteram partem* principle, which is a general principle of EU law.[2] Very different is the legal status of third parties that, being potentially affected by the same decision, can participate in the procedure. Access to the procedure of third parties other than the targeted undertakings is filtered by a discretionary assessment of their interest to participate.[3]

3. The role of third parties

Third parties are important "watchdogs" who can assist competition authorities in monitoring the good functioning of markets. Third parties may include the (small and medium) undertakings or association of undertakings that are competitors or customers of the undertakings being investigated, but also consumers, consumer organizations, and civil society organizations. Their knowledge of the day-to-day functioning of markets, in particular those in mass-market consumer goods, make third parties important information providers for competition authorities.[4]

Experience both at the EU and national level has shown that in particular in non-cartel cases for which leniency is not available, formal complaints are an important tool to discover anti-competitive conduct.[5] The possibility for third parties to lodge a complaint and participate in the (subsequent) administrative procedures also fulfils an important deterrent function. Furthermore, it is an important aspect of transparency and accountability that enhances the legitimacy of the proceedings and the final decision making. Third parties' participation functions as a complement to judicial review, because third parties are given the opportunity to contradict the possible decision of the competition authority, invoking errors, flaws, or mistakes which could ultimately lead to the illegality of the final decision.[6]

4. Decentralization and the handling of complaints

The reform of EU antitrust enforcement established by Regulation 1/2003 envisaged a more pronounced role for consumers and citizens: they were called upon to actively take part in the public and in the private enforcement of the competition rules.[7] The new decentralized enforcement system abolished the notification system, but it purposefully maintained a system of formal complaints. The European Commission implemented various measures to encourage third parties to come forward with

[2] Regulation 1/2003, Article 27; Regulation 773/2004, Articles 10-12. The right to be heard is, moreover, reinforced by the fundamental right to a fair trial laid down in Article 6 of the European Convention of Human Rights.
[3] Regulation 1/2003, Article 27(3).
[4] In its Notice on the handling of complaints the Commission underlines that it "wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules".
[5] Regulation 773/2004, recital 5. See also e.g. M. Vestager, "Setting priorities in antitrust", speech delivered at 11th Annual Conference of the Global Competition Law Centre, Brussels, 1 February 2016.
[6] Joana Mendes, *Participation in EU Rule-making: a rights based approach* (Oxford University Press, Oxford 2011) 32-33.
[7] Commission, White Paper on modernization of the rules implementing Arts 85 and 86 of the EC Treaty [1999] OJ C 132/1 ('White Paper on Modernization').

information about allegedly anti-competitive practices.[8] The Procedural Regulations, accompanied by a Commission Notice, articulated a procedure for the handling of formal antitrust complaints, codified the procedural rights of complainants,[9] and gave guidance on the prioritization criteria the Commission intended to use.[10]

The Commission did, however, retain its broad discretion to decide whether or not to pursue a complaint. The Procedural Regulations do not give a complainant the right to insist that the Commission takes a final decision as to the existence or not of the alleged infringement of Article 101 or 102 TFEU. It follows that a complainant also cannot compel the Commission to open proceedings and conduct an in-depth investigation. The EU courts have long recognized that the Commission is thus entitled to reject complaints on priority grounds.[11] Regulation 1/2003 added the possibility for the Commission to reject a complaint on the ground that a NCA is dealing or has dealt with the same case (Article 13).

With the entry into force of Regulation 1/2003, the Commission intended to enhance its priority setting powers as to allow it to "refocus its activities on the most serious infringements of Community law in cases with a (Union) interest",[12] and at the same time, to reduce the number of complaints addressed to the Commission in cases where NCAs could effectively deal with them. At the national level, however, the conditions under which third parties may access the competition law procedures and the question of which procedural rights they are entitled to in antitrust proceedings differs greatly.[13] Even though Directive 2019/1 was expected to result in further harmonization of national procedural rules, and. in particular, in harmonizing NCAs' ability to reject low-priority complaints (Article 4 (5)), the Directive's main goal is to compel NCAs to rationalize resource allocation and to optimally deal with financial and human resource constraints and not with the transparency and fairness of antitrust procedures. Besides the goal of increasing efficiency and effectiveness of NCAs' operation, the Directive leaves the rules and practices governing the handling and rejecting of complaints subject to national law.

5. The outer and inner limits of the participation of third parties

Third parties may have direct access to the public enforcement of Articles 101 and 102 TFEU by the European Commission. But having access does not necessarily mean that the conditions upon which access is granted enable them to protect their economic interests, which is the question this position paper addresses. First, there are *outer limits* to the participation of third parties in the Commission's investigations and procedures: access is dependent on the Commission's use of its discretion to set

[8] Ben Van Rompuy, 'The European Commission's Handling of Non-priority Antitrust Complaints: An Empirical Assessment' (2022) 45 World Competition 45 (2) 265–294.
[9] Regulation 773/2004, Articles 6-9.
[10] Commission Notice on the handling of complaints by the Commission under Arts 81 and 82 of the EC Treaty [2004] OJ C 101/65 ('Notice on the handling of complaints').
[11] Case T-24/90, Automec Srl v. Commission, ECLI:EU:T:1992:97.
[12] White Paper on modernization.
[13] Or Brook and Katalin Cseres, Policy Report: Priority Setting in EU and National Competition Law Enforcement (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930189

enforcement priorities (Section 5.1). Second, there are *inner limits* to participation of third parties that result from the way administrative enforcement procedures are structured, once third parties are admitted to the procedure (Section 5.2).

5.1 Outer limits

Pursuant to Article 7(2) of Regulation 773/2004, the Commission may reject a complaint on the basis that there are insufficient grounds for acting, in particular because the case does not display sufficient 'Union interest' to justify further investigation.

To assess the degree of Union interest raised by a complainant, the Commission relies on a number of publicly identified criteria.[14] The notion of Union interest, however, remains a highly elastic concept. It serves a particular, negative function: an insufficient degree of Union interest allows the Commission not to act upon a complaint, but, conversely, a 'sufficient' degree of Union interest provides no guarantee that the Commission will start an investigation.

When rejecting complaints, the Commission routinely invokes the ground that the complainant could seek protection of their rights by an action before a national court,[15] but without considering the legal and practical obstacles that the complainant may encounter. Arguments raised by complainants in relation to these obstacles are in fact systematically dismissed.[16] The use of this rejection ground simply presupposes that privately initiated litigation can be seen as a viable alternative to public enforcement. However, this often will not be the case. The Commission's policy of encouraging complainants to turn to national courts stands in sharp contrast with the low number of cases brought by third parties, especially consumers (organizations) or civil organizations, before their national courts.[17] Moreover, while several Member States have implemented legislation on some form of collective action in order to facilitate consumer actions, empirical evidence indicates that the expected increase in consumer litigation has not yet occurred.

We believe that the conditional link set by the Commission between third parties' access to public enforcement and to private litigation can only be justified in certain situations, for instance when a complainant has already brought proceedings before a national court,[18] and in relation to certain types of infringements (for which evidence-gathering advantages lie with private parties, such as vertical restraints).[19]

[14] Notice on the handling of complaints.
[15] Van Rompuy, see above n. 8.
[16] Idem.
[17] Katalin Cseres and Joana Mendes, Consumers' access to EU competition law procedures: Outer and inner limits (2014) 51 Common Market Law Review (2) 483-521.
[18] In those circumstances, reasons pertaining to procedural economy and the sound administration of justice militate in favour of the case being considered by the courts to which related questions had already been referred. Case T-24/90, Automec Srl v. Commission, ECLI:EU:T:1992:97, para. 88.
[19] Cseres and Mendes, above n. 28.

We therefore **recommend**, first, that the Commission incorporates, in its priority assessment of complaints, the likelihood of third parties' private litigation. The current yardstick is insufficient.[20] Instead, a wider range of factors that determine the likelihood of access to private antitrust enforcement should be identified and duly considered. As long as the Commission's priority-setting policy relies on the alternative of private enforcement as a ground for rejecting complaints, it should adduce concrete arguments that establish the conditional link between private and public enforcement in the case at hand.[21] We **recommend**, second, the introduction of the possibility for designated consumer and civil society organizations to file a "super-complaint" about alleged anti-competitive conduct, which would direct the Commission to prioritize the handling of the complaint in a transparent, fast-track procedure.[22]

5.2 Inner limits

Unlike the undertakings under investigation, who intervene in the quality of defendants, third parties do not need to defend their personal legal sphere, since the procedure has not been initiated against them. Still, they have an interest in its outcome: the ensuing decisions might affect their economic interests, even if not always in a direct way. They are "merely liable to suffer the incidental effects of the decision".[23] The "different degree of intensity of the harm caused to their interests" places them in a different procedural position.[24]

The participation of complainants in antitrust proceedings depends both on the Commission's assessment of their "legitimate interest",[25] and on the Commission's finding that there is a Union interest in pursuing the complaint. Hence, the establishment of "legitimate interest" results from a decision of the Commission, following the procedure to deal with complaints. Holders of a "sufficient interest" apply to be heard and their participation depends on the assessment of the Hearing Officer.[26] Besides holders of "sufficient interest" and of a "legitimate interest", other persons may be invited by the Commission to participate in the procedure.[27]

[20] The Commission must only ascertain whether the national courts are reasonably able, in view of the complexity of the case, to gather the factual information necessary in order to determine whether the conduct complained of constitutes an infringement. See e.g. Case T-24/90, Automec Srl v. Commission, ECLI:EU:T:1992:97, paras 89–96; Case T-5/93, Roger Tremblay and Others v. Commission, ECLI:EU:T:1995:12, para. 68; Case T-458/04, Au lys de France v. Commission, ECLI:EU:T:2007:195, para. 83.
[21] See, by analogy, Case T-791/19, Sped-Pro v Commission, ECLI:EU:T:2022:67, para. 104.
[22] Like the mechanism that exists in the United Kingdom and recently has been proposed by the government in Australia.
[23] Case T-290/94, *Kaysberg SA v. Commission*, ECLI:EU:T:1997:186, para. 107; see, however, Case T-224/10, Association belge des consommateurs Test-achats ASBL v. Commission, ECLI:EU:T:2011:588, para. 43. These cases regard the interpretation of the EU Merger Control Regulation, but this procedure is constructed on the same premises.
[24] Case T-213/01, Österreichische Postsparkasse, ECLI:EU:T:2006:151, para. 106.
[25] Regulation 1/2003, Art. 7(2).
[26] Regulation 773/2004, Art. 13(1) and (2). Decision of the President of the European Commission of 13 October 2011, on the function and terms of reference of the hearing officer in certain competition procedures ('Hearing officer terms of reference') [2011] OJ L 275/29, Article 5(2) and (3). See also Point 105 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/06.
[27] Regulation 773/2004, Article 13(3).

A person concerned by an alleged infringement of Articles 101 and/or 102 TFEU qualifies as holder of a legitimate interest if they are *directly and adversely affected* by the conduct suspected of violating these rules. The indications the Commission gives in its Notice on the handling of complaints suggest that a direct and adverse effect exists when there is a sufficient material connection of the person concerned to the factual situation that is being assessed.[28] According to the Commission, persons that wish to come forward on general interest considerations but are incapable of demonstrating that they or their members are liable to be directly and adversely affected by the infringement do not qualify as holders of legitimate interests.[29] The category of holders of sufficient interests is more undefined than that of holders of legitimate interests, at least in the context of Regulation 1/2003 procedures.[30] According to the Hearing Officer's terms of reference, in assessing whether a third person has sufficient interest, they will "take into account whether and to what extent the applicant is sufficiently affected" by the conduct.[31] The actual participation of third parties is mostly grounded on the instrumental function of their intervention. They provide, as already argued in section 3, information that might be relevant to achieve an accurate representation of the factual situation that will enable the decision-maker to issue a materially correct decision in correspondence with the truth of the facts.

This predominantly instrumental rationale of the intervention of third parties in the procedures is well established in relation to complainants.[32] There are, however, contradictory indications on whether this applies also to other interested third parties. On the one hand, according to the Hearing Officers' terms of reference, "in assessing whether a third party shows a sufficient interest, the hearing officer shall take into account whether and to what extent the applicant is *sufficiently affected* by the conduct which is the subject of the competition procedures".[33] Their access to an oral hearing is likely conditioned by 'the contribution they can make to the clarification of the relevant facts of the case'.[34]

In this respect, the way the procedure is structured does not seem to be problematic in the light of the public interests that the Commission needs to pursue in enforcing the antitrust rules. Nevertheless, whether they are accepted to the procedure depends on a discretionary assessment of the Commission or of the Hearing Officer on how the alleged illegal conduct affects their legally protected interests. Whether the Commission and the Hearing Officers have a consistent practice in this regard – and how effectively they assess legitimate and sufficient interest – is unknown. In this manner, the protection of third parties' economic interests and the place it effectively has in the assessment of the Commission is fully dependent on the Commission's view and interpretation of the circumstances of the cases it needs

[28] Notice on handling of complaints.
[29] Idem, para. 38.
[30] A search in the Eur-Lex database has not provided any relevant results in this respect.
[31] Hearing officer terms of reference, Article 5(2).
[32] Regulation 773/2004, recital 5; Notice on the handling of complaints, para. 3.
[33] Hearing officer terms of reference, Art. 5(2) (emphasis added).
[34] Idem, recital 13. This was also the criterion that, under the previous guidelines of the hearing officer, was applied when deciding both requests to participate and requests to access to the oral hearing ('Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (ex- articles 81 and 82 EC)', points 33 and 42).

to decide upon. Even if the way the procedure is designed gives third parties a role in the public enforcement of competition, the procedure is not constructed to give them voice with a view to protecting their economic interests.

This characteristic becomes a limit to third parties' access to antitrust enforcement from the moment in which they can be denied access to information that may not only be important to enable them to express their views during the public enforcement of competition law, but also, and fundamentally, may deny them the very possibility of exercising their right to file an action for damages before national courts. The limited access third parties have to access to competition files has led them to resort to the general EU rules on access to documents (Regulation 1049/2001).[35] This way of accessing information may not be the most suitable, and, in practice, remains uncertain, given the conflicting views of the two EU courts on this matter.

We believe that the rules on access to the file ought to be revised, or differently applied, in a way that would protect the interests of affected third parties in having access to information that is crucial to enforce their rights.

On the basis of judicial developments regarding access to leniency documents – which illustrates the conflict between, on the one hand, preserving confidential information to protect the interests of the undertakings concerned and the possibility of public enforcement, and, on the other, providing access to documents that ensure the procedural rights of other affected persons – we **recommend** that the Commission should classify the information contained in the file as a means of balancing the competing interests of the undertakings investigated and of the consumers who have been victims of their putative infringements. This classification should be guided by two criteria, which have been suggested by the European Ombudsman: the relevance of documents for a potential damages claims and the effective existence of other means of accessing the information compiled in the administrative file.[36] The procedural protection of the economic interests of third parties would require that this classification be subject to a duty to give reasons, which, in itself, needs to balance the competing interests at stake – i.e. it cannot jeopardise the interest of confidentiality, nor can it void the procedural rights of consumers.[37]

6. Recommendations/proposals

Under the current Procedural Regulations, third parties may have direct access to the antitrust investigations and proceedings conducted by the European Commission, but not always on conditions that enable them to effectively protect their economic interests. Our proposals – on differentiated

[35] Cseres and Mendes, above n. 28.
[36] Decision of the European Ombudsman closing his inquiry into complaint 3699/2006/ELB against the European Commission, 6 April 2010, para 110.
[37] Idem, paras. 105 and 109.

priority-setting and on the classification of documents – point in the same direction: the European Commission's discretionary power in dealing with complaints and in granting access to the file in antitrust proceedings should be structured in a way that better ensures the adequate protection of third parties' participatory rights.