October 6, 2022

European Commission
Directorate-General for Competition
Unit A1
1049 Brussels
Belgium

Per email: COMP-REG-1@ec.europa.eu

Reference Number HT.6033
CONSULTATION OF THE EUROPEAN COMMISSION "EU ANTITRUST PROCEDURAL RULES - EVALUATION"

The International Bar Association's Unilateral Conduct And Behavioural Issues Working Group (the "**Working Group**") sets out below its submission in response to the public consultation in relation to EU Antitrust procedural rules, i.e. Regulation 1/2003 and its implementing regulation, Regulation 773/2004.

The International Bar Association is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at http://ibanet.org.

The Working Group welcomes the opportunity to comment on the EU Antitrust procedural rules. The Working Group's central focus is to provide an international forum for thought leadership with respect to competition / antitrust law developments. The Working Group comprise lawyers with significant experience in a number of jurisdictions and brings together experience from advising a large number of clients in cartel and abuse proceedings. As such, the Working Group has sought to share its perspective

on certain points raised in the questionnaire relating to EU Antitrust procedural rules.

A. General Questions

Effectiveness

1. In your view, has Regulation 1/2003 achieved its objective of an effective and uniform application of Article 101 TFEU in the EU?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

To a great extent, Regulation 1/2003 provides an enforcement framework which is fit for purpose and provides for effective and uniform application of Article 101. This objective has been largely achieved thanks, in particular, to multiple features of Regulation 1/2003 and related measures that support effective and uniform application (e.g. requirement for National Competition Authorities to keep the Commission informed of cases, provision for the Commission to provide information/opinions and to intervene in cases, various guidance documents, ECN cooperation).

However, in certain aspects it could usefully be amended or further developed, and our suggestions to this end are set out under various questions below. Also included under various questions below are certain suggestions for improvements, which do not require significant change to Regulation 1/2003, but rather change to the way it is implemented in day-to-day practice.

Also below, we mention some cases in which effective and uniform enforcement of Article 101 does not appear to have been achieved.

2. In your view, has Regulation 1/2003 achieved its objective of an effective and uniform application of Article 102 TFEU in the EU?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

To a great extent, Regulation 1/2003 provides an enforcement framework which is fit for purpose and provides for effective and uniform application of Article 102. This objective has been largely achieved thanks, in particular, to multiple features of Regulation 1/2003 and related measures that support effective and uniform application (e.g. requirement for National Competition Authorities to keep the Commission informed of cases, provision for the Commission to provide information/opinions and to intervene in cases, various guidance documents, ECN cooperation).

However, in certain aspects it could usefully be amended or further developed, and our

suggestions to this end are set out under various questions below. Also included under various questions below are certain suggestions for improvements, which do not require significant change to Regulation 1/2003, but rather change to the way it is implemented in day-to-day practice.

Also below, we mention some cases in which effective and uniform enforcement of Article 101 does not appear to have been achieved.

Finally, effective and uniform application of Article 102 is sometimes hampered by the intrinsic difficulty of identifying effective remedies, but that is not necessarily due to the inadequacy of Regulation 1/2003.

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Broadly, experience has been positive. However, (i) increased transparency and predictability in case allocation as between the Commission and National Competition Authorities, as well as (ii) more consistency of approach as between the Commission and the various National Competition Authorities, would benefit parties and (potential) complainants. Case allocation as between the Commission and National Competition Authorities is occasionally unpredictable, and it is sometimes hard to understand why a particular decision has been made. For example, the Commission did not bring a case about price parity clauses in hotel booking platforms even if several National Competition Authorities took inconsistent positions, whereas it has taken a case concerning mobile network sharing in the Czech Republic.

Similarly, priority setting and approach vary considerably across the different authorities. For example, resale price maintenance, and parity clauses, have been approached differently.

It remains to be seen how the changes to the VBER and the corresponding guidelines that – among others – aim at harmonizing the European approach will lead to a more harmonised approach – also taken into consideration the "appetite" of the National Competition Authorities to start investigations in this area.

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Broadly, overall experience has been positive. However, (i) increased transparency and predictability in case allocation as between the Commission and National Competition Authorities, as well as (ii) more consistency of approach as between the Commission and the various National Competition Authorities, would benefit parties and (potential) complainants.

Case allocation as between the Commission and National Competition Authorities is occasionally 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. Another example is the division of labour between the Italian National Competition Authority and the Commission in handling the Aspen excessive pricing abuse case. Also the current Apple App Store investigations by the Commission and the Dutch authority show that case allocation is not always clear.

Similarly, priority setting and approach vary considerably across the different authorities. For example, the German National Competition Authority hardly ever imposes fines in Article 102 TFEU cases, in contrast to the Commission and other National Competition Authorities.

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)?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Regulation 773/2004 has generally been effective, but its functioning could be improved with the following changes, either to the rules or to practice:

- A clear timetable for investigations, with some fixed deadlines, would reduce the length of proceedings, and increase transparency and efficiency (the EU Merger Regulation or certain EU Member States' rules such as those in Spain can provide a model);
- More clarity at an early stage in investigations on the Commission's concerns/theory of harm through State of Play meetings or informal communications would facilitate and make quicker identification of relevant information and documents;
- Narrower and better targeted requests for information and document requests, as well as reduced use of Article 18(3) decisions, would speed -up investigations and increase efficiency;
- The range of documents protected from disclosure by legal professional privilege should be extended;

- 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;
- Avoiding requiring non-confidential versions of documents produced by the party under investigation before it is clear that access will be required would reduce workload and make proceedings quicker; and
- Publishing non-confidential version of decisions within a reasonable timeframe as happens in certain EU Member States (e.g. Spain) would increase transparency and facilitate private enforcement.

Efficiency

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

In general, the system has worked well, but more consistency of approach as between the Commission and the various National Competition Authorities would benefit parties and (potential) complainants.

For example, priority setting and approach vary considerably across the different authorities. For example, the German National Competition Authority hardly ever imposes fines in Article 102 TFEU cases, in contrast to the Commission and other National Competition Authorities.

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Yes, this is certainly the case. Notification was a very time-consuming process. Moreover, resources did not allow for notifications to be reviewed promptly by the Commission, thereby creating significant legal uncertainty. The vast majority of agreements are relatively easy to self-assess.

However, in the case of genuine uncertainty, in particular over sustainability agreements, it would be helpful if it were easier to obtain guidance and comfort for proposed agreements. National Competition Authorities' practices like the one in Germany, where guidance may be obtained relatively quickly and relatively informally, can provide a model.

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

See also answer to question 5.

The EU Antitrust procedural rules have generally led to timely and efficient enforcement, but the situation could be improved with the following changes, either to the rules or to practice:

- A clear timetable for investigations, with some fixed deadlines, would reduce the length of proceedings, and increase transparency and efficiency (the EU Merger Regulation or certain EU Member States' rules such as those in Spain can provide a model);
- Clarity at an early stage in investigations on the Commission's concerns/theory of harm would facilitate and make quicker identification of relevant information and documents;
- Narrower and better targeted requests for information and document requests, as well as reduced use of Article 18(3) decisions, would speed -up investigations and increase efficiency;
- The range of documents protected from disclosure by legal professional privilege should be extended;
- 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;
- Avoiding requiring non-confidential versions of documents produced by the party under investigation before it is clear that access will be required would reduce workload and make proceedings quicker; and
- Publishing non-confidential version of decisions within a reasonable timeframe as happens in certain EU Member States (e.g. Spain) would increase transparency.

Relevance

9. In your view, are the objectives of an effective and uniform application of Article 101 TFEU of Regulation 1/2003 still relevant?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Effective and uniform application of Article 101 remains as important as it ever has been in maintaining fair and competitive markets and all the economic and consumer benefits,

which flow from them.

10. In your view, are the objectives of an effective and uniform application of Article 102 TFEU of Regulation 1/2003 still relevant?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Effective and uniform application of Article 102 remains as important as it ever has been in maintaining fair and competitive markets and all the economic and consumer benefits, which flow from that.

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. digitalization 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.

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

The procedural framework is still broadly relevant. However, some adaptations could usefully be made. For example:

- The rules under which investigations are carried out were designed for a largely paper-based world; now that information and documents are mainly digital, the rules need changing e.g. to provide for electronic preservation orders instead of physical sealing of evidence. The recent change of the Commission regarding the eLeniency tool and online access to document is certainly a positive step.
- In the case of genuine uncertainty, in particular in newly developing areas such as sustainability agreements, it would be helpful if it were easier to obtain guidance and comfort for proposed arrangements. National Competition Authorities' practices like the one in Germany, where guidance may be obtained relatively quickly and relatively informally, can provide a model.

Coherence

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

☐ Yes
☒ No
☐ I don't know

Please explain your answer:

There is inconsistency between Regulation 1/2003 and Transparency Regulation 1049/2001. For example, we are aware of at least one case in which a party under investigation, under Regulation 1/2003 was refused access to certain documents concerning settlement with a different party, but did – after significant time – get access after making an application under the Transparency Regulation.

EU added value

13. In your view, have Regulations 1/2003 and 773/2004 contributed to ensuring the effective and uniform application of Articles 101 and 102 TFEU in a manner that goes beyond what would have been achieved by Member States alone?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

This is certainly true, and for a number of reasons. For example, effective enforcement frequently requires the use of the Commission's investigatory and information gathering powers in multiple EU Member States – something which is not possible for an EU Member State acting alone.

Uniform enforcement is promoted by, for example, the requirement for National Competition Authorities to keep the Commission informed of cases, provision for the Commission to provide information/opinions and to intervene in cases, and ECN cooperation.

B. Powers of Investigation (Articles 17 to 22 of Regulation 1/2003, Articles 3 and 4 of Regulation 773/2004)

The provisions on the Commission's powers of investigation in Regulations 1/2003 and 773/2004 aim at enabling the Commission to detect and investigate agreements, decisions of associations of undertakings and concerted practices that infringe Article 101 or unilateral conduct that infringes Article 102 TFEU. In particular, the Commission may (i) launch investigations into sectors of the economy and types of agreements (Article 17 of Regulation 1/2003); (ii) require undertakings and associations of undertakings to provide all necessary information by means of requests for information (Article 18 of Regulation 1/2003); (iii) take statements from natural or legal persons (Article 19 of Regulation 1/2003) and (iv) conduct inspections of premises (Articles 20 and 21 of Regulation 1/2003). The Commission intends to evaluate whether these powers have proven and remain adequate, notably in the context of the widespread digitisation of the economy.

Effectiveness

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 and 102 TFEU?

a. Investigations into sectors of the economy and into types of agreements (Article 17

of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

In general, we consider that the Commission's ability to conduct sector inquiries is an effective means for the Commission to gain a thorough understanding of specific sectors or types of agreements. However, sector inquiries do not appear to be the most appropriate tool for collecting evidence of potential anti-competitive conduct prohibited by Articles 101 and 102. Instead, the Commission should use its powers under Article 18 of Regulation 1/2003 to request information from market players.

In addition, we consider that it is inappropriate for the Commission to have the power to conduct unannounced inspections in the context of sector inquiries pursuant to Article 17 of Regulation 1/2003, which it has used in the context of its inquiry into the pharmaceutical sector.[1] The use of dawn raids in sector inquiries is inconsistent with the fundamental EU law principle of proportionality. In the absence of any evidence of an infringement, the Commission should use its powers under Article 18 of Regulation 1/2003 to request information from market players to better understand a particular sector. Unlike the use of its dawn raid powers in Article 101 and 102 TFEU investigations, there is no requirement for the Commission to have a reasonable suspicion of any infringement of the law, such that the use of dawn raids in sector inquiries ostensibly amounts to a disproportionate interference in the private sphere of companies' activity, in breach of Article 7 of the EU Charter of Fundamental Rights. As noted by Advocate General Pitruzella in Case C-682/20, *Les Mousquetaires*: *"in order to allow judicial review of the non-arbitrary nature of the interference in the private sphere of activity of the undertaking concerned which an inspection entails, the Commission must prove that the decision ordering the inspection is based on sufficiently serious evidence which it has been able to assess in practice and that the scope of the checks circumscribed by this decision is limited to the infringement which the Commission may suspect on the basis of these evidence*".[2] Consequently, the Commission should amend Article 20 of the Regulation to remove dawn raid powers in respect of sector inquiries. At minimum, it should clarify its enforcement approach and set objective criteria that must be met before such dawn raids can be conducted.

b. Requests for information (Article 18 of Regulation 1/2003)

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

1 "Commission launches sector inquiry into pharmaceuticals", remarks of Neelie Kroes, European Commissioner for Competition Policy, at press conference in Brussels, 16th January 2008, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_08_18

2 Paragraph 180 of the opinion, translated from French.

We generally consider that Article 18 of Regulation 1/2003 constitutes an appropriate tool for collecting evidence in relation to potential anti-competitive conduct.

Nevertheless, Regulation 1/2003 should clarify –in line with the territorial sovereignty of foreign States and principles of international comity –that Article 18 of the Regulation does not give the Commission the power to compel the production of documents and information from entities located outside the EU, to compel EU-based subsidiaries to provide information held by their foreign parent companies over which they have no control, or, in either case, to impose fines for failure to provide such information. The need for clarification of this issue is illustrated by the fact that it has been the subject of unresolved appeals to the General Court in a number of cases.[3]

In addition, information requests pursuant to Article 18(3) of Regulation 1/2003 should only be used for the purpose of requesting undertakings to supply documents. Requiring the supply of any other type of information (*e.g.*, explanations in narrative form) by decision creates significant uncertainty for the undertakings concerned, notably in terms of ensuring that the responses provided fulfil the requirements of the Commission's decision. The Commission should use its powers pursuant to Article 18(2) of Regulation 1/2003 to request such other information.

c. Power to take statements (Article 19 of Regulation 1/2003)

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

We understand that the Commission is considering whether to remove the requirement for consent in Article 19 of Regulation 1/2003, such that the Commission could compel employees and officers of a company under investigation to attend an Article 19 of Regulation 1/2003 interview. We strongly disagree that such a measure is necessary or proportionate for the effective enforcement of EU competition law. It is undertakings that are liable for infringements of the EU competition rules, not their employees that have taken part in the infringement. It must therefore be possible for the undertakings under investigation to organise and coordinate their response to questions that are posed by the Commission, drawing on information from various different internal sources, including all employees with relevant information.

Compelling employees to attend interviews would create various risks that would, in our view, be adverse to the effective enforcement of EU competition law:

- Compelled interviews are likely to cause employees to perceive a potential conflict between their interests and those of their employer, particularly in jurisdictions where individuals can be penalised for infringements of national competition laws, and even if – as would have to be the case – the Commission is

[3] *See e.g.*, Case T-227/18 *Microsemi Europe* and Case T-140/07 *Chi Mei Optoelectronics Europe.*

prohibited from disclosing information obtained in compelled interviews to any third party that may use it in proceedings against the employee. Such perceived conflicts would hamper the ability of the company to gather information effectively regarding the full circumstances surrounding the infringement and to respond appropriately to Article 18 information requests.

- For similar reasons, employees may refuse to participate in a compulsory interview, particularly if they anticipate that their future employment is likely to be terminated in any event as a result of their participation in an infringement. Companies may then incur liability for fines for failure to procure an outcome – attendance of the employee at an interview – over which they had no control. The only solution to this would be the introduction of personal liability for individuals for failure to comply with a compulsory interview requirement, contrary to the established principle that it is undertakings that bear responsibility for breaches of the EU antitrust prohibitions, not individuals.

- For similar reasons, in certain circumstances employees may consider it in their interests to disclose in an interview information that is covered by their employer's legal professional privilege and/or privilege against self-incrimination, so making any use by the Commission of information obtained in the interview vulnerable to legal challenge.

d. Powers of inspection (Article 20 of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

In general, we consider that the Commission's powers of inspection have the potential to contribute to the detection of potential anti-competitive conduct.

Nevertheless, we would welcome the clarification of the following points:

- The Commission should clarify the procedures allowing for the proper safeguarding of individual employees' right to privacy of their data during dawn raids (*e.g.*, in relation to any personal e-mails contained on servers seized by the Commission). EC officials have in the past assessed that the Commission's power in Article 20(2)(e) of Regulation 1/2003 to request information "on facts or documents relating to the subject matter of the investigation" means that it can compel employees to disclose passwords to their personal email account or personal (non-work) device and/or fine companies that are unable to persuade their employees to disclose such passwords. In our view, that infringes the company's right to respect for the private life of its employees or its managers, which has been recognised by the General Court in Case T-255/17 *Les*

Mousquetaires.[4] In our view, such powers should only be available if Commission officials can demonstrate to the company that the relevant personal email account has been used to send or receive messages connected with a suspected infringement, and with prior authorisation from the national judicial authority of the EU Member State concerned. That would be consistent with Article 21 of Regulation 1/2003, which provides that powers to carry out inspections at domestic premises can only be used if there is a reasonable suspicion that records related to the business are being stored there, and must be authorised in advance by a national court.

- On a similar note, the wording of Article 20(2)(e) of Regulation 1/2003 should be amended to correct the grammatical error (in the English language version) that it is possible to ask a question "*on*" a fact or document. In our experience, the vagueness of this wording frequently leads Commission officials to cross-examine employees in a way that ought to be limited to a formal Article 19 interview. Article 20(2)(e) of Regulation 1/2003 should refer instead to requesting "factual information about the location or content of existing documents or business records".

- The Commission's powers of inspection under Regulation 1/2003 need to be updated to reflect the fact that information is now stored almost exclusively in digital format and is often stored on servers outside the EU. In particular, Regulation 1/2003 should be amended to clarify that electronic documents stored outside the EU are only disclosable during an inspection if they are accessible in the ordinary course of business from the premises that are the subject of the inspection decision and within the control of the entity that is the subject of the inspection decision.

- We are aware that in a number of cases the Commission has taken the position that legal professional privilege only protects communications between clients and their outside counsel in relation to advice on competition law issues. However, pursuant to the case law of the European Court of Justice, communications between clients and their independent outside counsel are protected by legal professional privilege to the extent that they are connected to the undertaking's rights of defence and that the communication has a direct relationship to the subject matter of the Commission's investigation. Thus, the case law draws no distinction between advice related to competition law proceedings and advice related to other areas of the law (*e.g.*, intellectual property law). The Commission's guidance should clarify this position.

e. Inspections of other premises (Article 21 of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

[4] ECLI:EU:T:2020:460, para. 39.

Please explain your answer:

In our view, inspections at non-business premises (including homes of directors, managers and other members of staff) carry a significant risk of infringement of employees' fundamental right to a private life. Our primary concern with the current wording of Article 21 of Regulation 1/2003 is that it does not reflect the fact that where – as will usually be the case – the relevant "books and records" are digital files, such as emails from a personal email account, they will often be accessible from both the undertaking's work premises and the employee's domestic premises. In those circumstances, while there may be a "reasonable suspicion" that relevant records are "being kept" at the domestic premises, an unannounced inspection of those premises is neither necessary nor proportionate. We therefore favour adding a requirement that the Commission must have a reasonable suspicion that relevant books and records are being kept in domestic premises only and could not be obtained from the premises of the undertaking.

Efficiency

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? In order to answer this question, please take into account, on the one hand, the type and importance of the evidence that can be collected by means of each specific investigative tool and, on the other hand, the administrative burden on both the Commission and third parties.

a. Investigations into sectors of the economy and into types of agreements (Article 17 of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(a):

In general, we consider that the Commission' ability to conduct sector inquiries is an effective means for the Commission to gain a thorough understanding of specific sectors or types of agreements. However, sector inquiries do not appear to be the most appropriate tool for the purpose of collecting evidence of potential anti-competitive conduct prohibited by Articles 101 and 102 TFEU. Instead, the Commission should use its powers under Article 18 of Regulation 1/2003 to request information from market players.

In addition, we consider that it is inappropriate for the Commission to have the power to conduct unannounced inspections in the context of sector inquiries pursuant to Article 17 of Regulation 1/2003, which it has used in the context of its inquiry into the pharmaceutical sector.[5] The use of dawn raids in sector inquiries is inconsistent with the fundamental EU

[5] "Commission launches sector inquiry into pharmaceuticals", remarks of Neelie Kroes, European Commissioner for Competition Policy, at press conference in Brussels, 16th January 2008, available at:

law principle of proportionality. In the absence of any evidence of an infringement, the Commission should use its powers under Article 18 of Regulation 1/2003 to request information from market players to better understand a particular sector. Unlike the use of its dawn raid powers in Article 101 and 102 TFEU investigations, there is no requirement for the Commission to have a reasonable suspicion of any infringement of the law, such that the use of dawn raids in sector inquiries ostensibly amounts to a disproportionate interference in the private sphere of companies' activity, in breach of Article 7 of the EU Charter of Fundamental Rights. As noted by Advocate General Pitruzella in Case C-682/20, *Les Mousquetaires*: "*in order to allow judicial review of the non-arbitrary nature of the interference in the private sphere of activity of the undertaking concerned which an inspection entails, the Commission must prove that the decision ordering the inspection is based on sufficiently serious evidence which it has been able to assess in practice and that the scope of the checks circumscribed by this decision is limited to the infringement which the Commission may suspect on the basis of these evidence*".[6] Consequently, the Commission should amend Article 20 of the Regulation to remove dawn raid powers in respect of sector inquiries. At minimum, it should clarify its enforcement approach and set objective criteria that must be met before such dawn raids can be conducted.

b. Requests for information (Article 18 of Regulation 1/2003)

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(b):

We generally consider that Article 18 of Regulation 1/2003 constitutes an appropriate tool for collecting evidence in relation to potential anti-competitive conduct.

Nevertheless, Regulation 1/2003 should clarify –in line with the territorial sovereignty of foreign States and principles of international comity –that Article 18 of the Regulation does not give the Commission the power to compel the production of documents and information from entities located outside the EU, to compel EU-based subsidiaries to provide information held by their foreign parent companies over which they have no control, or, in either case, to impose fines for failure to provide such information. The need for clarification of this issue is illustrated by the fact that it has been the subject of unresolved appeals to the General Court in a number of cases.[7]

In addition, information requests pursuant to Article 18(3) of Regulation 1/2003 should only be used for the purpose of requesting undertakings to supply documents. Requiring the supply of any other type of information (*e.g.*, explanations in narrative form) by decision creates significant uncertainty for the undertakings concerned, notably in terms

https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_08_18

6 Paragraph 180 of the opinion, translated from French.

7 *See e.g.*, Case T-227/18 *Microsemi Europe* and Case T-140/07 *Chi Mei Optoelectronics Europe.*

of ensuring that the responses provided fulfil the requirements of the Commission's decision. The Commission should use its powers pursuant to Article 18(2) of Regulation 1/2003 to request such other information.

c. Power to take statements (Article 19 of Regulation 1/2003)

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

See response to question 14(c):

We understand that the Commission is considering whether to remove the requirement for consent in Article 19 of Regulation 1/2003, such that the Commission could compel employees and officers of a company under investigation to attend an Article 19 of Regulation 1/2003 interview. We strongly disagree that such a measure would be necessary or proportionate for the effective enforcement of EU competition law. It is undertakings that are liable for infringements of the EU competition rules, not their employees that have taken part in the infringement. It must therefore be possible for the undertakings under investigation to organise and coordinate their response to questions that are posed by the Commission, drawing on information from various different internal sources, including all employees with relevant information.

Compelling employees to attend interviews would create various risks that would, in our view, be adverse to the effective enforcement of EU competition law:

- Compelled interviews are likely to cause employees to perceive a potential conflict between their interests and those of their employer, particularly in jurisdictions where individuals can be penalised for infringements of national competition laws, and even if – as would have to be the case – the Commission is prohibited from disclosing information obtained in compelled interviews to any third party that may use it in proceedings against the employee. Such perceived conflicts would hamper the ability of the company to gather information effectively regarding the full circumstances surrounding the infringement and to respond appropriately to Article 18 information requests.

- For similar reasons, employees may refuse to participate in a compulsory interview, particularly if they anticipate that their future employment is likely to be terminated in any event as a result of their participation in an infringement. Employers may then incur liability for fines for failure to procure an outcome – attendance of the employee at an interview – over which they had no control. The only solution to this would be the introduction of personal liability for individuals for failure to comply with a compulsory interview requirement, contrary to the established principle that it is undertakings that bear responsibility for breaches of the EU antitrust prohibitions, not individuals.

For similar reasons, in certain circumstances employees may consider it in their interests to disclose in an interview information that is covered by their employer's legal professional privilege and/or privilege against self-incrimination, so making any use by the Commission of information obtained in the interview vulnerable to legal challenge.

d. Powers of inspection (Article 20 of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(d):

In general, we consider that the Commission's powers of inspection have the potential to contribute to the detection of potential anti-competitive conduct.

Nevertheless, we would welcome the clarification of the following points:

- The Commission should clarify the procedures allowing for the proper safeguarding of individual employees' right to privacy of their data during dawn raids (*e.g.*, in relation to any personal e-mails contained on servers seized by the Commission). EC officials have in the past assessed that the Commission's power in Article 20(2)(e) of Regulation 1/2003 to request information "on facts or documents relating to the subject matter of the investigation" means that it can compel employees to disclose passwords to their personal email account or personal (non-work) device and/or fine companies that are unable to persuade their employees to disclose such passwords. In our view, that infringes the company's right to respect for the private life of its employees or its managers, which has been recognised by the General Court in Case T-255/17 *Les Mousquetaires*.[8] In our view, such powers should only be available if Commission officials can demonstrate to the company that the relevant personal email account has been used to send or receive messages connected with a suspected infringement, and with prior authorisation from the national judicial authority of the EU Member State concerned. That would be consistent with Article 21 of Regulation 1/2003 which provides that powers to carry out inspections at domestic premises can only be used if there is a reasonable suspicion that records related to the business are being stored there, and must be authorised in advance by a national court.

- On a similar note, the wording of Article 20(2)(e) of Regulation 1/2003 should be amended to correct the grammatical error (in the English language version) that it is possible to ask a question "*on*" a fact or document. In our experience, the vagueness of this wording frequently leads Commission officials to cross-examine employees in a way that ought to be limited to a formal Article 19 interview.

8 ECLI:EU:T:2020:460, para. 39.

Article 20(2)(e) of Regulation 1/2003 should refer instead to requesting "factual information about the location or content of existing documents or business records".

- The Commission's powers of inspection under Regulation 1/2003 need to be updated to reflect the fact that information is now stored almost exclusively in digital format and is often stored on servers outside the EU. In particular, Regulation 1/2003 should be amended to clarify that electronic documents stored outside the EU are only disclosable during an inspection if they are accessible in the ordinary course of business from the premises that are the subject of the inspection decision and within the control of the entity that is the subject of the inspection decision.

- We are aware that in a number of cases the Commission has taken the position that legal professional privilege only protects communications between clients and their outside counsel in relation to advice on competition law issues. However, pursuant to the case law of the European Court of Justice, communications between clients and their independent outside counsel are protected by legal professional privilege to the extent that they are connected to the undertaking's rights of defence and that the communication has a direct relationship to the subject matter of the Commission's investigation. Thus, the case law draws no distinction between advice related to competition law proceedings and advice related to other areas of the law (*e.g.,* intellectual property law). The Commission's guidance should clarify this position.

e. Inspections of other premises (Article 21 of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(e):

In our view, inspections at non-business premises (including homes of directors, managers and other members of staff) carry a significant risk of infringement of employees' fundamental right to a private life. Our primary concern with the current wording of Article 21 of Regulation 1/2003 is that it does not reflect the fact that where – as will usually be the case – the relevant "books and records" are digital files, such as emails from a personal email account, they will often be accessible from both the undertaking's work premises and the employee's domestic premises. In those circumstances, while there may be a "reasonable suspicion" that relevant records are "being kept" at the domestic premises, an unannounced inspection of those premises is neither necessary nor proportionate. We therefore favour adding a requirement that the Commission must have a reasonable suspicion that relevant books and records are being kept in domestic premises and could not be obtained from the premises of the undertaking.

Relevance

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)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(a):

In general, we consider that the Commission' ability to conduct sector inquiries is an effective means for the Commission to gain a thorough understanding of specific sectors or types of agreements. However, sector inquiries do not appear to be the most appropriate tool for the purpose of collecting evidence of potential anti-competitive conduct prohibited by Articles 101 and 102 TFEU. Instead, the Commission should use its powers under Article 18 of Regulation 1/2003 to request information from market players.

In addition, we consider that it is inappropriate for the Commission to have the power to conduct unannounced inspections in the context of sector inquiries pursuant to Article 17 of Regulation 1/2003, which it has used in the context of its inquiry into the pharmaceutical sector.[9] The use of dawn raids in sector inquiries is inconsistent with the fundamental EU law principle of proportionality. In the absence of any evidence of an infringement, the Commission should use its powers under Article 18 of Regulation 1/2003 to request information from market players to better understand a particular sector. Unlike the use of its dawn raid powers in Article 101 and 102 TFEU investigations, there is no requirement for the Commission to have a reasonable suspicion of any infringement of the law, such that the use of dawn raids in sector inquiries ostensibly amounts to a disproportionate interference in the private sphere of companies' activity, in breach of Article 7 of the EU Charter of Fundamental Rights. As noted by Advocate General Pitruzella in Case C-682/20, *Les Mousquetaires*: "*in order to allow judicial review of the non-arbitrary nature of the interference in the private sphere of activity of the undertaking concerned which an inspection entails, the Commission must prove that the decision ordering the inspection is based on sufficiently serious evidence which it has been able to assess in practice and that the scope of the checks circumscribed by this decision is limited to the infringement which*

9 "Commission launches sector inquiry into pharmaceuticals", remarks of Neelie Kroes, European Commissioner for Competition Policy, at press conference in Brussels, 16th January 2008, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_08_18

the Commission may suspect on the basis of these evidence".[10] Consequently, the Commission should amend Article 20 of the Regulation to remove dawn raid powers in respect of sector inquiries. At minimum, it should clarify its enforcement approach and set objective criteria that must be met before such dawn raids can be conducted.

b. Requests for information (Article 18 of Regulation 1/2003)

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(b):

We generally consider that Article 18 of Regulation 1/2003 constitutes an appropriate tool for collecting evidence in relation to potential anti-competitive conduct.

Nevertheless, Regulation 1/2003 should clarify –in line with the territorial sovereignty of foreign States and principles of international comity –that Article 18 of the Regulation does not give the Commission the power to compel the production of documents and information from entities located outside the EU, to compel EU-based subsidiaries to provide information held by their foreign parent companies over which they have no control, or, in either case, to impose fines for failure to provide such information. The need for clarification of this issue is illustrated by the fact that it has been the subject of unresolved appeals to the General Court in a number of cases.[11]

In addition, information requests pursuant to Article 18(3) of Regulation 1/2003 should only be used for the purpose of requesting undertakings to supply documents. Requiring the supply of any other type of information (*e.g.*, explanations in narrative form) by decision creates significant uncertainty for the undertakings concerned, notably in terms of ensuring that the responses provided fulfil the requirements of the Commission's decision. The Commission should use its powers pursuant to Article 18(2) of Regulation 1/2003 to request such other information.

c. Power to take statements (Article 19 of Regulation 1/2003)

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(c):

We understand that the Commission is considering whether to remove the requirement for

---

10 Paragraph 180 of the opinion, translated from French.
11 *See e.g.*, Case T-227/18 *Microsemi Europe* and Case T-140/07 *Chi Mei Optoelectronics Europe.*

consent in Article 19 of Regulation 1/2003, such that the Commission could compel employees and officers of a company under investigation to attend an Article 19 of Regulation 1/2003 interview. We strongly disagree that such a measure is necessary or proportionate for the effective enforcement of EU competition law. It is undertakings that are liable for infringements of the EU competition rules, not their employees that have taken part in the infringement. It must therefore be possible for the undertakings under investigation to organise and coordinate their response to questions that are posed by the Commission, drawing on information from various different internal sources, including all employees with relevant information.

Compelling employees to attend interviews would create various risks that would, in our view, be adverse to the effective enforcement of EU competition law:

- Compelled interviews are likely to cause employees to perceive a potential conflict between their interests and those of their company, particularly in jurisdictions where individuals can be penalised for infringements of national competition laws, and even if – as would have to be the case – the Commission is prohibited from disclosing information obtained in compelled interviews to any third party that may use it in proceedings against the employee. Such perceived conflicts would hamper the ability of the company to gather information effectively regarding the full circumstances surrounding the infringement and to respond appropriately to Article 18 information requests.

- For similar reasons, employees may refuse to participate in a compulsory interview, particularly if they anticipate that their future employment is likely to be terminated in any event as a result of their participation in an infringement. Employers may then incur liability for fines for failure to procure an outcome – attendance of the employee at an interview – over which they had no control. The only solution to this would be the introduction of personal liability for individuals for failure to comply with a compulsory interview requirement, contrary to the established principle that it is undertakings that bear responsibility for breaches of the EU antitrust prohibitions, not individuals.

- For similar reasons, in certain circumstances employees may consider it in their interests to disclose in an interview information that is covered by their employer's legal professional privilege and/or privilege against self-incrimination, so making any use by the Commission of information obtained in the interview vulnerable to legal challenge.

d. Powers of inspection (Article 20 of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(d):

In general, we consider that the Commission's powers of inspection have the potential to contribute to the detection of potential anti-competitive conduct.

Nevertheless, we would welcome the clarification of the following points:

- The Commission should clarify the procedures allowing for the proper safeguarding of individual employees' right to privacy of their data during dawn raids (*e.g.*, in relation to any personal e-mails contained on servers seized by the Commission). EC officials have in the past assessed that the Commission's power in Article 20(2)(e) of Regulation 1/2003 to request information "on facts or documents relating to the subject matter of the investigation" means that it can compel employees to disclose passwords to their personal email account or personal (non-work) device and/or fine companies that are unable to persuade their employees to disclose such passwords. In our view, that infringes the company's right to respect for the private life of its employees or its managers, which has been recognised by the General Court in Case T-255/17 *Les Mousquetaires*.[12] In our view, such powers should only be available if Commission officials can demonstrate to the company that the relevant personal email account has been used to send or receive messages connected with a suspected infringement, and with prior authorisation from the national judicial authority of the EU Member State concerned. That would be consistent with Article 21 of Regulation 1/2003 which provides that powers to carry out inspections at domestic premises can only be used if there is a reasonable suspicion that records related to the business are being stored there, and must be authorised in advance by a national court.

- On a similar note, the wording of Article 20(2)(e) of Regulation 1/2003 should be amended to correct the grammatical error (in the English language version) that it is possible to ask a question "*on*" a fact or document. In our experience, the vagueness of this wording frequently leads Commission officials to cross-examine employees in a way that ought to be limited to a formal Article 19 interview. Article 20(2)(e) of Regulation 1/2003 should refer instead to requesting "factual information about the location or content of existing documents or business records".

- The Commission's powers of inspection under Regulation 1/2003 need to be updated to reflect the fact that information is now stored almost exclusively in digital format and is often stored on servers outside the EU. In particular, Regulation 1/2003 should be amended to clarify that electronic documents stored outside the EU are only disclosable during an inspection if they are accessible in the ordinary course of business from the premises that are the subject of the inspection decision and within the control of the entity that is the subject of the inspection decision.

---

12 ECLI:EU:T:2020:460, para. 39.

- We are aware that in a number of cases the Commission has taken the position that legal professional privilege only protects communications between clients and their outside counsel in relation to advice on competition law issues. However, pursuant to the case law of the European Court of Justice, communications between clients and their independent outside counsel are protected by legal professional privilege to the extent that they are connected to the undertaking's rights of defence and that the communication has a direct relationship to the subject matter of the Commission's investigation. Thus, the case law draws no distinction between advice related to competition law proceedings and advice related to other areas of the law (*e.g.*, intellectual property law). The Commission's guidance should clarify this position.

e. Inspections of other premises (Article 21 of Regulation 1/2003)

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

See response to question 14(e):

In our view, inspections at non-business premises (including homes of directors, managers and other members of staff) carry a significant risk of infringement of employees' fundamental right to a private life. Our primary concern with the current wording of Article 21 of Regulation 1/2003 is that it does not reflect the fact that where in our view, inspections at non-business premises (including homes of directors, managers and other members of staff) carry a significant risk of infringement of employees' fundamental right to a private life. Our primary concern with the current wording of Article 21 of Regulation 1/2003 is that it does not reflect the fact that where – as will usually be the case – the relevant "books and records" are digital files, such as emails from a personal email account, they will often be accessible from both the undertaking's work premises and the employee's domestic premises. In those circumstances, while there may be a "reasonable suspicion" that relevant records are "being kept" at the domestic premises, an unannounced inspection of those premises is neither necessary nor proportionate. We therefore favour adding a requirement that the Commission must have a reasonable suspicion that relevant books and records are being kept in domestic premises only and could not be obtained from the premises of the undertaking.

Coherence

17. In your view, are the Commission's investigative tools provided by Regulation 1 /2003 coherent with other EU legislation and EU policies?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As explained in response to questions 14(a) and 14(e) above, there are certain aspects of the Commission's dawn raid powers that we consider to be potentially inconsistent with Article 7 of the Charter of Fundamental Rights.

EU added value

18. In your view, have the Commission's investigative tools provided by Regulation 1/2003 contributed to ensuring the effective and uniform application of Articles 101 and 102 TFEU compared to, in their absence, a system based on investigative tools conferred exclusively to national administrative and/or judicial authorities?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

We agree that if the Commission were required to rely on national competition authorities to gather relevant information its investigations would be considerably less efficient, for example because of the need to coordinate information gathering in numerous different EU Member States and the differing procedural rules that exist in each.

C. Procedural rights of parties and third parties, handling of complaints (Articles 7(2), 27, 28 and 30 of Regulation 1/2003, Articles 5-9, 10-17 of Regulation 773/2004)

Regulation 1/2003 and Regulation 773/2004 respect fundamental rights and observe the principles recognised in particular by the Charter of Fundamental Rights. In this regard, the Commission respects the parties' fundamental right to be heard by addressing a statement of objections to them and by granting parties access to the file. Parties may exercise their right to be heard by submitting their views in writing and by developing their arguments at an oral hearing, if they so request. Third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand and the decisions taken should be widely publicised. While ensuring the rights of defence, Regulation 1/2003 and Regulation 773/2004 also protect business secrets.

For its enforcement activity, the Commission benefits from information supplied by undertakings and by consumers in the market. Currently, there are two ways to provide information to the Commission in this respect. One is by lodging a complaint pursuant to Article 7(2) of Regulation 1/2003 (a 'formal complaint'). The other way is the provision of market information that does not have to comply with the requirements for complaints pursuant to Article 7(2) of Regulation 1/2003.

The Commission intends to evaluate whether these procedures have proven and remain adequate, notably in the context of the widespread digitisation of the economy.

Effectiveness

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As has often been mentioned[13], the provisions of the Antitrust procedural rules need to be improved in several aspects:

- Legal privilege is not sufficiently broad in scope. Only EU lawyers are granted legal privilege and it is granted only to external lawyers. The reasons for this differentiation are not convincing. Examples from Anglo-Saxon countries show that broader legal privilege provisions, covering also in-house counsel, help to protect the interests of all parties to the proceedings.

- The Commission is prosecutor and judge in one function. While the parties may challenge decisions in front of the courts, in practice such actions have only limited effect and usefulness during the actual proceedings, even if they may to some extent help at a much later stage.

- The practice under the Leniency Notice practically results in a shift of the burden of proof from the Commission to the undertakings. Companies that wish to be eligible for immunity from fines or a reduction of fines must incriminate themselves, which will expose them to private damage actions. The Commission should consider whether granting (full or partial) immunity from damages to immunity applicants could be an appropriate way to revitalize the EC leniency regime.
- Otherwise, the leniency applications will probably decline further given the huge costs involved with private damage actions.

- While it is certainly to be acknowledged that protecting the confidentiality of business secrets remains an important procedural principle, confidentiality disputes often seem to deviate the focus from the actual topic of the investigation. There is no incentive not to claim confidentiality. Confidentiality claims and preparing access to the file also pose a significant burden on the case teams. Also for the parties, it is burdensome to challenge confidentiality claims.

- Investigations last far too long. In particular, the long gaps between individual RFIs make the proceedings inefficient.

- In practice, witnesses are not heard orally. As a result, especially in leniency proceedings, the Commission tends to believe everything a leniency applicant tells

13 https://www.biicl.org/files/5749_forrester_25-06-11_biicl_1.pdf.

the Commission and does not challenge the leniency applicant sufficiently. This makes it hard for the other parties to convince the Commission that the actual facts may be different.

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

In practice, the changes to the role of the hearing officer that were undertaken in 2011 were positive. However, for example, when it comes to the hearing officer's role regarding deadlines, it is hard to explain to clients why – after not having heard from the Commission for several months or sometimes even for years during an investigation – the hearing officer often accepts that the Commission is extremely reluctant to extend deadlines longer than just by only few days.

Efficiency

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

No, the current procedural framework does not ensure the efficient exercise of the right to be heard: Proceedings last for a very long time, sometimes with very long gaps during which no progress appears to be being made in the case. In addition, parties do not have the chance to present witnesses, and the whole investigation is based on paper work. This is inefficient and does not help to ensure that the facts of a case are understood properly.

In addition, the facts of a case only become known to the parties late in the process (once the statement of objections is available). It is difficult for the parties to prepare a proper defence strategy, but also to decide early in the process that settlement might be the better option. It may be worth considering giving access to the file already much earlier, i.e. not only once the Statement of Objections has been sent out.

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, under the current procedural framework, the companies facing investigations only know late in the process the concrete facts and proof the Commission has in its file. Companies might decide to go for a settlement or an amicable solution if they knew earlier in the process the concrete facts that the Commission has in its files. This makes a proper defence strategy more difficult. Access to file should therefore be organized in a way that it is possible much earlier in the process.

We understand that the Commission is considering alternative frameworks for ensuring confidentiality in the access to file process. While such alternative procedures can be less burdensome than the Commission's current framework, our experience is that they can be characterised by significant drawbacks. Notably, the alternative system used in some jurisdictions of establishing so-called "confidentiality rings" (which grant unredacted access to the confidential case file to the advisors of the parties subject to an investigation and only provide non-confidential versions of certain key documents to the parties themselves at certain phases of the investigation) risks undermining the parties' rights of defence if, for example, they prevent parties from accessing the full text of key documents prior to the start of important procedural time-limits for the parties.

In particular, disclosing non-confidential versions only of documents relied on in the statement of objections ("**SO**") to the parties under investigation means that they do not have access to documents and evidence that (i) inform those that are expressly referred to and relied on in the SO, and are often very important to understanding the context of those documents; and (ii) exculpatory documents that the Commission does not refer to in the SO. Giving access to these documents to an undertaking's external counsel through a confidentiality ring does not permit the undertaking to exercise properly its rights of defence, as its external counsel do not have the knowledge and expertise of the relevant markets and conduct that are necessary to identify all probative evidence on the file.

Moreover, when probative documents can be identified, it is then necessary to ask for them to be made available outside the confidentiality ring, to justify the requests and to wait for non-confidential versions to become available from the providers of the relevant documents. In our experience, this process can end up taking as much as half of the period within which an undertaking has to respond to the SO, with substantial adverse impact on its ability to formulate its response.

We recognise that there is scope for procedural efficiency, if the use of confidentiality rings means that a large number of documents do not need to be redacted, but consider

that, in light of the above concerns, such a system creates considerable risks for undertakings' rights of defence and the corresponding robustness of Commission decisions to appeal. If such a system were to be implemented, we consider that at least the following safeguards would be required:

- Key employees of the undertaking should be allowed to join the confidentiality ring (subject to appropriate conditions, such as a condition that they no longer carry out functions relating to the markets under investigation);
- The length of time for undertakings to respond to the SO should be greatly increased (reflecting the fact that the Commission will be able to issue its SOs much more quickly if fewer confidentiality redactions are required); and
- The process for requesting documents to be made available outside the confidentiality ring should be streamlined, such that it is possible to request such treatment in respect of batches of documents to which the same justification applies, rather than having to justify such treatment for each document individually.

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

The current procedural framework does not allow for an efficient handling of formal complaints for the following reasons:

- Proceedings last far too long.

- Complainants have no real means to make the Commission start an investigation if the Commission does not want to look into the matter in more detail (for "priority reasons" or for other reasons).

- It often remains unclear whether the Commission or a National Competition Authority is best placed to look into a complaint.
-
- For the party that is the subject of the complaint, it is relatively easy to make sure that the proceedings are time-consuming and not moving forward quickly (by claiming confidentiality etc.). So complainants definitely need "deep pockets" and much time to allow them to wait for results following from their complaint. National courts in some EU Member States may be the better alternative.

Relevance

24. In your view, does the procedural framework provided by Regulations 1/2003 and 773/2004 for the protection of the rights of parties and third parties to investigations continue to be appropriate?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

Given the recent Qualcomm decision, the protection of third party rights needs to be revisited. For complainants, it may be of utmost importance that even the fact that there is a complainant is kept secret. However, in practice it is difficult to contribute in a meaningful way to proceedings if the complainant must be kept confidential.

In addition, complainants fully depend on the will of the Commission to take action. As mentioned above, complainants therefore need high profile cases or other incentives to invest into their complaint.

Coherence

25. In your view, is the procedural framework provided by Regulations 1/2003 and 773/2004 for the protection of the rights of parties and third parties to investigations coherent with other EU legislation and other EU policies?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

Overall, the process seems to be coherent with other EU legislation and other EU policies.

D. Commission Decisions (Articles 7 to 10 Regulation 1/2003)

To ensure the effective and uniform application of Articles 101 and 102 TFEU, Regulation 1/2003 grants the Commission a series of decisional powers. In particular, the Commission may (i) require undertakings and associations of undertakings to bring an infringement to an end and impose on them behavioural or structural remedies (Article 7 of Regulation 1/2003); (ii) order interim measures (Article 8 of Regulation 1 /2003); (iii) make binding the commitments offered by undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment (Article 9 of Regulation 1/2003); and (iv) find that Article 101 and/or 102 TFEU are not applicable to a specific case (Article 10 of Regulation 1/2003).

The Commission intends to evaluate whether these powers have proven and remain adequate, notably in the context of the widespread digitisation of the economy.

Effectiveness

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

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

The current rules are not satisfactory when it comes to bringing an infringement to an end. This is particularly the case for Article 7 decisions in abuse proceedings. Often, the aim of restoring effective competition or opening up markets cannot be achieved. Fines often do not have the desired effect on the structure of the relevant market.

Quicker pro-competitive effects can be achieved through Article 9 proceedings, i.e. commitments. However, the restoring of competition should not depend on whether the dominant company agrees to such a solution. Rather, it would be preferable for the Commission itself to have appropriate powers to restore effective competition in a timely manner.

Currently, the exact implementation of a fine decision under Article 7 of Regulation 1/2003 is left to the dominant company. If a company implements the decision too late, insufficiently or incorrectly, the Commission can only try to force the company to fully implement the decision with the help of penalties under Article 24 of Regulation 1/2003. This means that additional time passes before market conditions change as a result of the decision and competition is restored.

Moreover, in practice it is difficult for the Commission to enforce sanctions for the non-implementation of a decision. The Commission must understand exactly which measures need to be taken to implement the decision. The Commission must also be able to understand exactly which remedial measures are reasonable and which would not be sufficient to prevent an identified abuse in the future.

However, in the past, it has not necessarily proved successful for the Commission to take very specific, final remedial measures as a result of a decision under Article 7 of Regulation 1/2003[14]. Today the Commission therefore tends to leave it to the companies to decide which exact measures have to be taken in order to put an end to the infringement. However, without feedback from market participants, the dominant company has broad leeway to implement the decision.

Thus, the Commission lacks input from the market to help it adopt appropriate guidelines when issuing a prohibition decision and a cease-and-desist order under Article 7 of

[14] See for example, Commission ./. Microsoft I – Mediaplayer, COMP/C-3/37.792.

Regulation 1/2003. Similar to merger control cases, where the Commission welcomes input from competitors and other market participants in order to examine possible proposals (also in the run-up to a market test), the Commission is also dependent on the support of market participants in order to be able to understand whether the measures proposed are sufficient. Accordingly, the third parties concerned should be more involved. In particular, their input should result in the relevant remedy measures getting to the heart of the problem and making it easier for the Commission to understand if a decision is subsequently not implemented satisfactorily. Otherwise, disputes between the Commission and affected third parties in abuse proceedings (such as in Google Shopping or also in Google Android) lead to the Commission defending its decisions – together with the dominant company – against the affected third parties, just so as not to call into question the success of its proceedings.

b. To impose behavioural or structural remedies on undertakings and associations of undertakings

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As already explained above, the focus on fines often does not lead to the desired result of creating effective competition, especially in cases of abuse. Fines do not change the market conditions. The procedural requirements associated with decisions on fines often lead to unacceptable delay in proceedings. Instead, the Commission should make more use of the possibility of pure declaratory and cease-and-desist orders. The practice of the National Competition Authority in Germany, where the authority often avoids fining proceedings against dominant companies, but tries to encourage the dominant company to agree on settlements, and where third parties concerned are involved much more intensively in the run-up to the decision, could serve as an example. In particular, market tests before rendering a decision would be helpful.

Regarding behavioural and/or structural measures, it make sense to have both kinds of measures in the Commission's portfolio (in contrast to some national rules; for example, in Germany behavioural measures are – strictly speaking – not possible as remedy). It may make sense to clarify whether there is a subsidiarity of structural measures compared to behavioural measures on EU level.

c. To order interim measures

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

Interim measures at EU level in practice do not function. Thus, new procedural rules should tackle this topic and provide rules that can be actually implemented and used. In

addition, there also needs to be the will to implement these rules. The DMA may make-up for the implementation deficit that existed in the past especially on digital markets.

To facilitate the application of interim measures in the future, several options seem to exist:

- Third parties should get the power to apply for interim measures (similar to complaints), because typically parties directly affected by the behavior of another company have the most obvious interest to apply for such measure. France could serve as an example for such application rights. Currently, third parties can only request such a decision, but if the Commission does not take action, there is no legal remedy.

- The burden of proof with regard to the infringement and the potential harm to competition should lie with the applicant, but it should be taken into consideration that the applicant has limited possibilities to investigate a matter.

- Interim measures in court cannot serve the same purpose. Their geographic scope is different; they do not necessarily cover the whole EU territory.

- It may also be considered if the current Article 8 of Regulation 1/2003 still sets the sufficiently flexible conditions for the adoption of interim measures, especially when taken together with the strict case law of the European courts (IMS for interim measures, Intel and Qualcomm for the finding of an abuse). The strict IMS case low on the *prima facie* infringement ties the Commission's hand in terms of interim measures with only one interim measure decision adopted in nearly 20 years. It could be considered to have more relaxed criteria for interim measures particularly for fast-moving markets. The Commission could draw inspiration from the French model, where the National Competition Authority adopts interim measures more frequently.

- Procedural (short) deadlines would also help to make interim measures more effective in practice.

- In addition, there should be clarification in Regulation 1/2003 whether commitment decisions are binding on National Competition Authorities and courts or not. Currently, conflicting views exist. For private enforcement, this plays a significant role.

Obviously, where changes are made to facilitate interim measures, it should be taken into account that interim measures may have very serious negative impact on a business that may ultimately be found to have committed no infringement. Moreover, if imposed without a full understanding of the markets in question and the effects of the alleged conduct, interim measures can themselves have anticompetitive effects and/or cause consumer harm by prohibiting pro-competitive conduct (e.g., below cost pricing by an undertaking that is ultimately determined not to be dominant).

The use of interim measures may also create a significant risk of confirmation bias, in the sense that it may create incentives for the Commission to adopt an infringement decision, in order to avoid accusations that its earlier interim measures (and associated business disruption for the subject of those measures) were unjustified. Consequently, any revised standard for imposing interim measures should be accompanied by appropriate due process rights for the subject of the proposed measures.

d. To make binding the commitments offered by undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

The procedural rights in Article 9 proceedings should be strengthened in the sense that the person affected should have a comprehensive right of access to the file under Article 27(2) of Regulation 1/2003 in order to understand better the Commission's concerns and theory of harm before agreeing to commitments.

In addition, rights of third parties are currently not adequate. Active participation early in the process should be possible. Possibly, tripartite meetings (affected party, third party and Commission) would be helpful to speed up the process and lead to a solution that takes into consideration the interests of all.

In addition, there should be clarification in Regulation 1/2003 whether commitment decisions are binding on National Competition Authorities and courts or not. Currently, conflicting views exist. For private enforcement, this plays a significant role.

e. To find that Article 101 and/or Article 102 TFEU are not applicable to a specific case

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

At EU level, the current instrument for determining that Article 101 and/or Article 102 are not applicable, is not satisfactory.

The scope of the current Article 10 of Regulation 1/2003 is too narrow. Not only fundamentally new situations should be included. Also a right of application, especially where there is a concrete danger of divergent national decisions, should be considered.

Conditions should be defined under which the Commission must take action upon request.

As the recent examples in the pharmaceutical case and in a case involving cloud solutions[15] show, it is only in very specific cases that the Commission communicates in writing and externally that it has examined a case under Article 101 or Article 102 TFEU. Much more frequently, the Commission refers to the fact that the companies are legally represented and the lawyers can advise on what is permitted and what is prohibited. However, this view is extremely unsatisfactory from a company's point of view. The National Competition Authorities are much more open in this respect. In particular, the approach of the German and the Dutch National Competition Authorities could serve as example.

The consequence of this high hurdle at the Commission is that companies go to the National Competition Authorities for (partial) legal clarity. These are more willing to talk, but, of course, can only make statements for the respective territory and therefore offer less legal certainty. This jeopardises the uniform application of EU law and can lead to nationally divergent decisions and different contractual constellations based on them, especially in the area of the distribution of goods or services.

27. In your view, are the Commission's powers pursuant to Articles 7, 9 and 17 of Regulation 1/2003 adequate to address situations where the Commission concludes at the end of an antitrust investigation or a sector inquiry that a market presents economic features leading to structural competition concerns? This could be the case e.g. when the economic features of a given market result in a risk of systemic non-compliance with Articles 101 and 102 TFEU by the operators active thereon.

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As mentioned also above, the Commission's tool box to adequately address situations where it concludes at the end of an antitrust investigation or a sector inquiry that a market presents economic features leading to structural competition concerns is not satisfactory. In practice, especially Article 7 decisions do not change the market situation sufficiently, also because remaining competitors sometimes are forced to leave the market because the Commission's investigations took so long.

Efficiency

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

☐ **Yes**
☒ **No**
☐ **I don't know**

[15] Cf. https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf) and Gaia-X (cf. https://gaia-x.eu/wp-content/uploads/files/2021-11/Letter%20to%20Gaia-X_update.pdf.

Please explain your answer:

As mentioned above, when decisions are rendered, the Commission often seems to lose interest in these cases (if no appeal is filed). Sometimes there can also be felt a certain "fatigue" on the Commission's behalf. All this has the effect that the actual market situation may not significantly change despite a high fine.

In addition, the Commission does not push for the strengthening of compliance measures in the wake of an investigation and does not give any additional incentives to invest into compliance measures. Despite the global trend to take compliance efforts into consideration when rendering fines, on EU level ex-Commissioner Almunia's statement of 2011 is still the guiding principle: "*If a company which has put a compliance programme in place is nevertheless found to have committed an infringement of EU competition rules, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No.*"[16]

It is suggested that the Commission takes the positive experiences of other competition authorities on this topic into consideration when adopting new procedural rules.

b. To impose behavioural or structural remedies on undertakings and associations of undertakings

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, the current rules need some changes.

c. To order interim measures

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, the current rules need some changes.

d. To make binding the commitments offered by undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

16 https://compliance-consultancy.de/pdf/eu/commission_compliance_matters.pdf, page 22.

As mentioned above, the current rules need some changes.

e. To find that Article 101 and/or Article 102 TFEU are not applicable to a specific case

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, the current rules need some changes.

Relevance

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

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

It is obviously still necessary to require undertakings and associations of undertakings to bring an infringement to an end to ensure the effective application of Articles 101 and 102 TFEU.

b. To impose behavioural or structural remedies on undertakings and associations of undertakings

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, it is obviously still necessary to require undertakings and associations of undertakings to impose behavioural or structural remedies to ensure the effective application of Articles 101 and 102 TFEU. However, changes to these rules are necessary (see above).

c. To order interim measures

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, it is obviously still necessary to require undertakings and associations of undertakings to order interim measures to ensure the effective application of Articles 101 and 102 TFEU. However, changes to these rules are necessary (see above).

d. To make binding the commitments offered by undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, it is obviously still necessary to require undertakings and associations of undertakings to make binding commitments offered by undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment to ensure the effective application of Articles 101 and 102 TFEU. However, changes to these rules are necessary (see above).

e. To find that Article 101 and/or Article 102 TFEU are not applicable to a specific case

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, it is obviously still necessary to find that Article 101 and/or Article 102 are not applicable to a specific case to ensure the effective application of Articles 101 and 102 TFEU. However, changes to these rules are necessary (see above).

30. In your view, are the decisional powers granted to the Commission by Regulation 1/2003 coherent with other EU legislation and EU policies?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

In our view, the decision powers granted to the Commission by regulation 1/2003 are coherent with other EU legislation and EU policies. However, possible implications of data protection laws, for example, need to be taken into consideration.

EU added value

31. In your view, have the decisional powers granted to the Commission by Regulation 1/2003 contributed to ensuring the effective and uniform application of Articles 101

and 102 TFEU compared to, in their absence, a system based on decisional powers conferred to national administrative and/or judicial authorities?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

The decisional powers granted to the Commission by Regulation 1/2003 have contributed to ensuring the effective and uniform application of Articles 101 and 102 TFEU compared to, in their absence, a system based on decisional powers conferred to national administrative and/or judicial authorities. However, as mentioned above, changes to the decisional powers are necessary.

E. Fines and limitation periods (Articles 23 to 26 of Regulation 1/2003)

Article 23 of Regulation 1/2003 empowers the Commission to punish and deter infringements of Articles 101 and 102 TFEU as well as procedural breaches by means of fines imposed on undertakings and associations of undertakings. Article 24 of Regulation 1/2003 empowers the Commission to compel compliance with its decisions adopted pursuant to Articles 7, 8, 9, 17, 18(3) or 20(4) by means of periodic penalties imposed on undertakings and associations of undertakings.

Articles 25 and 26 of Regulation 1/2003 specify the rules on periods of limitation for the imposition and enforcement of fines and periodic penalty payments. They also specify the acts which may interrupt or suspend a limitation period.

Effectiveness

32. In your view, are the Commission's fining powers effective in sanctioning infringements and ensuring full compliance with Articles 101 and 102 TFEU?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

The Commission indeed enjoys rather wide powers to sanction substantive infringements by imposing fines. This power is also applied regularly in practice and thus appears to have a sufficiently deterrent effect (i.e. undertakings which infringe Article 101 and 102 TFEU can indeed expect – if their infringement comes to light – that they could be the subject of a serious sanction). This sufficiently deterrent effect is shown for instance by the high level of willingness of companies to settle cases in cartel proceedings (and thus to achieve a reduction in the level of the fine). As a result, the Commission's fining powers are rather effective to ensure full compliance. For the sake of completeness, it can be noted that significant further costs (legal, management costs, private enforcement) also aggravate the financial consequences of any infringement, which would render the further

increasing of fines superfluous.

33. In your view, are the Commission's fining powers effective in ensuring full compliance with the procedural obligations associated with proceedings under Articles 101 and 102 TFEU?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

In general, it can be stated that the current level of fines seems to be sufficiently high for sanctioning procedural infringements. It can be noted that in a number of cases, procedural infringements are less driven by a deliberate and well-informed decision by undertakings to oppose the procedure of the Commission, but rather derive from negligence or lack of awareness of the relevant obligations. As a result, instead of an increase of the maximum amount that can be imposed, the Commission could consider imposing procedural fines more frequently where it considers that certain forms of procedural rules are generally not observed to the required level.

34. In your view, does the system of limitation periods for the imposition and enforcement of fines and periodic penalty payments allow the Commission to make effective use of its fining powers?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Special deterrence is an important function of any administrative fine imposed. However, the greater the temporal distance between the wrongdoing and the fine imposed, the less appropriate this element of the deterrence of the sanction becomes. Importantly, the Commission's procedure itself is not bound by any deadlines, which would make an investigation time-barred, as opposed to a number of national regimes, where such limitations are specifically provided for. This entails that the infringement decision could be further removed from the infringement itself, which could lessen the effectiveness of special deterrence.

It also needs to be considered that limitation periods have an important role in protecting the rights of the parties. As the availability of evidence tends to become limited over time, limitation periods provide a protection to parties where the lateness of the intervention of the authority results in the restriction of their capabilities to defend themselves. The current limitation periods are generally in line with similar national periods, thus the applicable rules on the use of evidence do not show great discrepancies. Clearly, a possible increase of the limitation periods applicable for the Commission could result in a conflict with national civil and administrative procedural rules.

35. In your view, are the Commission's fining powers adequate to ensure in an efficient

manner full compliance with Articles 101 and 102 TFEU?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

As explained above, the level of fines has sufficient deterring effect. In case of cartels, in our experience, parties and managers are unable to make an advance and deliberate "cost-benefit" calculation before an infringement, which shows that the current level of fines (together with the further legal consequences) clearly eliminate and "trump" any possible benefit of participation. The situation is more complex in case of potential infringements of Article 102 TFEU, where, in some cases, the existence of a possible infringement is also more difficult to establish in advance.

Efficiency

36. In your view, are the Commission's fining powers adequate to ensure in an efficient manner full compliance with the procedural obligations associated with proceedings under Articles 101 and 102 TFEU?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

As mentioned above, we believe the way the Commission expresses its priorities regarding procedural obligations – through the actual application of these fines – could be re-assessed and re-evaluated, if necessary.

Relevance

37. In your view, are the Commission fining powers for infringements of Articles 101 and 102 TFEU and for procedural breaches still relevant to ensure full compliance with Articles 101 and 102 TFEU?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

We consider the available sanctions to be relevant and are clearly taken into account by companies and managers when taking decisions in this respect.

Coherence

38. In your view, are the Commission's fining powers for infringements of Articles 101 and 102 TFEU and for procedural breaches coherent with other EU legislation and EU policies?

☐ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

It is extremely difficult to undertake a meaningful comparison in this respect. In any case, one can note that antitrust has always been a field where the Commission enjoyed much greater possibilities and powers as compared to many other policy areas. These stronger powers are coherently fit into EU policies due to the important of sanctioning competition law infringements that harm consumers (in particular, fighting cartels).

EU added value

39. In your view, have the Commission's fining powers for infringements of Articles 101 and 102 TFEU and for procedural breaches contributed to the enforcement of Articles 101 and 102 TFEU compared to a system of penalties imposed by Member States' National Competition Authorities and courts?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

The National Competition Authorities generally tend to imitate the approach of the Commission, which is the *primus inter pares* among National Competition Authorities. The steadily increasing level of fines over the past decades was followed by similar, or sometimes even greater increase in the level of national sanctions. National systems also extended the available toolkit with criminal or public procurement law sanctions or special provisions helping civil damages litigations (as a result of the relevant EU Directives). The Commission provided guidance, in particular, relating to this latter area. The powers and procedures of the Commission and those of the national bodies complement each other properly.

F. Cooperation between the Commission and NCAs and courts (Articles 11-16 of Regulation 1/2003)

Articles 11 to 13 and 15 of Regulation 1/2003 set forth cooperation mechanisms to promote the uniform application of Articles 101 and 102 TFEU by National Competition Authorities and national courts.

Effectiveness

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

Even though the enforcement of Articles 101 and 102 TFEU is largely harmonized, there are still a few instances where significant differences remain, such as the treatment of Most-Favoured-Nation Clauses. In some instances, Member States also use the concept of collective dominance in a much more expansive way than the Commission.

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

See response to question 40 above:

The Commission indeed enjoys rather wide powers to sanction substantive infringements by imposing fines. This power is also applied regularly in practice and thus appears to have a sufficiently deterrent effect (i.e. undertakings which infringe Article 101 and 102 TFEU can indeed expect – if their infringement comes to light – that they could be the subject of a serious sanction). This sufficiently deterrent effect is shown for instance by the high level of willingness of companies to settle cases in cartel proceedings (and thus to achieve a reduction in the level of the fine). As a result, the Commission's fining powers are rather effective to ensure full compliance. For the sake of completeness, it can be noted that significant further costs (legal, management costs, private enforcement) also aggravate the financial consequences of any infringement, which would render the further increasing of fines superfluous.

Efficiency

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?

☐ **Yes**
☒ **No**
☐ **I don't know**

Please explain your answer:

The current rules ensure procedural efficiency. However, additional delays may have to be built in (such as an expansion of the deadline for the National Competition Authorities to inform the Commission under Article 11(4) from 30 to 60 days, so that the Commission

has enough time to properly assess the case to ensure the uniform application of competition law). In addition, the Commission should be able to assert jurisdiction even after the National Competition Authority has opened an investigation. The Amazon Buy Box case is an example where the Commission had to open an EU-wide investigation outside of Italy, which is not procedurally efficient.

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

The provisions of Article 16(1) of Regulation 1/2003 and the system of preliminary rulings are efficient.

Relevance

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Yes, these provisions are still relevant and necessary, and should be reinforced.

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?

☒ Yes
☐ No
☐ I don't know

Please explain your answer:

Yes, these provisions are still relevant and necessary.

Coherence

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?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

We do not see any obvious discrepancy between EU's policies and the provisions on cooperation between the Commission and the National Competition Authorities.

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?

☒ **Yes**
☐ **No**
☐ **I don't know**

Please explain your answer:

We do not see any obvious discrepancy between EU's policies and the provisions on cooperation between the Commission and the National Competition Authorities.

Other

48. Is there any other comment related to the application of Regulation 1/2003 and Regulation 773/2004 that you want to bring to the Commission's attention and that has not been addressed in your replies to the previous questions?

Not applicable.

49. If you want to share any documents (e.g. data, research paper, position paper, etc.) which may be relevant for the evaluation of Regulation 1/2003 and Regulation 773/2004, please upload them here. Please make sure you do not include personal data in the file you upload if you want to remain anonymous.

Please upload your file(s).

Not applicable.

* * *