# Evaluation of Regulations 1/2003 and 773/2004 - General questionnaire

Fields marked with * are mandatory.

## Introduction

Regulation 1/2003 is the result of the most comprehensive reform of procedures for the enforcement of Articles 101 and 102 TFEU since 1962. Its main features are:

- The abolition of the practice of notifying business agreements to the Commission, enabling the Commission to focus its resources on serious violations of the antitrust rules.
- The empowerment of National Competition Authorities ('NCAs') and courts to apply Articles 101 and 102 TFEU in their entirety, so that there are multiple enforcers and therefore wider application of the EU antitrust rules.
- More level playing field for businesses operating cross-border as all competition enforcers, including the National Competition Authorities and national courts, are obliged to apply the EU antitrust rules to cases that affect trade between Member States.
- Close cooperation between the Commission and National Competition Authorities in the European Competition Network (the 'ECN').
- Enhanced enforcement tools for the Commission so that it is better equipped to detect and address breaches of the EU antitrust rules.

In the context of Regulation 1/2003, the Commission further adopted the Commission implementing Regulation 773/2004 (together with Regulation 1/2003, the "Regulations").

A number of significant changes have occurred in market dynamics over the past twenty years and many are potentially liable to impact the way competition rules are enforced. The digitisation of the global economy, for example, has highlighted a potentially increasing tension between the need for prompt and effective intervention and the complexity of antitrust proceedings.

In order to ensure that its antitrust enforcement tools remain fit for purpose, the Commission is launching an evaluation of the procedures for the application of Articles 101 and 102 TFEU, as established by the Regulations.

**Purpose of the evaluation**

The purpose of the evaluation is to provide a solid basis for the assessment of the performance of the antitrust procedural framework, also in light of changes that have occurred in market dynamics since the adoption of Regulation 1/2003, such as the digitisation of the global economy.

The evaluation of the Regulations has to be seen in the context of the broader review exercise launched in the area of EU competition law in the past years. It will take place roughly ten years after the publication on

"Ten years of Antitrust enforcement under Regulation 1/2003" and will allow taking stock of the almost twenty years of experience with the application of the antitrust procedural framework.

More information on the evaluation can be found in the Call for Evidence.

**Structure of the public consultation and how to respond to it**

As part of the evaluation, the Commission will seek the views of stakeholders on the effectiveness, efficiency, relevance, coherence and EU added value of Regulation 1/2003. To this end, both a short questionnaire and a detailed questionnaire are being published in parallel. The results of this consultation will serve as input for the evaluation. Views are welcome from all stakeholders.

The shorter questionnaire is more suitable for the general public. The detailed questionnaire instead is more suitable for stakeholders with specific expertise and experience in the application of Regulation 1 /2003 and of Articles 101 and 102 TFEU. All topics addressed in the shorter questionnaire are also covered in the detailed questionnaire, which contains additional and more technical questions. Each stakeholder should therefore choose to reply to either the short or the detailed questionnaire.

Both questionnaires are open for 14 weeks, and replies can be provided in all 24 official EU languages. Replies to either questionnaire will be equally considered.

You are now in the shorter questionnaire. If you want to switch to the detailed questionnaire, please click here.

This shorter questionnaire contains high-level questions, grouped by the following evaluation criteria:

- Effectiveness: The Commission will evaluate the extent to which the Regulations have been effective in meeting their objective of effective and uniform application of Articles 101 and 102 TFEU;
- Efficiency: The Commission will evaluate whether its experience in the application of the Regulations has contributed in an efficient manner to the effective and uniform application of Articles 101 and 102 TFEU, in particular for (i) undertakings; (ii) NCAs and (iii) consumers and whether the outcomes associated with the Regulations have been positive;
- Relevance: The Commission will evaluate whether the objective of the Regulations, namely the effective and uniform application of Articles 101 and 102 TFEU, continue to be appropriate, taking into account developments since 2004, for instance the digitisation of the economy and other legislative instruments that have come into force (e.g. the ECN+ Directive);
- Coherence: The Commission will evaluate how well the different components set out in the Regulations operate together, but also whether the Regulations are consistent with other EU legislation, EU Courts' case-law and other EU policies; and
- EU added value: The Commission will evaluate the extent to which the Regulations, that provide the Commission with important powers in the application of Articles 101 and 102 TFEU, but also empower NCAs to apply these Treaty provisions, have contributed to ensuring the effective and uniform application of these provisions in a manner that goes beyond what would have been achieved by Member States acting alone.

The collected information will provide part of the evidence base for determining whether it will be appropriate to revise Regulation 1/2003 and/or Regulation 773/2004.

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. Please note that your replies will also become public as a whole, see below under Section 'Privacy and Confidentiality.'

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

You are invited to provide your feedback through this online questionnaire. Please explain your responses and, as far as possible, illustrate them with concrete examples. We also invite you to upload any documents and/or data that you consider useful to accompany your replies at the end of this online questionnaire.

In order to ensure a fair and transparent consultation process, only responses received through this online questionnaire will be taken into account and included in the report summarising the responses.

If you encounter problems with completing this questionnaire or if you require assistance, please contact COMP-REG-1@ec.europa.eu.

## About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese

- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as
  - Academic/research institution
  - Business association
  - Company/business organisation
  - Consumer organisation
  - EU citizen
  - Environmental organisation
  - Non-EU citizen
  - Non-governmental organisation (NGO)
  - Public authority
  - Trade union
  - Other

* First name
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* Surname
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* Email (this won't be published)
  [redacted]

* Scope
  - International
  - Local
  - National
  - Regional

* Level of governance

- ○ Local Authority
- ○ Local Agency

* Level of governance

- ○ Parliament
- ○ Authority
- ○ Agency

* Organisation name

*255 character(s) maximum*

Association of Inhouse Competition Lawyers – ICLA

* Organisation size

- ○ Micro (1 to 9 employees)
- ○ Small (10 to 49 employees)
- ○ Medium (50 to 249 employees)
- ○ Large (250 or more)

Transparency register number

*255 character(s) maximum*

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

Identification number: 513747339430-11

* Country of origin

Please add your country of origin, or that of your organisation.

*This list does not represent the official position of the European institutions with regard to the legal status or policy of the entities mentioned. It is a harmonisation of often divergent lists and practices*

Belgium

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **Fo r the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* **Contribution publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- **Anonymous**

  The type of respondent that you responded to this consultation as, your country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself.

- **Public**

  Your name, the type of respondent that you responded to this consultation as, your country of origin and your contribution will be published.

* **Contribution publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

☐ **I agree with the personal data protection provisions**

**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
- Don't know

Please explain your answer

ICLA members are of the view that in general, Regulation 1/2003 has proved to be an effective tool to ensure the uniform application of Art. 101 TFEU across the EU, as well as its equal application by the Commission, NCAs and national courts. Nevertheless, there have been cases in which NCAs took a different interpretation of competition laws, leading to fragmentation in the application of Art. 101 and 102 TFEU. This is the case, for instance, of Booking.com and parity clauses. In addition, there have been cases where NCAs deviated from established case law of the European courts and of the Commission, creating legal uncertainty and threatening the coherence of the application of EU competition law.

Therefore, a full alignment and close coordination in the application of EU competition law rules by competition authorities, both at national and European level, is paramount to ensure the effectiveness of the single market. To ensure better alignment, ICLA suggests amending Regulation 1/2003 to allow NCAs to refer competition cases to the Commission, in line with the existing referral procedures under the EU Merger Regulation. This could be helpful to ensure that potentially anti-competitive behaviour prevalent in a number of different Member States are investigated and addressed in a coherent and consistent manner, avoiding divergences in application of competition law principles. At the very least, the Commission should be informed by the NCA as soon as the latter triggers an antitrust proceeding and not only 30 days prior the adoption of a decision (as currently set out by the Regulation in Art. 11). The latter should promote closer coordination between competition authorities, allowing the Commission to engage early with NCAs to ensure coherence and uniformity in the application of EU competition rules.

In addition, to avoid companies having to consider multiple filings and approaches, we also suggest the Commission to consider centralizing the leniency process – such that a leniency application at EU level should be sufficient to secure a leniency applicant's position at both EU and national level.

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
- Don't know

Please explain your answer

As stated in response to the previous Question, Regulation 1/2003 has proved to be equally effective also for the uniform application of Art. 102 TFEU across the EU, as well as its equal application by the Commission, NCAs and national courts.

We refer to our response to the previous Question for a number of suggestions as to how to ensure closer alignment and coordination in the application of EU competition law rules by competition authorities at national and European level.

3. 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
- Don't know

Please explain your answer

ICLA believes that overall Regulation 773/2004 has been effective in empowering the Commission to regulate certain aspects of proceedings for the application of Art. 101 and 102 TFEU. However, there are a number of important improvements that can be made.

First, regarding the procedural aspects as a whole, ICLA is of the view that statutory periods or at least strict guidelines should be established for all Art. 101 and 102 TFEU proceedings. Similarly, clearer signposting of the steps in a case, and more "state of play" or equivalent stages to keep parties up to speed would be welcome. It would also be particularly valuable for parties if the Commission was under a duty to respond to their arguments (unless repetitive or manifestly unfounded).

Second, the regime around the treatment of confidential information should be reviewed. This is especially sensitive with regards the confidential information that third-parties provide. Currently, when there is a divergent opinion between the Commission and a third-party with regards to confidentiality of information provided, the Commission can decide to disclose information if there is an overriding interest to do so. However, such disclosure may significantly harm the company who submitted the information confidentially. We are therefore of the view that if there is continued disagreement after the Commission and the third-party have engaged in a constructive dialogue, there should be a presumption of confidentiality, following which the burden would be on the Commission to prove otherwise. The current regime under Art. 18 of Regulation 1/2003 does not guarantee that companies' interests are not affected when engaging with the Commission. Taking a different approach moving forward could be an incentive for better and more in-depth collaboration with third-

parties, as well as avoid lengthy procedures before the Court of Justice in cases where third-parties disagree with the Commission's confidentiality decision. If a confidentiality presumption in case of disagreement would not be acceptable from a broader policy point of view, the Commission could also consider limiting the sharing of information with strict confidentiality obligations to outside counsels only (and potentially a limited number of identified inhouse (competition) counsels).

Last, to further effectively protect procedural rights in proceedings, third-parties should be properly heard early on in the process, such that parties can review and comment on the views that have been submitted. Likewise, access by the investigated parties to the information exchanged under Art. 11.4 of Regulation 1/2003 could reinforce the right to be heard. For parties involved in a procedure before the NCA, it is important to know the opinion of the Commission to be able to exercise their right of defence and right to be heard in a meaningful manner.

4. In your view, do the following investigative tools provided by Regulation 1/2003 provide for an effective means to detecting and investigating potential infringements of Articles 101 or 102 TFEU?

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

- Yes
- No
- Don't know

Please explain your answer

Sector enquiries may be a useful tool to gather insights into the dynamics and competitive interactions of a given market segment. At the same time, sector enquiry RFIs are often incredibly burdensome. To justify the impact in terms of costs and resources involved for companies, the Commission should have clear indications of concerns before launching such tool. Questions should also be targeted to the concerns the Commission seeks to verify, to avoid that an overly broad approach increases even further the burden for companies needing to comply with such requests.

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

- Yes
- No
- Don't know

Please explain your answer

RFIs are a meaningful tool for the Commission to collect information about potential infringements of EU competition rules. Irrespective of whether the RFIs are addressed to third-parties or parties to the investigation, RFIs should be targeted at the investigation at hand, and seek to collect input in the most efficient way possible. This means that

questionnaires should be short and targeted to the company in question. When more complex information is collected, timeframes should be adapted to allow the respondent to produce a meaningful response. In the merger context for example, third party RFIs are often so lengthy and burdensome that they discourage company representatives to provide input. Questionnaires are also sometimes poorly drafted, so that some questions either do not make sense (from a company or sector perspective for example) and fail to capture the relevant issue(s). It would be helpful if case teams make sure that they are properly informed or have had a chance to verify the scope of their questions upfront. Having oral interviews with those companies/third-parties that would be happy to do so may be one way to improve the quality and response rate to third-party questionnaires. The hearing officer could also play a role in making sure that the Commission's information requests remain proportionate and targeted.

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

- Yes
- No
- Don't know

Please explain your answer

The power to take statements may be a meaningful tool for the Commission to collect information about potential infringements of EU competition rules. We do not see the Commission utilizing this tool very often, so have limited experience in this regard. When using this tool, it is important however that the Commission properly captures the content of the discussion and makes the input part of the file. Importantly, the Commission should treat the content of individuals' declarations with great care, as individuals may have their own agenda when presenting views or express confident opinions on topics they do not necessarily master.

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

- Yes
- No
- Don't know

Please explain your answer

The powers of inspections are an important tool for the Commission to collect information about potential infringements of EU competition rules. It is important however that those inspections target the authors of the conduct concerned, and respect the rights of privacy and rights of defence in particular if investigations take place at home offices. Investigations must also respect the position of inhouse counsels within a corporation. More specifically, the Commission should recognize legal privilege to communications with inhouse counsels – as further explained in response to Question 14 below. This is critical in order to preserve the ability of inhouse counsels to have open conversations with business teams and

promote EU competition compliance across the teams they support.

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

- (●) Yes
- ( ) No
- ( ) Don't know

Please explain your answer

In addition to inspections of office premises, the power of inspections of other premises may also be a meaningful tool for the Commission to collect information about potential infringements of EU competition rules, especially as people are increasingly working remotely following the Covid-19 pandemic. However, when such inspections are conducted at the homes of employees, they are seen as much more intrusive to private life, and so the Commission should exercise such tool with great caution and only in cases it would not otherwise be able to obtain the information it is looking for (also bearing in mind that electronic communications from employees can typically be found on company servers, for example).

5. 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
- ( ) Don't know

Please explain your answer

Regulations 1/2003 and 773/2004 include important rules to protect the procedural rights of the parties (subject to the comments and suggestions outlined in this document, and in particular in response to Question 14 below). Whether those rules are adequate often depends on the implementation of the rules. While the Commission aims to protect those rights, it is important to bear in mind the importance of the rules and the need to apply a high standard – as it is critical to allow companies a meaningful defence against any allegations brought forward.

We also refer to our response to Question 3 above in relation to the required review of the regime around the treatment of confidential information.

6.In your view, are the following 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
- Don't know

Please explain your answer

To require undertakings and associations to end EU competition law violations is likely the most effective and efficient power granted to the Commission by Regulation 1/2003 to ensure compliance with EU competition rules, as it directly targets the problem in question. We appreciate, however, that in certain circumstances, the Commission may also authorise a company to continue its practices temporarily, typically to preserve the confidentiality of the investigation pending a dawn raid.

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

- Yes
- No
- Don't know

Please explain your answer

The power to impose behavioural or structural remedies to ensure an effective application of Art. 101 or 102 TFEU can be an important tool to address a competition law violation. It must be ensured however that such a behavioural or structural remedy does not go beyond what is strictly necessary. The imposition of remedies must be used under strict observance of the principle of proportionality, to ensure that the remedy is targeted (and limited) to addressing the underlying competition law concern.

c. To order interim measures

- Yes
- No
- Don't know

Please explain your answer

Interim measures can be a very useful power granted to the Commission by Regulation 1/2003 for an effective and efficient application for Art. 101 and 102 TFEU, given that it

allows for a fast intervention. In particular in fast moving markets, this tool can be used to prevent harm from intensifying over a short period of time. At the same time, interim measure should be used with caution since they are only based on a very preliminary assessment of the facts and circumstances of the case. Furthermore, interim measures should have a maximum time limit of application to ensure clarity and transparency.

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
- Don't know

Please explain your answer

The ability to make binding commitments are contributing to an effective application for Art. 101 and 102 TFEU. It enables an undertaking to bring the case to a faster resolution and creating certainty for the company involved from a business perspective. Therefore, it is crucial that such proceedings do lead to quicker decisions, which currently is not always the case. To that end, as mentioned above, we recommend the introduction and use of time limits for proceeding under Art. 101 or 102 TFEU.

This being said, commitment decisions should be used in appropriate cases only, as they do not conclude on whether a specific conduct qualifies as an infringement, thereby creating uncertainty as to its precedential value for other players on the market. In areas where the law is arguably not sufficiently clear, it would be important to try to provide clarity and guidance, for example through the use of articles or publications in the Newsletter.

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

- Yes
- No
- Don't know

Please explain your answer

In addition to identifying anti-competitive behaviour, identifying conduct that does not raise concerns from an EU competition law perspective is equally important from a compliance perspective. Therefore, the ability to find that Art. 101 or 102 TFEU are not applicable is an adequate tool to enforce compliance with EU competition rules. However, the tool is currently not used. Given that it could bring further clarity around the application of Art. 101 and 102 TFEU, we encourage the Commission to use this tool more frequently in the future in particular in relation to behaviour for which the compatibility with competition rules is unclear.

f. To impose fines on undertakings for substantive breaches of Article 101 and 102

- Yes
- No
- Don't know

Please explain your answer

The ability to impose fines helps to sanction infringements, create deterrence, and thereby ensure compliance with Art. 101 and 102 TFEU.

It remains important that sufficient transparency and predictability is created in terms of fine calculations, in order to guarantee the parties' rights of defence. Furthermore, ICLA is of the view that fine calculations should take into consideration whether compliance programs were in place. A broader recognition by the Commission of effective compliance programs and the recognition of such programs as a mitigating factor in fine calculations, in line with the approach of many other competition agencies around the globe, would further encourage companies to implement compliance trainings and protocols. Furthermore, in case of novel theories of harms or behaviours, the competition law compliance of which is unclear due to lack of precedents, the Commission should continue to use caution and consider not imposing fines or only symbolic ones.

g. To impose fines on undertakings for breaches of antitrust procedural rules

- Yes
- No
- Don't know

Please explain your answer

The fining powers of the Commission are also effective in contributing to compliance with the procedural obligations associated with proceedings under the Art. 101 and 102 TFEU. Especially, recent case law on procedural infringements and imposed fines have sent an important signal to stakeholders.

**Efficiency**

7. 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

Don't know

Please explain your answer

The system of parallel enforcement between the Commission and the NCAs set out by Regulation 1/2003 is efficient in ensuring an effective enforcement of Art. 101 and 102 TFEU, as NCAs may be better placed than the Commission to detect certain practices. In general, it has allowed for an efficient allocation of resources and use of expertise between the Commission and the NCAs, while the supremacy of EU antitrust rules and the possibility for the Commission to give guidance have contributed to a more uniform application (even though there are still examples of inconsistent application of the rules by some NCAs – see our responses to Questions 10 to 12 above). This parallel enforcement needs to be embedded in a system of close coordination between the Commission and the NCAs, where exchanges between NCAs and the Commission on specific cases happens early on (see our response to Question 2 above) and where the European Competition Network plays a more important role.

8. 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
- Don't know

Please explain your answer

ICLA welcomes the removal of the burdensome notification system of business agreements to the Commission, which has led to substantial reduction in resources needed on both sides. The Commission can now be more efficient in prioritizing the cases that matter.

However, the self-assessment system has put a greater responsibility on companies, in particular in areas where there is not enough case law. Here the Commission must make more use of its tools, such as guidelines, informal guidance or decisions on non-application of Art. 101 or 102 TFEU. Especially, regarding the informal guidance and the decisions on non-application, we recommend that the Commission re-evaluates how to make these tools more practicable in the future (e.g., by allowing for anonymous guidance requests or making binding the comfort letters given by the Commission).

9. 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
- Not
- Don't know

Please explain your answer

We do not consider that the current framework allows for a timely and efficient enforcement of Art. 101 or 102 TFEU – or at least, there is significant room for improvement. The actual length of proceedings under Art. 101 or 102 TFEU, often lasting more than 3 years, has been a significant concern with regard to an efficient enforcement. That antitrust proceedings have no deadline under EU competition law may have serious implications on undertakings concerned, but also the markets in question. The undertakings under investigation are under substantial strain for multiple years, while at the same time there is legal uncertainty and potentially a chilling effect on a whole industry for years. Therefore, as mentioned above, we recommend the introduction and use of time limits for proceeding under Art. 101 or 102 TFEU.

**Relevance**

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

- Yes
- No
- Don't know

Please explain your answer

With new theories of harm being developed by the Commission as well as NCAs, and the risk of potential discrepancies between the application of competition rules, the need for a uniform and consistent application of Art. 101 TFEU is even more important than ever.

There have been a number of recent examples of cases where Art. 101 TFEU was applied with slightly different standards at national level (such as e-books, MFN clauses or selective distribution), creating uncertainty for market players, especially when operating internationally. A uniform application of the rules, including procedural ones, provides more certainty and predictability for companies especially in a fast-changing environment with companies facing new theories of harm and potential lack of precedents.

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

- Yes
- No
-

Don't know

Please explain your answer

Please see our response to Question 10 above. The need for consistency in the assessment of Art. 101 TFEU cases by the Commission and NCAs is equally crucial with respect to Art. 102 TFEU. A recent example arises from the application of Art. 102 TFEU to exclusivity provisions in the ice-cream sector, where the Italian NCA has adopted a different position from settled EU case law (which is now pending before the ECJ for a preliminary ruling). This is also particularly relevant in relation to new theories of harm and the recent increased focus of authorities on innovation (for example in sectors such as Tech and Pharma).

**Coherence**

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

- Yes
- No
- Don't know

Please explain your answer

Generally speaking, Regulations 1/2003 and 773/2004 function well and are well understood by companies. There is however increasing focus on alternative considerations (environmental, societal, etc.) that create uncertainties for companies as to the priorities of agencies and public institutions more generally, and the weight to be attributed to these considerations in the assessment of competition law cases. A good example is the progressive shift from the standard of "harm to competition" towards more "consumer-focused" objectives, increasingly taking account of fairness and other relevant factors in antitrust analysis. Similarly, the recent debate relating to the definition of a "fair share" of benefits that must be passed on to consumers under Art. 101(3) TFEU and potential difference in approach between the Commission and at least one NCA (the Authority for Consumers and Markets in the Netherlands) (in the context of sustainability-related agreements in particular), shows that the risk is real and may create significant uncertainty for companies.

Further guidance to complement competition-related regulations would be useful for companies in order to evaluate the impact of these new factors on the assessment of specific behaviour and their compliance with competition law.

**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

Don't know

Please explain your answer

In an ever more integrated world, companies require clarity and predictability in the application of rules, including competition rules. As mentioned in responses to Questions 10 and 11 above, a consistent and uniform application of competition rules arising from Art. 101 and 102 TFEU is critical for companies operating internationally, which – in an increasingly inter-connected world– is the case of almost all market players, in most industries. Guiding principles and precedents at EU level are therefore essential to ensure – again – sufficient predictability and consistency for companies active internationally. The risk of discrepancy arising from the application of different standards at national level is particularly relevant, and the role of the EU – and the Commission in particular – in ensuring such an effective and uniform application of Art. 101 and 102 TFEU is therefore critical.

As mentioned above, there have been a number of recent cases whereby Art. 101 and 102 TFEU have been applied through slightly different standards at national levels. Such inconsistencies lead to additional complexities for companies, makes it more challenging to navigate the regulatory environment and may disincentive companies from taking pro-competitive or innovative initiatives (e.g., collaborating with competitors to bring greener solutions to the market) by fear of repression in certain jurisdictions, where standards may differ in the application of competition rules.

**Other**

14. 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?

- Yes
- No
- Don't know

Please explain your answer

The Commission should recognize legal privilege to communications with or documents prepared by in-house competition counsel when produced to give legal advice to their internal clients. There has been strong scepticism to grant legal privilege to in-house competition counsels because of the alleged "lack of independence", as in-house counsels are also employees of their client. ICLA strongly disagrees with this perception and considers it is time to revisit this conclusion. Granting legal privilege to in-house competition lawyers would allow them to have even more open conversations with their internal clients and provide more detailed legal advice. Inhouse competition counsels know their clients well, and are best placed to give tailored legal assessments. Furthermore, it is not the role of in-house counsels to take final decisions about certain conduct – it is their role to advise about the risks such conduct may or may not entail, so that business clients can take well-

informed decisions. In-house counsels would not be doing their job right if they would not point at compliance risks that may exist. In fact, this is exactly the idea that Regulation 1/2003 had in mind, i.e., to promote the ability of companies to make self-assessments rather than having to rely on a notification system that was very burdensome on the Commission as well. By not acknowledging the privilege protection to communications with internal clients, the ability of in-house counsel to give advice and ensure compliance is hampered, obliging companies to instruct external advisors and incurring significant costs that could otherwise be spent on other, more value-added activities, such as research and innovation. Companies should be guaranteed that their efforts to abide by the law will not be jeopardized by the risk of authorities being able to freely access any communication between business teams and their inhouse competition counsels. If having inhouse legal counsel risks to backfire, companies would be discouraged from investing in compliance. For all these reasons, a number of important jurisdictions (e.g., the UK, US, Belgium, the Netherlands, Portugal, Spain) have explicitly or implicitly recognized privilege for in-house competition lawyers. We request that, as part of its review of Regulation 1/2003, the Commission at least considers our proposal to recognize legal privilege to in-house competition lawyers. If of interest, ICLA would be happy to provide a comprehensive note of the various considerations to be taken into account, and develop a practical proposal for the Commission's consideration.

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 any personal data in the file you upload if you want to remain anonymous

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed