ERT Response:

EC Evaluation of Regulations 1/2003 and 773/2004

1. Introduction

1.1 ERT welcomes the European Commission's commitment to updating and refining its competition law "toolkit" including its evaluation of Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("**Regulation 1/2003**") and Commission Regulation (EC) No. 773/2004 relating to the conduct of proceeding by the Commission pursuant to Articles 81 and 82 of the EC Treaty ("**Regulation 773/2004**").

1.2 Regulation 1/2003 is now nearly 20 years old. Many, if not most, competition practitioners and professionals working today did not experience a world of competition enforcement before its inception. It may therefore be that elements of this response unduly understate its positive impact given how difficult the "counterfactual" of a world without such a regulation would now be even to imagine.

1.3 Broadly speaking, ERT thinks Regulation 1/2003 has been working well. The system of "self-assessment" has been a success in materially reducing the burden on businesses and on reducing the delay on implementing otherwise economically valuable commercial collaborations.

1.4 There are, however, certain areas of improvement where the system has perhaps not achieved its stated objectives, or where new challenges should be accounted for that couldn't have been anticipated when Regulation 1/2003 was enacted. ERT has set out its views on these below, and some proposals for reform. These have been organised around the five evaluation criteria set out in the EC's evaluation questionnaire.

2. 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*

2.1 Looking back over the last twenty years, it is clear that the arc of competition law has matured considerably. That is shown both in terms of the cases which are the subject of active enforcement and in the sophistication of assessment conducted by businesses themselves. The move to self-assessment does not therefore seem to have stunted the development of the discipline. That said, there are many areas where companies are still left relying on caselaw pre Regulation 1/2003 (which does not seem likely to be in line with the latest competition law thinking) as the system of self-assessment has largely halted the evolution of enforcement caselaw when more up-to-date guidance would be welcome.

2.2 Notwithstanding the benefits brought about by the abolition of the *ex-ante* notification regime, self-assessment therefore has its limitations as regards providing a sufficient level of legal certainty in instances where businesses are assessing complex agreements or face novel legal situations, which have not been addressed by the existing caselaw (often pre Regulation 1/2003) (e.g. sustainability co-operation). Consequently, in many situations, businesses are often hesitant to undertake the risks associated with the implementation of novel or more complex legal instruments without any guidance from the Commission.

2.3 Presently, companies are reluctant to come forward for informal guidance to help in these circumstances given the time and levels of publicity entailed in such a process. Improvements to the system on informal guidance – which might include formal timelines, commitments by the Commission that the guidance would be binding provided the key elements of the cooperation have not changed, and the ability for applications and the resulting guidance to be anonymous but still published – would be welcome.

2.4 Alternatively, making informal guidance an anonymous (but still public) process could be a sensible way to differentiate it from the formal guidance envisaged in Article 10 of Regulation 1/2003 for which companies would trade-off the benefit of legal certainty (in the shape of a binding opinion) for a loss of anonymity. Both systems could benefit from more widespread use than has been the case in the past 20 or so years. This same aim (of more public commentary from decision makers on the limits of Article 101 and 102) could also be enhanced by empowering member states (subject to appropriate coordination with the Commission) to render inapplicability decisions.

2.5 Regulation 1/2003 and its associated guidelines have clearly helped to bring national and pan-European enforcement in line. However, uniformity is – and should be – the aim and that has not been wholly achieved in part due to increasingly differing interpretations of particular competition law issues (see, for instance, the experience on wide vs narrow MFN clauses, the interpretation of horizontal concepts such as hub-and-spoke, or of essential elements of exclusionary abuse under Art. 102 TFEU, to name just a few examples), and the absence of a centralized mechanism for allocating cases. Currently, radical deviations from existing EU case practice by NCAs can only be contested before appeal courts and clarification is oftentimes only obtained through ECJ referral procedures. This leads to unnecessary legal uncertainty on key questions of the application of EU law for many years. The fact that supreme courts in several member states (e.g. the supreme administrative court in Greece) categorically refuse to refer competition law questions to Luxemburg further increases disunity.

2.6 ERT would therefore strongly encourage the introduction of stronger instruments for the Commission to ensure uniformity between its approach and that of member states and the definition of a systematic process for allocating cases at European

or national levels as a means of underpinning both effective (and more efficient) enforcement within the single market. One of the proposed means to enhance and ensure the desired decisional uniformity would be to vest the Commission with greater intervention powers in national proceedings involving the application of Article 101 and/or 102 and allowing the Commission to participate in the proceedings before a NCA from the beginning and not only 30 days prior to the adoption of a decision, as currently provided for in Regulation 1/2003. In addition, ERT suggests introducing a process according to which guidelines of the national competition authorities would require an approval of the Commission to ensure the desired level of uniformity.

2.7 Whilst not formally part of Regulation 1/2003, changes to the leniency programme would also help to ensure more efficient enforcement by for instance introducing a "one stop shop" for leniency The Commission should also clarify the confidentiality protection afforded to leniency statements, settlement submissions, and business secrets in national court proceedings.

2.8 Similarly, whilst the focus of Regulation 1/2003 is understandably on uniform application of competition law within the EU, given the increasingly global nature of competitive behaviour, there would be value in the Commission capturing its approach to information exchange and liaison with third countries in the revised version of Regulation 1/2003.

2.9 ERT notes that although Regulation 1/2003 is fit for the challenges of digitalisation, specific actions should be taken to ensure a swift response from competition authorities, especially in fast-moving and dynamic digital markets. In a number of cases, the duration of competition investigations has been a source of concern. The efficient and timely resolution of such cases is key to effective enforcement. Some of the harms to competitors and consumers, which can result from competition issues remaining unresolved whilst competition investigations are ongoing, could be addressed through an increased use of interim measures, where appropriate. In addition, a broader application of cautiously tailored remedies reflecting the specificities of the case at hand would be welcomed. ERT is of the view that an imposition of remedies is particularly useful in cases (e.g. fast-moving and dynamic digital markets) where mere termination of an infringement is too slow in restoring effective competition or not sufficient to remedy the harm already caused by the infringement.

3. 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 net benefits associated with the Regulations have been positive.***

3.1 The move to self-assessment has led to an overall much more efficient system of competition compliance. It is critical that this be maintained.

3.2 However, once a case is in fact being investigated formally, the process loses its efficiency. This manifests itself in several ways, including:

(A) The overall duration of the case.

(B) The volume of information required of both investigated and third parties.

(C) The (almost inevitable) appeal process which follows the majority of infringement decisions.

3.3 To mitigate the inefficiencies outlined above, ERT would be in favour of the introduction of:

(A) Statutory periods, or at least strict best practice periods for the different stages, in all Article 101 and 102 investigations. 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.

(B) Limiting the scope of information requests addressed to third parties (including that they are not required to undertake exhaustive searches to be able to comply with the request) and ensuring that the timescales given to third parties to respond are more reasonable, by reference to the volume of information being sought and that third party's role in the case.

(C) A stronger role for the hearing officer, including for determining the scope of information requests.

3.4 ERT appreciates the Commission's recognition of the burdens that the access to file system places on the parties. ERT would support proposals which aim to reduce that burden *provided* there is no reduction in the obligation on the Commission to provide parties with access to all information that the Commission has relied on in preparing its statement of objectives and similarly provided access to *all exculpatory materials* on the Commission's files.

3.5 ERT would also like to draw the Commission's attention to the issue of competitively sensitive information provided by third parties and how it is shared with the parties under investigation. Considering the importance of this information to those third parties, and the fact that it is the third parties themselves that are generally best placed to make the judgment on what information is confidential, it is essential that the Commission engages constructively with the parties concerned. In particular, the Commission should have a dialogue as to whether the information should be disclosed and, if so, what should be the level of

reduction. In the event of disagreement, the Commission should not publish the information unless it can provide a reasoned justification.

3.6 ERT understands and welcomes the Commission's recent drive to increase the use of interim measures to improve the effectiveness of its decision making and enhance the deterrence effect of its rules. The duration of the interim measures must be, however, considered carefully to ensure their effectiveness in preventing irreversible harm to competition.

4. 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)***

4.1 The main barrier to relevance is the time delay between the start and finish of enforcement proceedings. As above, this would be mitigated by statutory time periods or strict best practice time periods at a minimum.

4.2 ERT recognises the importance of the Commission retaining an element of discretion in deciding which cases to investigate and therefore being able to take into account its resource constraints in deciding which cases to prioritise. However, there is a sense – particularly in recent years – that the Commission's focus has been on a relatively narrow group of cases, namely the Article 102 cases brought against "big tech" which has left other areas of enforcement under-resourced.

4.3 One other recent development which has not yet filtered through into the Commission's documentation is the COVID-related shift to working from home and how that is factored-in to the Commission's unannounced inspections process. Updated guidance on this would be welcomed, including the circumstances in which the Commission would seek to perform an inspection at domestic premises.

5. 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***

5.1 Unannounced inspections are perhaps the most challenging aspect of the Commission's investigative process in terms of compatibility with the overall legal order, notably in terms of proportionality and rights of defence. Several improvements could be made including requiring the Commission to provide more information at the outset of such an inspection including, most notably, setting out the key elements of the alleged infringements instead of stating merely the subject of the investigation.

5.2 ERT is concerned by the reported proposal for the Commission to add new investigative powers such as the power to summon a company's employees for an interview. It is the company that is the subject of the Commission's investigations, not any individual. It is inconsistent with the company's rights of defence and risks a wholly disproportionate ranking of evidence for the Commission to have any greater role for individual interviews than it currently does. In addition, the Commission should reflect on the conditions in which it may be necessary or at least beneficial to its compliance objectives to afford legal privilege (or equivalent) protection to in-house counsel.

5.3 The recognition of in-house legal professional privilege is a critical issue. ERT strongly disagrees with the perception that in-house legal advice does not benefit from "independence". Indeed, only by granting legal privilege to in-house competition counsel, can they properly advise their clients. By not acknowledging the legal privilege protection to their communications with the clients, in house counsels' ability to provide advice is severely limited, obliging companies to instruct external advisors even if they have internal expert counsel. For all these reasons, in many jurisdictions (e.g. the UK or the US) legal privilege for in-house counsel has been explicitly or implicitly accepted and ERT would welcome that the Commission follows that path within this review of Regulation 1/2003.

5.4 Similarly, rights of defence would be better served by the parties under investigation being given clearer updates on the Commission's emerging thinking and signposting of the steps in the case. The Commission should also have an obligation to respond to the parties' arguments (unless manifestly repetitive or unfounded) after the parties have responded to the statement of objections and the oral hearing (if any) has taken place. In some instances, companies experience exchanges with the Commission as a "tick-the-box" exercise rather than a true exchange on the arguments. Coupling this with access to key documents at an earlier stage than the statement of objections would also be a welcome change. ERT also consider that more widespread access to the file for third parties may provide a more balanced overall assessment of the evidence, and can support the Commission in its decision making.

5.5 There is a lack of transparency in the Commission's fining process. The current rules grant the Commission a great level of discretion when determining the level of fines it imposes on undertakings. This remains the case despite the adoption of the EC's fining guidelines. This lack of transparency may lead to incoherency and potentially discriminatory outcomes. ERT does not see a basis for supporting further fine increases by the Commission. This is particularly because the level of fines imposed by the Commission is already very high, with multiple avenues to ensure deterrence. Moreover, there is no evidence of recidivism as a result of fines being too low.

5.6 The current rules also provide for a very limited list of mitigating circumstances disregarding general efforts of business to be compliant with EU competition rules through, for instance, compliance programmes. ERT considers that a broader list of mitigating circumstances would have a positive impact on businesses' endeavours to engage in compliance measures and monitoring. For instance, in 2020, the Spanish Competition Authority adopted a Guide to Antitrust Compliance Programmes (see here) whereby it sets out that compliance programs might be considered a mitigating element when establishing the level of sanction.

5.7 Similarly, the fining policies across the NCAs lack transparency and coherence, which are essential elements in achieving uniform enforcement of EU competition rules. To remedy these shortcomings, the Commission could consider amending its existing fining guidelines and bringing more uniformity into fining policies at the national level.

5.8 The updated guidance should also indicate which corporate entity(ies) the Commission would plan to issue its fines against. It is currently unpredictable where undertakings have changed ownership structure over the course of the infringement and/or in the subsequent period leading up to the imposition of the fine.

5.9 Under the current rules, undertakings subject to fines for anticompetitive conduct must pay the fine without an undue delay following the issuance of the decision, regardless of their choice to appeal the Commission's decision. There has been an ongoing discussion that this practice might be in breach of Article 6 of the European Convention on Human Rights. The Commission could therefore consider an adoption of automatic suspensory effect of the appeal. This would also assist in the developing caselaw regarding the payment of interest.

6. 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***

6.1 In ERT's view, the Commission adds significant value to the overall enforcement of competition law within the EU. However, as outlined above, there are areas in which this could be improved.

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