

EUROPEAN COMPETITION LAWYERS FORUM

**EUROPEAN COMMISSION CALL FOR FEEDBACK ON REVISION OF EU ANTITRUST
ENFORCEMENT FRAMEWORK**

MEMORANDUM

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MEMORANDUM OF THE EUROPEAN COMPETITION LAWYERS FORUM - RESPONSE**

1. Introduction

- 1.1 The European Competition Lawyers Forum (“**ECLF**”¹) welcomes the opportunity to respond to the European Commission’s (“**Commission**”) Call for Evidence published on 10 July 2025, inviting stakeholder feedback on the future of the EU procedures for the application of competition rules under Regulation 1/2003.
- 1.2 The ECLF acknowledges the profound changes that have occurred since the introduction of Regulation 1/2003 and recognises the need for the Commission to adapt its enforcement practices to ensure that they reflect the current enforcement environment.
- 1.3 With that in mind, the ECLF has considered the areas outlined in the Commission’s Call for Evidence, specifically the Commission’s powers with respect to inspections, requests for information, and interviews, as well as procedures for seizing and reviewing internal company documents and data. These processes are being assessed in the context of a significantly evolved digital environment, nearly two decades after the current antitrust enforcement framework was first introduced.
- 1.4 In light of the matters outlined in this submission, the ECLF has formulated a series of recommendations aimed at promoting cost-efficient and timely antitrust investigations, while ensuring that the rights of defence of those undertakings involved are adequately safeguarded.

2. Areas for reform

Extensive document search requests (section A(i) of the EC Questionnaire)

- 2.1 It is widely acknowledged that the Commission’s Requests for Information (“**RFIs**”) have increased significantly in scope and volume over recent years. While such an expansion may be justified by the complexity of the matters under investigation, there are instances where RFIs can impose substantial burdens on recipients where the probative value of the information being sought risks not being commensurate to that burden.
- 2.2 As recognised by respondents to the Commission’s study recorded in the Staff Working Document Evaluation of Regulations 1/2003 and 773/2004, RFIs can be “*burdensome*” in nature.² While the ECLF acknowledges the important role that RFIs play during

¹ The European Competition Law Forum (‘ECLF’), founded in 1994, is a group of leading practitioners in EU competition law, which is drawn from law firms across the EU. Its aim is to engage in an open dialogue on topical competition law issues and to consider proposals for reform. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1. While the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group or their firms, and members of the Working Group may have diverging views on certain issues raised in the EC’s consultation comments, as reflected in this submission.

² Commission Staff Working Document Evaluation of Regulations 1/2003 and 773/2004, published on 5 September 2024, the “**Staff Working Paper**”, page 51. In response to the Commission study, out of 133 study interviewees, only 30%

Commission investigations, one area of increasing concern for undertakings is striking the right balance between complying with burdensome RFIs while at the same time protecting the undertaking's rights of defence and respecting privacy laws. As the Commission will be aware, these issues were considered recently by the General Court in *Meta Platforms Ireland v Commission* ("**Meta**").³ The European Court of Justice (the "**ECJ**") has also confirmed that the Commission must state reasons for the scope and formulation of an RFI, and that RFIs must be sufficiently precise and justified to respect companies' fundamental rights in *HeidelbergCement AG v Commission* ("**Cement cases**")⁴.

- 2.3 While it is to be expected that Commission investigations have grown in complexity given advancements in technology since the inception of Regulation 1/2003, as highlighted in the *Meta* judgment, respondents to Commission's RFIs are increasingly required to produce large volumes of documents that are responsive to search terms, with such documents being assessed for relevance by the Commission at a later stage. Equally, the Commission may issue RFIs, which require the production of large amounts of quantitative data that must be adapted to the Commission's requested format, or which require the parties to undertake additional calculations. This development risks posing a threat to the rights of defence of undertakings and compliance with privacy rules, and may increase the risk of a lack of legal and procedural certainty for such undertakings.
- 2.4 In light of the *Meta* judgment and concerns raised by other participants of the Commission's previous consultation,⁵ there is a growing need for the Commission to provide greater clarity regarding the scope of its investigative powers, particularly with respect to the interpretation of the 'necessity' criterion that must be satisfied before potentially relevant material should be seized.
- 2.5 In the context of reforms to the procedure in Regulation 1/2003, the ECLF considers that the Commission should take care to avoid further increasing the burden on undertakings subject to an investigation, while at the same time recognising that extensive document productions based on search terms, prior to any opportunity for the respondent to assess relevance, is unlikely to alleviate the administrative or cost burden on companies that is associated with such requests. These companies will still need to conduct a comprehensive review of the documents obtained by the Commission, including the identification any material protected by applicable privilege rules, as well as performing their own relevancy assessments to identify materials pertinent to the subject matter of the investigation.

found RFIs efficient, 50% considered RFIs efficient but in need of improvement, whereas 20% did not consider them efficient.

³ Case T-451/20 *Meta Platforms Ireland v Commission*, judgment of the General Court of 24 May 2023.

⁴ Case C-247/14 P *HeidelbergCement v Commission*, judgment of the ECJ of 10 March 2016.

⁵ Respondents to the Commission's consultation noted that there is currently "*some lack of clarity as to how data protection and privacy rules apply in the context of requests for information*", see further pages 50 – 51, Staff Working Paper.

2.6 Accordingly, the ECLF has set out below certain suggestions for the Commission to consider:

- (i) The process for determining search terms to be applied in a document collection, review and/or production process could be conducted collaboratively:
 - (a) The Commission could outline the scope and subject matter of its investigation decision (or inspection notice) to the recipient, enabling both parties to jointly develop a targeted and proportionate list of search terms to be applied for the purposes of any document collection, review and/or production process. This approach could be particularly beneficial in cases involving digital or “virtual” searches, which have the propensity to generate a significantly larger volume of responsive documents. Such an approach would also reduce the burden on undertakings if the case team were to contact undertakings in advance of RFI where possible, to have more targeted requests that are tailored to the information available through a collaborative approach.
 - (b) To avoid unnecessary delays to the investigative process, the Commission and the recipient could aim to reach agreement on the list of search terms within a defined timeframe. Should a consensus not be reached, the Commission’s unilateral selection of search terms could serve as a fall-back mechanism.
 - (c) To address privacy concerns associated with sensitive personal data potentially being disclosed in response to a request to produce documents, a virtual data room procedure could be established for the review of such material, or the RFI could expressly exclude this data.
- (ii) Steps could be taken to help ensure that the Commission’s inspection and investigation powers continue to be exercised in a proportionate manner:
 - (a) The Commission’s inspection notice or investigation decision could clearly outline how and why the Commission believes that it has exercised its powers in this way.
 - (b) This is particularly important in the context of digitalisation – and it would be helpful for the Commission to set out the justification for the use of its digital tools in gathering evidence during an investigation or inspection.

Preservation of evidence

2.7 As noted in the Staff Working Paper, concerns have been raised that the current EU legal framework ⁶ may not sufficiently empower the Commission to effectively gather information necessary for its investigations and enforcement of competition law, due to

⁶ Note that the European Courts have developed a duty of care for addressees to preserve the evidence required by the Commission, see T-371/17 – *Qualcomm and Qualcomm Europe v Commission*, (9 April 2019), confirmed by the Court of Justice of the European Union in X-466/19 P – *Qualcomm and Qualcomm Europe v Commission*, (28 January 2021).

the absence of preservation orders.⁷ In this sense, it is worth noting that the ECN+ Directive does not require Member States to empower their national competition authorities to issue preservation orders, raising questions as to why this power should be granted to the Commission.

2.8 Should the Commission be minded to introduce such preservation orders, the ECLF respectfully submits that the following be taken into consideration:

- (i) The undertaking subject to any such order should, in advance of adoption, be afforded the opportunity to review the proposed scope and nature the order, to ensure the order:
 - (a) only captures material relevant to the Commission's investigation, in line with the principle of proportionality and territoriality. This implies that the object of these preservations orders should not include documents that are confined to the jurisdiction of a single EU Member State, or that are created and stored outside the EU and are not accessible to the company, its employees or its directors; and
 - (b) does not impose undue practical burdens, including those related to the feasibility or cost of data preservation.
- (ii) Any proposed sanctions for failure to comply with an order should be proportionate, taking into account the practicalities and cost of compliance (including where there may be risks of inadvertent or accidental breaches). Additionally, sanctions should only be imposed if fraud or gross negligence is proven by the Commission. Positive cooperation by a significant number of employees (often hundreds or even potentially thousands) can be required to ensure that document retention policies are duly implemented and therefore carries an inherent risk of inadvertent or innocent errors in implementation. The nature of who commits those errors, as well as their seriousness, should also be relevant to assessing whether any fine should be imposed if a breach is found.
- (iii) It would also be appropriate to take account of the interplay with other areas of law, e.g. privacy or labour law, that may prevent undertakings from accessing (and storing) data of their employees in compliance with any such preservation orders.

2.9 The ECLF does not foresee major benefits for companies under investigation from the introduction of preservation orders. Instead, these obligations would place additional burdens on them, such as figuring out how to meet the preservation requirements set out in the order, or ensuring that those requirements align with a clearly defined scope and purpose of the investigation (as to avoid fishing expeditions), among others. These

⁷ Staff Working Paper, pages 50 – 51. In this context, the ECLF also notes that the UK Digital Markets, Competition and Consumers Act 2024 (the “**DMCCA**”) gives the Competition and Markets Authority in the UK (the “**CMA**”) new direct enforcement powers mandating that companies preserve documents relevant to potential infringements of competition, consumer protection and digital market regulations. The CMA also has the power to impose fines and/or other penalties on businesses that fail to preserve the relevant documents.

burdens may be avoidable, especially considering the extensive investigative powers that the EC already bears.

- 2.10 In addition, under the duty to cooperate, the introduction of preservation orders may shift the burden of proof from the Commission to the investigated company, since the failure to provide the documents covered by the order may be considered a violation of such duty.
- 2.11 Furthermore, introducing preservation orders does not enhance the effectiveness of an EC investigation. Companies under investigation already have a duty to cooperate with the EC which bounds them to provide all documents related to the investigation; and submitting incomplete information may be punishable by fines of up to 1% of the company's total turnover.
- 2.12 Finally, as regards the increase of costs for companies, the increase in cost and complexity must be considered, since the exceptions to the general data retention policies would be broader than they currently are, and sophisticated monitoring systems would need to be implemented. Likewise, the increase in compliance risks for the investigated companies must be taken into account, since a breach of the requirements of the preservation order may be considered an infringement of the duty of cooperation regardless of whether this breach has actually affected the Commission's investigation.

Virtual inspections

- 2.13 The ECLF recognises that the Commission's inspection powers may need to be adapted to accommodate for company data commonly hosted in the cloud, and for the reality of "home working". However, it is respectfully submitted that any such adaptations should strike a careful balance between operational efficiency and the protection of undertakings' rights of defence.
- 2.14 Since the inspection of digital data increases the risk of exceeding the scope of the investigation decision, the use of these inspections should be exceptional, and the Commission should justify their necessity, explaining why a physical inspection would not be sufficient. The inspection notice should also outline how and why the Commission believes it has exercised its powers in accordance with the principle of proportionality.
- 2.15 Likewise, the Commission should be held accountable for ensuring that its inspection and investigation powers are exercised in a proportionate manner. Therefore, in the inspection order the Commission should unequivocally define the scope of its powers, which needs to be limited to those materials in respect of which it has reasonable grounds for considering them relevant to the conduct at issue. This level of detail is necessary to ensure that the company can assist with guiding the inspectors during the digital review, and that it does not result in a potential fishing expedition.
- 2.16 Furthermore, strong procedural safeguards must be established to ensure that the limits imposed in the inspection notice are not surpassed. In consequence, the duration of the inspection, cannot be indefinite. Also, to guarantee adherence with the principle of territoriality, prior clear rules on how specific documents located outside the EU should be assigned to the recipient of the Decision must be established.

- 2.17 As of now, when the Commission carries out a physical inspection at the premises of an undertaking, employees of the undertaking and legal counsel are present to ensure that the Commission exercises its powers in line with Regulation 1/2003, e.g. to ensure the withholding of material outside the scope of the inspection decision or that is protected by applicable privilege rules.
- 2.18 These safeguards are crucial in ensuring that undertakings subject to an inspection can properly exercise their rights of defence, and that the Commission's inspection powers are exercised in a proportionate manner in line with Regulation 1/2003. Should the Commission's powers of inspection be expanded to include carrying out virtual inspections, the ECLF respectfully submits that equivalent, if not enhanced, safeguards should be implemented. This could, for instance, take the following format:
- (i) The Commission's search terms and review process would be run on the undertaking's systems, or otherwise on a secure platform that is wiped once the virtual inspection is complete, with an equivalent verification process as takes place at the end of a physical inspection.
 - (ii) The key search terms shall be revealed to the undertaking so it can help guide the inspectors through the cloud and its digital storage systems (for instance, if the inspection refers to prices in Unit X of Undertaking Y, which is stored in certain parts of the network, access to and review of information should be limited to that Unit and no other areas of the network).
 - (iii) A facility for virtual shadowing would be developed, for example via video call and screen sharing (or at the Commission's premises, depending on the preferences of the shadowers), allowing the shadower team of the undertaking to review any materials reviewed by the Commission case and/or inspection team in parallel and on a real-time basis with the Commission case and/or inspection team. This can avoid, for instance, undue access to privileged materials.
 - (iv) A facility for final review by the undertaking before materials are virtually seized would be developed.
- 2.19 The ECLF considers that such safeguarding measures must be carefully considered and sufficiently robust to ensure undertakings subject to an inspection are afforded their rights of defence (including with respect to making submissions where irrelevant or legally privileged material is being sought).

Interviews

- 2.20 The ECLF considers that making interviews compulsory during an inspection does not give rise to relevant efficiencies for the procedure.
- 2.21 However, where necessary, interviews may help the understanding of the factual elements of the case by the Commission, which could improve the successive parts of the investigation, such as the requests for information, which may become more precise. As a result, the overall duration of the investigation and the associated costs for stakeholders may be reduced.

- 2.22 In any case, the introduction of a compulsory interview power must be accompanied by appropriate safeguards to protect the rights of defence of the investigated parties, including: (i) right to legal representation; (ii) prohibition of self-incrimination; (iii) the interviews should be recorded and companies should have the right to obtain a copy of the recording once the interview concludes; and (iv) shall respect the scope of the investigation. Furthermore, as regards the possibility that the Commission could impose fines on stakeholders subsequent to these interviews, it is important to note that Article 23 of Regulation 1/2003 empowers the Commission to impose fines only on undertakings and associations of undertakings, and not on natural persons. Accordingly, companies under investigation should not be held liable for infringements committed by individuals, particularly where those individuals have acted against the company's instructions and compliance efforts. For example, an employee who destroys documents or provides false information to the Commission despite clear instructions to cooperate, or one who refuses to attend an interview despite pressure from the company, should bear individual responsibility. This applies even more strongly in cases involving individuals who are no longer employed by the company and over whom the company has no authority or control.

Interim measures (section A(ii) of the EC Questionnaire)

- 2.23 As previously expressed by the ECLF, there is not necessarily a need for a fundamental overhaul of the legal standard applied by the Commission for most interim measures cases, since those situations can be effectively addressed by national courts, which have the authority to adopt interim measures, including *inaudita parte* orders, where appropriate. For example, in Spain, a Mercantile judge issued *inaudita parte* interim measures against UEFA in application of Articles 101 and 102 TFEU within a record time of two days.

National courts are particularly well positioned to grant interim relief. They routinely issue such measures in different legal areas and, in the antitrust context, are also empowered to declare restrictive agreements null and void, as well as to award damages for any resulting harm. This role is expressly recognised by the Commission in its Communication on the handling of complaints (OJ C 101, 27.4.2004, paragraph 16).

- 2.24 Nevertheless, the ECLF agrees with the Commission's view that interim measures "*can be a powerful tool [...] to ensure that competition on the market is preserved or restored while an antitrust investigation is ongoing*".⁸ However, the Commission's own use of this tool remains limited, having only been applied once.⁹ By contrast, 95 decisions imposing interim measures have been adopted by national competition authorities (NCAs) in the period 1 May 2004 to 1 June 2024.¹⁰ This suggests that the tool at EU level in its current

⁸ COM(2004) 394 "Report from the Commission to the Council and the European Parliament on the legal framework for and the use of interim measures by national competition authorities", 5 September 2004, page 1.

⁹ Case AT.40608 – *Broadcom*, 16 October 2019.

¹⁰ COM(2004) 394 "Report from the Commission to the Council and the European Parliament on the legal framework for and the use of interim measures by national competition authorities", 5 September 2004, page 9.

form is not fit for purpose, neither for competition in general, nor for stakeholders critically impacted by unlawful anticompetitive conduct.

- 2.25 As the Commission has identified,¹¹ those NCAs that have adopted the most interim measure decisions, namely France and Belgium, have both less stringent procedural requirements and a less onerous legal test.
- 2.26 For example, while the Commission must establish that the conduct in question gives rise to a *prima facie* infringement of competition law, the French competition authority need only establish a 'likelihood' of an infringement.
- 2.27 Consequently, the Commission may want to consider applying a less onerous standard in general or at least in certain fast-moving markets, where dynamic market conditions demand timely intervention. In particular, softening the interpretation of urgency of the request in relation to financial harm under Article 8 and aligning it to what judges in many Member States apply, would greatly facilitate the granting of IMs. The interpretation of this provision is usually much stricter than the equivalent provisions in Member states and financial harm is rarely deemed "irreparable". Whilst the Commission only includes within this category a financial loss that may put in question the viability/existence of the company, other EU jurisdictions accept a more qualitative concept of irreparable harm which refers to long run losses or risk of interruption in investments in R&D, loss of sales/clientele, that may seriously damage the competitive position of a company some years later, when the infringement ceases, although it cannot be proven that it will cease to exist. A similar approach would be welcome, at least in fast moving markets.
- 2.28 The Commission could also consider applying a less onerous standard for interim measures that are easy to implement and cause limited disruption to the defendants' business. Article 11 of ECN+ Directive explicitly leaves it open to NCAs to impose interim measures in cases that would not meet the standard established in *Camera Care*, and many have chosen to do so. The ECLF would welcome the Commission's consideration of a similar approach, at least in those sectors that would benefit most from timely intervention.
- 2.29 Furthermore, the Commission may also wish to consider following the example of Member States, such as Belgium and Spain, to set time limits for the imposition of interim measures, which would seem appropriate in light of the purpose of this tool. If the Commission designates a special team entrusted with this task, which requires usually urgent action, maybe some efficiencies can be achieved. In addition, a clear procedure with specific deadlines could be established for each step (acknowledgement of receipt of the request, initial information request, hearing and final decision).
- 2.30 Finally, the Commission should consider allowing third parties to formally request interim measures as is the case, for example, in France.
- 2.31 That said, it is important that interim measures are not seen as a tool to justify more lengthy investigations simply because protections are in place in the interim period.

¹¹ Ibid. page 10.

Having interim measures in place for an extended period of time would undermine the rights of defence and run contrary to effective enforcement. Interim measures should be utilized alongside broader measures aimed at expediting the time taken to reach a substantive decision, and NCAs have reported that, when utilised in the right cases, interim measures can shorten substantive proceedings.¹² It must also be taken into consideration that, in general, lowering the substantive legal threshold for adopting interim measures would raise the costs for investigated companies, given the impact they have on their ability to conduct business freely.

- 2.32 Likewise, the ECLF welcomes the possibility of the Commission being able, at the request of the parties, to make voluntary interim measures binding; as the parties may better positioned than the Commission to propose appropriate measures in complex technical cases. Such measures could also be taken into account as a mitigating circumstance (in line with paragraph 29 of the Guidelines on the method of setting fines, where the termination of the infringement and the effective cooperation with the Commission are considered as mitigating circumstances).
- 2.33 To preserve the incentive for companies to propose voluntary interim measures, this power should be accompanied by a clear statement that:
- (i) The submission of voluntary provisional measures does not amount to an admission of wrongdoing or create a presumption of illegality regarding the conduct under investigation; and
 - (ii) The company retains the right to contest the existence of any infringement in the course of the main investigation.

Commitment Decisions

- 2.34 Given the breadth of experience the Commission now has with commitments since the introduction of this option, it would seem appropriate for this tool to be updated on the basis of this experience to specify in greater detail the mechanics of tabling and accepting commitments and the desired policy goals which they should achieve (and be measured against).
- 2.35 The introduction of a deadline for the parties to submit a binding commitments offer should be beneficial in terms of the effectiveness of enforcement, including duration of the Commission's investigations, provided this is accompanied by sufficient safeguards for both the companies under investigation and other stakeholders impacted by the proceedings.
- 2.36 Such a deadline should only run from the adoption of the opening decision detailing the Commission's preliminary concerns if the antitrust concerns are clearly articulated which is not necessarily the case in opening decisions. It may therefore be more appropriate to tie the deadline to the date of the Statement of Objections. As regards the length of the

¹² Ibid. page 12.

deadline, it may be advisable for this to be dependent on the status of the proceedings to ensure both rights of defence and incentives to enter into commitments.

- 2.37 As regards whether the consequence of a binding deadline for parties to offer commitments should be that commitments submitted after such a deadline could not be accepted by the Commission, it may be advisable for the Commission to retain some flexibility. This would still provide parties with the incentive to submit commitments prior to the deadline as there would be no absolute right to do so after it had expired.
- 2.38 The Commission should also consider the scope of commitments, including how best to encourage consensual redress mechanisms through its policy on commitments. The compensatory commitment approach taken in the *Aspen* case¹³ should be systematically considered in appropriate cases to enable some level of redress through public enforcement, as is the case in other jurisdictions. This would not be new territory but mean going back to an approach used by the Commission in the past.¹⁴
- 2.39 Given that implementation is often seen as a significant obstacle to the acceptance of behavioural commitments, thought should be given to enabling National Regulatory Authorities to monitor the implementation of behavioural commitments where the subject matter falls within their remit (e.g., especially in liberalised/regulated sectors such as telecommunications, energy). This could provide a more effective means of ensuring the effectiveness of behavioural remedies.
- 2.40 Finally, the effectiveness of the Commission's decision-making powers in relation to remedies under Article 7 Decisions could be improved through market testing remedies before they are put in place, as is currently the case for commitment decisions. While such market testing would potentially mean adding additional weeks to the implementation timeline, this could nevertheless be beneficial in comparison to the counterfactual of needing to later revise the remedy due to lack of effectiveness. This should reduce the length of effective enforcement overall as well as reduce legal uncertainty and implementation cost for the companies under investigation and lead overall to more effective remedies for all stakeholders.
- 2.41 More generally on remedy decision-making, the Commission should reflect on the outcomes and recommendations contained in its Study 'Ex post evaluation of the implementation and effectiveness of EU antitrust remedies', published on 20 February 2025 and make amendments to Regulation 1/2003 accordingly.

¹³ Case AT.40394 – Aspen, 10 February 2021.

¹⁴ The Philips/Sony CD Licencing Program case included, among other commitments, a retroactive application of a reduced royalty rate and the offer of a one-time credit on royalties for EEA licensees affected by the conduct at issue, see Press release IP/03/1152 of 7 August 2003: https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1152.

See also: Deutsche Telekom 2004 Commitment Decision leading to lower access prices: https://ec.europa.eu/commission/presscorner/detail/en/ip_04_281 and the Eurozone Bank Charges Decision which was closed with commitments to reduced conversion charges for Eurozone currencies: https://ec.europa.eu/commission/presscorner/detail/en/ip_01_1159.

Access to the file (section A(iii) of the EC Questionnaire)

- 2.42 Whilst the ECLF members acknowledge that discussions on confidentiality and the personal character of some of the documents available in the file can be burdensome and time consuming for the Commission and the parties, neither of the two options proposed in the consultation process seem convincing. These options restrict the investigated parties' rights of defence. For instance, the proposed approach allows only a few members of the external legal counsel team (which may vary during the investigation) to access the complete file. This is problematic especially considering valuable exculpatory documents are sometimes not mentioned in the SO and are only identified by the companies' in-house teams. Moreover, the two options proposed by the Commission do not acknowledge that rights of defence belong to the companies, not only to external counsel. Hence, a limited number of in-house counsel should always be given access to the file, given their knowledge of the market and of the circumstances of the case. If access is not granted, it is very likely that the level of subsequent litigation for violation of a company's rights of defence will dramatically increase. In addition, given the central role of economic arguments and analysis in the Commission's competition law proceedings, it is often necessary for the parties' economists to access certain documents and data. This access is essential to conduct the economic analysis needed to effectively respond to the Commission's allegations.
- 2.43 Also, it is important to bear in mind that it is inappropriate to impose the burden on external counsel to demonstrate that *not* granting non-confidential access to a certain document to their client would violate the latter's right of defence. Discussions on this matter risk prolonged debate and litigation, that would delay even further the procedure and make it more costly to the parties going through the process.
- 2.44 The option proposed by the ECLF is as follows:
- (i) Provide gradual access to all the documents of the file in a non-confidential format since the opening of formal proceedings (this follows the experience in some jurisdictions, such as Spain). Discussing confidentiality at early stages of the procedure, even before any SO is issued, would reduce costs and delays in the evolution of the case.
 - (ii) The parties should be given access to all non-confidential versions agreed with the Commission in a first round, regardless of whether they are cited or not in any SO.
 - (iii) Only for proposals of non-confidential versions that are not admitted by the Commission in the first round of contacts, the documents would be set in a separate batch. For those that are mentioned in any SO, the affected party and the Commission would necessarily need to agree on the non-confidential version, and it should be made accessible to the company and its external advisors (without limitation of the number thereof). For the rest of the documents not cited in any SO, access should be given at least to the external advisors (e.g. within a confidentiality ring), and with the possibility to request that such documents are

produced in a non-confidential version, if they are deemed relevant for the defence of the company.

Investigation of breaches of confidentiality and imposition of sanctions (section A(iii) of the EC Questionnaire)

- 2.45 The ECLF's members have experience of information providers who are concerned about possible leaks of confidential information. A system of sanctions for breaches of confidentiality duties would be necessary to alleviate these concerns. Sanctions would be imposed on the companies and, as the case may be and only if duly proven that they were aware of the leak, external counsel who are personally liable for the breach of confidentiality (for instance, it is proven that the external advisor supplied information to the press in breach of the personal commitment assumed with the Commission).
- 2.46 The amount of the fine could be equivalent to those for obstruction of dawn raids and for breaches of other procedural obligations under Regulation 1/2003 (for instance, the obligation to provide complete, accurate and non-misleading information under Article 18).
- 2.47 These fines should not prejudice the possible claim for damages by the company whose business secrets have been disseminated, and the affected party should have access to the documents available in this parallel investigation process for the purposes of proving damages before the national courts.
- 2.48 Proactive cooperation with the Commission when a leak has been identified should also be considered for the purposes of setting fines.
- 2.49 Additional security measures could be envisaged for very sensitive confidential data (for instance, strategic R&D projects, economic data and business plans, trade secrets), like granting access only via a virtual data room through specific security platforms that do not allow the printing of documents, or establishing other measures that are common in the UK (including watermarks in the documents, for instance, and tracking record of their use, downloading of documents, etc.).

Complainants' rights and third-party rights (Section 1.(iv) of the EC Questionnaire)

- 2.50 Some members of the ECLF do not propose changes to the current system, as they believe that it which works well. If a change were to be envisaged, it could be the use of a simplified reasoning (rather than a complete and fully detailed decision) for rejecting claims within a given term.
- 2.51 However, other members of the ECLF consider that it is better that the Commission is not obliged to formally issue decisions rejecting complaints, as it may delay the overall process and the complainants have in any event access to the NCAs and national judges. In their view, the formal rejection decisions made some sense back in 1962 when the first regulation on enforcement was adopted, since at that time there was effectively no national enforcement of EU competition law (not to mention national competition law). However, in the era of modernisation and decentralisation, such a procedure would make no sense anymore and depletes the Commission's finite resources.

Article 3(2) and stricter national competition regulations to unilateral conducts (section 2 of the EC Questionnaire)

- 2.52 The ECLF views as a legal irritant Article 3(2) Reg. 1/2003, second sentence, which allows Member States to adopt and apply stricter national laws on unilateral conduct. Our experience is that in some cases this exception has been abused in the past by NCAs. It has also been misinterpreted: for example, some members of the ECLF that participate in this working group consider that this provision does not currently allow a stricter application of unilateral conduct rules **that are similar to Article 102 TFEU**, but only the introduction (and subsequent application) of national rules that are stricter than Article 102 TFEU.
- 2.53 In any event, stricter unilateral rules at the national level fragment the internal market in an area that has long been “communitarised” either spontaneously or as a result of EU law exigencies. This patchwork of national regulations and regulatory barriers between Member States increase costs and inefficiencies for businesses operating across the internal market and legal uncertainty.
- 2.54 For these reasons, **the ECLF’s preferred option** would be to abolish this rule altogether (this is presented as Option 2 at the consultation).
- 2.55 Otherwise, a **second-best solution** would be to introduce a freezing provision with a restrictive enumeration of the existing stricter national rules (“*no more stricter unilateral conduct rules than the ones enumerated in an Annex*”). In this scenario, it would be extremely important to define with clarity the scope of the exception; for instance, to determine whether “unfair competition practices” -which are usually private law and are applied by national judges, form part of this exception (and hence, NCAs can also apply them and impose sanctions) or, on the contrary, these provisions cannot be applied by NCAs but can still be applicable by national judges under civil law proceedings (i.e., proceedings in which they may declare the unfairness of the conduct and impose cease and desist orders and warrant damages but cannot impose fines).
- 2.56 It should be noted that, normally, unfair competition laws fall under Article 3(3) of Regulation 1/2003 since it does not seek to protect the market or the competitive environment, but competitors (thus it aims at a different goal than Articles 101 and 102 TFEU). However, it depends on countries and how the laws are drafted; for instance in Spain the unfair competition law -Law 3/1991- expressly establishes that one of its objectives is to ensure competition in the market and that the markets remain competitive and avoid “anticompetitive practices”. Hence, it is better to clarify this issue as no guidance exists on the scope of application of Article 3(2) second paragraph of Regulation 1/2003.
- 2.57 As a **third-best solution**, the amended Regulation could introduce an obligation for Member States to “designate” or “specify” such rules when they introduce them (similar to Article 35(1) Reg. 1/2003), thus furthering legal certainty. If the rule is not included in the related list, it could not be applied in a stricter way than Article 102 TFEU.

2.58 All these second/third best solutions – if Option 2 is not finally adopted – should be accompanied with an improved coordination between NCA and the Commission. For instance:

- (i) the NCA should inform the Commission when they start proceedings under these stricter national laws and they should obtain comments from the Commission before taking a decision – similar to Article 11.4 of Regulation 1/2003;
- (ii) furthermore, some members advocate for considering that the recommendations received from the Commission should be binding for the NCA and that sanctioning decisions cannot be taken without the Commission's prior approval (a certain analogy with Article 21.4 of the Merger regulation (139/2004) could be established);
- (iii) it can be established that if the Commission starts an infringement proceeding under Article 102 TFEU concerning a unilateral practice that affects EU trade, NCAs cannot start proceedings that refer to that same practice and which is being investigated under national stricter competition laws under the exception of Article 3.2, second sentence, of Regulation 1/2003. This prohibition would mirror article 11.3 of Regulation 1/2003.

3. Other observations (section 5 of the Commission's questionnaire)

Duration of investigations As previously submitted by the ECLF¹⁵, lengthy antitrust proceedings create an environment of uncertainty for businesses. On the one hand, lengthy proceedings cause disproportionate disruption for defendants and undermine their rights of defence because, as acknowledged by the Court of Justice of the European Union ("CJEU"), the more time that elapses between an investigation starting and the notification of the statement of objections ("SO"), the more difficult it becomes for the respondent to retrieve exculpatory evidence.¹⁶ On the other, drawn out proceedings may significantly harm law-abiding businesses prejudiced by illegal conduct, even to the extent of them exiting the market. The ability of the Commission to effectively restore competitive conditions is, therefore, reduced since infringers are able to benefit from the anticompetitive conduct during the course of the investigation (absent interim measures), thereby entrenching their position in or tipping the market. In many markets, particularly in fast-moving sectors, the harm caused by the anticompetitive conduct may be difficult to reverse.

- 3.1 The current situation is, in our view, unsustainable and leads to infringement decisions being adopted years, sometimes a decade, after the case has been opened. As a result, undertakings may be fined for practices implemented under different management, which greatly reduces the deterrent effect of penalties. Furthermore, the effect of such enforcement in terms of protecting competitive markets may be marginal, further reducing

¹⁵ Submission on Potential improvements to procedural aspects of the European Commission's investigations under Regulation 1/2003, 14 April 2025.

¹⁶ Judgment of 30 January 2025, *Caronte & Tourist*, C-511/23 ("Caronte") paragraph 64 and the case law cited.

the deterrent effect. This is neither a good use of public resources, nor does it further the Commission's competitiveness agenda.¹⁷

3.2 The ECLF welcomes both the fact that the Commission acknowledges the need to take action and the efforts that have already been made to expedite proceedings.¹⁸ While recognizing the significant resourcing challenges that DG COMP has faced (particularly as a consequence of its increased competences without a commensurate increase in resources in recent times), our view is that further changes are required to accelerate antitrust proceedings. This is also supported by a majority of study interviewees to the Commission's last consultation.¹⁹ In this regard, it is noted that the average period of investigation for the Commission to adopt a prohibition decision is 4.49 years for cartel decisions, 4.61 years for non-cartel Article 101 cases and 5.59 years for Article 102 cases.²⁰

3.3 With that in mind, the ECLF makes the following observations:

- (i) As previously expressed²¹, the ECLF suggests the implementation of deadlines on the Commission and, where relevant, on the undertakings to conclude proceedings within a reasonable timeframe. For example, in some jurisdictions, relevant national legislation sets timelines for authorities to conclude an investigation (or, in any event, have adopted a more transparent approach to timetables). In Spain, the Comisión Nacional de los Mercados y la Competencia has a 24-month deadline for the formal phase of the investigation (subject to stop-the-clock provisions). Similarly, in Portugal, the Autoridade da Concorrência has set an indicative deadline of 18 months to conclude the first phase of the proceedings, and of 12 months to issue a final decision following that.
- (ii) Notwithstanding this, the ECLF acknowledges that any deadline should be proportionate and come with a degree of flexibility to reflect the need to carry out a complex factual and economic analysis and preserve the Commission's discretion in setting its priorities, as AG Pikamäe and the CJEU noted in *Caronte*.²² However, the CJEU also stressed the importance of reasonable time limits that the Commission should respect at every stage of the proceedings.²³ The introduction of firmer target deadlines would significantly shift the paradigm

¹⁷ Draghi, M. (2024). The Future of European Competitiveness—A Competitiveness Strategy for Europe, and Letta, E. (2024) Much more than a market – Speed, Security, Solidarity: Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens.

¹⁸ Special Report 24/2020 'The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight' 2020/C 400/04, page 28.

¹⁹ Staff Working Paper, page 198.

²⁰ As of 2024, see the Staff Working paper, page 202.

²¹ Submission on Potential improvements to procedural aspects of the European Commission's investigations under Regulation 1/2003, 14 April 2025, Sections 3.2-3.7.

²² *Caronte* paragraphs 57, 60, 67; Opinion of Pikamäe AG in Cases C-510/23 and C-511/23 paragraphs 97-109.

²³ *Id.*, paragraphs 50-54, 61 and 64.

and allow the Commission to conclude an investigation within a reasonable period.

- (iii) To that end, the preference is for an overall deadline, including the preliminary phase.
- (iv) Alongside other improvements to be made to the access to file process and settlement procedures, antitrust investigations could be completed within 36 months from the day of opening formal proceedings (see for instance the Spanish case). In any event, the Commission should publish timetables covering all key phases of an investigation to increase transparency and accountability.

Legal Professional Privilege (“LPP”) in Commission investigations

- 3.4 The key elements of the EU legal privilege rules have been developed predominantly by the jurisprudence of the EU courts and do not arise as a result of Regulation 1/2003. Nevertheless, LPP is of significant importance in the context of Commission inspections and investigations, providing a crucial safeguard for an undertaking’s rights of defence while under inspection or investigation.
- 3.5 The scope of LPP under EU law is, it is respectfully submitted, unduly narrow and outdated, as it does not apply to communications with or legal advice from: (i) non-EEA qualified lawyers; and (ii) in-house legal counsel.
- 3.6 In this regard, the ECLF makes the following observations:
 - (i) With respect to LPP not covering external advice from non-EEA qualified lawyers, many large undertakings that fall within the jurisdiction of the Commission have global operations and, as a result, will frequently seek and rely on advice from non-EEA qualified external counsel. While the Court in *Akzo Nobel*²⁴ ruled that communications with non-EEA lawyers are not protected because they fall outside the scope of the EU’s legal system and safeguards, this reasoning is increasingly at odds with modern business practice and, in some cases, reality. It of course may be true that some non-EEA jurisdictions do not have adequate safeguards, however this cannot be the case with respect to *all* non-EEA jurisdictions.

The rationale underpinning the Court’s judgment in *Akzo Nobel* becomes increasingly difficult to maintain when applied to UK lawyers post-Brexit. Prior to Brexit, UK lawyers, regulated by bodies such as the Solicitors Regulation Authority and the Law Societies of England and Wales and of Scotland, were recognised as independent legal professionals whose communications with clients were protected under EU legal privilege rules. These regulatory bodies continue to enforce strict standards of professional ethics, independence, and confidentiality, which are comparable to those applied within the EU and EEA.

²⁴ Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*.

Notwithstanding that UK lawyers are still subject to the same pre-Brexit core regulatory framework governing their professional conduct and disciplinary oversight has not changed, however, EU law no longer recognises their advice as protected by EU legal privilege.

The exclusion contained in *Akzo Nobel seemingly* therefore now rests solely on jurisdictional grounds, rather than any substantive difference in the lawyer's independence or ethical obligations, creating a distinction that risks undermining the principle of legal certainty and the effective exercise of a company's rights of defence. It also risks penalising undertakings who have global operations and seek counsel from non-EEA qualified lawyers to support their operations outside of the EU.

- (ii) Regarding in-house communications, the blanket exclusion of such communications means that written advice from in-house counsel to the company could be seized during an inspection and relied on as evidence in any subsequent inspection. While the EU Court has previously stated that the independence of in-house counsel is not guaranteed by virtue of their employment by an undertaking,²⁵ it cannot be assumed this is necessarily always the case and much less nowadays, where almost all EU Member States have established strict deontological rules for the lawyers registered in their respective bars.

- 3.7 The distinction between in-house and external lawyers is increasingly seen as outdated, given in-house lawyers are often subject to the same rigorous professional regulation, including ethical and disciplinary oversight, as their external counterparts. Indeed, several Member States already recognise privilege for in-house counsel under national law. When the EU courts ruled on this matter, they compared the situation in different Member States and took the minimum common features as a proxy. However, these characteristics have evolved with time and need to be revisited. Extending the settlement procedure to abuses of dominance and to cases of vertical restraints (not only for cartel cases)
- 3.8 The application of the current settlement procedure for cartels to these other types of infringements would reduce the resources devoted by the companies and the Commission to the cases and reduce the number of appeals. It may also reinforce the culture of compliance of undertakings and promote a more and prompt cooperation with the Commission, thereby accepting and proposing negotiated commitments and finding a rapid solution for the affected parties.

Further cooperation within the ECN

- 3.9 Cooperation within the ECN must allow parties to parallel proceedings in two or more Member States for similar investigations for akin facts to refer the case to the Commission to ensure a consistent and coherent analysis. Article 11.4 should also be revisited to allow the parties to have access to the Commission's comments when consulted on national proceedings that entail the application of Articles 101/102 TFEU and the parties should

²⁵ *Ibid.*

also be able to submit their comments to the Commission within that procedural step so the Commission also receives full information from the parties before taking a position on the national proceeding (a limited number of pages for this information can be established, for instance, 10 pages).

Annex 1: Members of the ECLF Working Group

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- Dickie, Jack – Slaughter & May
- Doran, Hazel – Slaughter & May
- Frank, Stéphane – O'Melveny
- Komninos, Assimakis – White & Case
- Lovdahl Gormsen, Liza – British Institute of International and Comparative Law (BIIC)
- Malone, Daniel – Slaughter & May
- Turner, Vanessa – O'Melveny
- Vidal, Patricia – Uría Menéndez