ECLF
European Competition Lawyers Forum

EUROPEAN COMPETITION LAWYERS' FORUM

Contribution to the Public Consultation Reforms to Regulation 1/2003 Reforms

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24 October 2022

I. INTRODUCTION

1. The European Competition Lawyers' Forum ("ECLF") is delighted to be able to contribute to the public stakeholder consultation launched by the European Commission ("Commission") on 30 June 2022 regarding the future upgrading of the EU's procedural legal instrument which has provided the foundation for the Commission's investigative powers own the field of competition law for over two decades - Regulation 1/2003.

2. The Commission's initiative is to be welcomed because, despite the success of Regulation 1/2003 as an effective legal instrument, the time is ripe for updating the Regulation to take into account important developments in the Commission's enforcement practice over the past two decades, alongside critical clarifications by the European Courts on the scope of the Commission's powers and the rights of the defence.

3. Whereas we feel that the input of the ECLF will be most useful at that later point in time when the Commission is in a position to publicise its concrete proposals for comment, we take this opportunity to comment at a broader level on those areas where our members believe that Regulation 1/2003 could benefit from an updating, or even an upgrading. The discussion that follows focuses on certain areas of particular interest to the ECLF, namely:

- The relationship between EU level and national level competition law enforcement.
- The role that should be played by national courts in the enforcement of EU competition law.
- The process of lodging complaints.
- The scope of the Commission's investigative powers.
- The procedural rights of parties to investigations, including the rights of the defence and access to the file.
- The process of remedy prescription and enforcement.
- The process of accepting and enforcing commitments.
- The practice of granting interim measures.
- The conduct of sectoral inquiries.
- The burden and standard of proof.
- Fining policy.

II. SUBSTANTIVE COMMENTS

A. Relationship with National Competition Enforcement

4. There is no doubt that Regulation 1/2003 and its decentralisation/modernisation reforms have resulted in the creation of European competition "culture" and in a success story for the enforcement of EU competition law. The vast majority of EU competition law cases are now decided not in Brussels by the Commission but at the national level by National Competition Authorities (NCAs) and national courts. The fact that this has been a success story in general terms does not, however, mean that there is no room for improvement of the system. We believe that this can be so in two critical respects:

(i) If the substantive applicable law for Articles 101-102 TFEU is the same, NCAs and courts are obliged to apply that law, and if the "*effect on inter-state trade*" criterion is fulfilled, we need to ensure that divergent outcomes are avoided. Further effort is necessary to ensure that a level-playing field is attained throughout the Union in terms of uniformity and consistency in the methods of analysis and thoroughness of procedures.

(ii) Ensuring that the enforcement of EU competition law by NCAs and its application by the national courts is effective should be another priority. The *ECN+ Directive* and the *Damages Directive* represent clear progress in this respect. But effectiveness does not mean only equipping the national enforcers with certain powers. It also means that they be in a position to exercise those powers with the requisite amount of speed, expertise, independence, and pursuit of sound policy priorities.

5. While there does not appear to be any compelling rationale for a fundamental change to the allocation of competence when acting within the scope of Regulation 1/2003, it does make sense for NCAs to play an active role, where necessary, in enforcing Articles 101 and 102 TFEU (see below also). This can be justified not only in terms of greater decisional efficacy but also because it will reinforce the policy of avoiding decisional fragmentation.

6. The greater degree of NCA involvement should be tempered by the following considerations:

(i) There are several examples of NCAs applying interpretations of Articles 101 and 102 TFEU in a rather idiosyncratic manner. Accordingly, the Commission should consider whether there should be greater scope for greater Commission/ECN involvement during the NCA decision-making process. This would obviously not limit the affected NCA's independent powers but would provide an opportunity for Commission-level input on consistency on an *ex ante* basis. To the extent that errors in NCA decision-making have been identified *ex post*, the Commission should be less reluctant in practice to exercise its powers as an *amicus curiae* in national proceedings or in working actively to have facilitate the hand-over of complex cases by smaller Member States' NCAs, especially where the defendant(s) in question have overwhelming resources *vis a vis* the NCA.

(ii) There is increasing evidence of NCAs taking overlapping and inconsistent action in the same area as the Commission. This is especially true in the technology space, where different but interrelated issues need to be handled consistently. To this end, thought could be given to whether there ought to be a new 'clearing house' mechanism constituted, whereby an undertaking that considers it is subject to parallel proceedings with potential for inconsistent application of Article 101 or 102 TFEU could apply to the Commission for an allocation. The ultimate structure of such a regime could take a number of forms, given the different jurisdictional claims of institutional stakeholders involved in the process.

7. The role of national competition laws needs to be re-evaluated. Currently, we have an incomplete rule of convergence in Article 3 of Regulation 1/2003. Even in the area of anti-competitive agreements, where full convergence is required, there are several examples of NCAs resorting to interpretations of Article 101 TFEU that appear to be inconsistent with EU law. In the area of unilateral conduct, the current state of affairs is rather unfortunate. Recent practice suggests that Article 3(2) is being read by the NCAs and Member States as a *carte*

blanche for fragmentation. There are also examples of NCAs that clearly infringe both the letter and spirit of Article 3(1) and refuse to apply EU competition law (in the form of Article 102), even though they required to do so. The justifications sometimes are at times extremely provocative (*e.g.*, "*the conduct would have been legal under Art 102, so we prefer to apply only our national law*"). For this reason, we believe that the exception created under Article 3(2) for unilateral conduct rules should be abandoned and that there should be a rule of convergence in decision-making across the board.

8. The greatest risk of decisional fragmentation in the single market probably exists in the digital sector. This is a very serious issue and will only further hinder Europe's attempts to develop digital sovereignty and to promote indigenous start-ups. The recent adoption of the *Digital Markets Act* arguably provides the Commission with greater leverage to pursue measures that would mitigate the scope of future fragmentation in the digital space.

Given the growth in Commission competence in the digital field across the regulatory domain in addition to its competition law competence and given the increasing enactment of national laws which intersect or overlap with competition law practice (and usually set at a lower level of intervention), the opportunity arises for the Commission to clarify the concept of a national decision that is "*already the subject of a Commission Decision*". Given that Commission and NCA decision-making is today prone to greater divergence, establishing jurisdictional competence on the basis of like-for-like decisions is prone to much more legal uncertainty.

B. The Role of National Courts

9. Private enforcement before the national courts has risen dramatically in the recent past, although a few Member States are clearly more active than the majority. The *Damages Directive* clearly complements the provisions of Regulation 1/2003 in a very comprehensive manner. However, certain elements can be improved. For example, Article 15(2) on the duty of courts to send their Judgments to the Commission has clearly has not worked efficiently in practice. The introduction of a different mechanism such as having a national compendium per country, which could then be forwarded to Brussels, might make the national judges more willing to share their Judgments.

10. The *amicus curiae* mechanism also has not really been as successful as it could be, possibly because of insufficient resources, but also possibly because of a tendency on the part of the Commission to tread softly when exercising its right to intervene in national court proceedings. It is an exceedingly rare occurrence for the Commission to intervene as an *amicus* in order to advise the national courts against the adoption of an erratic interpretation of EU competition law.

11. Preliminary references to the Court of Justice remain relatively rare relative to the number of pending competition law proceedings in the EU at any given time – maybe in the range of only 5-7 per year. This state of affairs is particularly regrettable given the large number of national courts across the EU that exercise the power of judicial review over their NCAs' Decisions, and especially given the important role which Judgments from Preliminary References yield in the development of EU competition law doctrine. Such references are clearly too few in absolute terms, as can be seen from the Table which we have put together overleaf, which covers the period 1962 - Summer of 2022:

EU Member State	Preliminary references by courts that review NCA decisions	
	No. of cases	**Case references**
Austria	2	C-151/20
		C-681/11
Belgium	1	C-117/20
Bulgaria	0	-
France	3	C-671/15
		C-226/11
		C-439/09
Germany	4	C-252/21
		C-360/09
		C-266/93
		14/68
Denmark	2	C-23/14
		C-209/10
Greece	0	-
Estonia	0	-
Ireland	1	C-209/07
Spain	1	C-67/91
Italy	9	C-261/21
		C-680/20
		C-377/20
		C-179/16

		C-450/15
		C-428/14
		C-136/12
		C-280/06
		C-198/01
Croatia	0	-
Cyprus	0	-
Latvia	4	C-306/20
		C-177/16
		C-542/14
		C-345/14
Lithuania	2	C-128/21
		C-74/14
Luxembourg	0	-
Malta	0	-
Netherlands	1	C-8/08
Hungary	2	C-228/18
		C-32/11
Poland	2	C-617/17
		C-375/09
Portugal	3	C-331/21
		C-525/16
		C-1/12

Romania	3	C-385/21
		C-308/19
		C-172/14
Slovakia	2	C-857/19
		C-68/12
Slovenia	0	-
Sweden	1	C-52/09
Czech Republic	1	C-17/10
Finland	1	C-450/19
TOTAL	45	

C. The Lodging of Complaints

12. There is no doubt that complaints represent an important channel for the Commission to garner information about possible competition law infringements. However, it is also the case that the Commission's resources are spent dealing with a number of unmeritorious cases based on formal complaints, where the complainant insists on receiving an answer and the formal rejection of complaint, which is in turn usually the subject of legal challenge before the EU Courts. Such a procedure often results in the mis-allocation of resources and runs counter to the idea that a modern competition authority must be able to avail itself of a discretion to prioritise its cases. For this reason, serious thought should be given the abolition of the procedural right of the complaint to receive a final rejection Decision.

13. In effect, the Commission should be able to enjoy a margin of discretion in deciding not to deal with a competition law-based complaint, especially where a national forum might provide an available avenue of legal redress. This type of discretion would not carry with it the implications on potential complainants that the original Regulation 17 – the predecessor of Regulation 1/2003 - sought to address. Times have changed since the early 1980s, with complainants now being able to bring their legal challenges before NCAs and, most importantly, before the national courts. These options were not readily available to them in practice until relatively recently. Moreover, such a change would mirror the situation which prevails in the application of Article 106 TFEU, which reflects a very specific application of competition rules.

D. The Commission's Investigative Powers

14. By and large, the Commission's investigative powers have been shown over the years to be "fit for purpose", both in terms of the breadth of those powers and in terms of the necessary

national administrative cooperation that is required before the Commission's officers can engage in dawn raids, conduct on-the-spot interviews, and so forth. We can imagine that this level of administrative cooperation could always be improved without impinging upon the rights of the defence.

15. Given that we now have some precedents (predominantly in the context of merger control) on what constitutes "*incomplete, incorrect or misleading information*", the Commission now has the opportunity to seek to define those terms in light of its practice in Article 18 of Regulation 1/2003. In particular, it should be relevant to the Commission's analysis that the information in question be material in its effect and that the conduct of the defendant be wilful or negligent, with those expressions needing to be understood in the context of the particular form of information request at issue.

E. Procedural Rights of Parties to Investigations

16. The general consensus is that the Commission's information requests have grown exponentially over the years. While the scope of such requests may often be necessary because of the complex nature of the subject-matter or factual issues involved, there are many occasions where the information requests impose significant burdens on their recipients and arguably add little utility or efficiency to the decision-making process. Accordingly, it would be appropriate for the Commission impose some administrative constraints on itself so that information requests in antitrust investigations do not run the risk of becoming little more than "fishing expeditions". Accordingly, the review of Regulation 1/2003 provides the Commission with the opportunity to clarify the guiding principles (proportionality, relevance, *etc.*) which it will respect when gathering information in an antitrust investigation.

17. Recent case-law has thrown into question how the Commission should deal with information provided by third parties that wish to hide behind the cloak of anonymity. While one can often understand why the Commission would seek to protect the identity of certain parties from potential commercial retaliation, the fundamental right of effective access to the file for the defence is not something that should be dispensed with other than in exceptional circumstances (if at all). Accordingly, the Commission has the opportunity to set forth working appropriate principles which can guide all stakeholders in the level of transparency that can be expected in the retrieval of communications between third parties and the Commission in the context of antitrust investigations.

18. The experience of ECLF members suggests that the procedural rights afforded to defendants might be able to be improved significantly if the Commission were prepared to strengthen the role of two key institutional stakeholders in the decision-making process and to consider whether the re-calibration of their relationship can be achieved. For example:

(i) The importance of the role of the **Hearing Officer** in contentious proceedings cannot be under-estimated. While there has been progress in the relative importance of the position and in its relative independence from the Commission as a decision-making body, the consensus of opinion in the competition bar is that the role of the Hearing Officer is still too closely aligned with a deferential approach towards Commission decision-making. With a more robust Hearing Officer role, for example, the procedural flaws which were recently the subject of successful legal challenges before the European Courts in relation to the Commission's *INTEL* and

Qualcomm Decisions might never have occurred, or could at least have been remedied during the course of the proceedings.

(ii) Similarly, while the role of the **Ombudsman** cannot be called into question in terms of their impartiality, the fact that their powers in competition cases are limited to a "*naming and shaming*" role with no material legal impact on the rights of the defence means that the process is undermined in terms of its potential efficacy.

19. The recent European Court cases involving *Intel* and *Qualcomm* have highlighted some important procedural issues where the implementation of the rights of defence need to be fully respected. While this is arguably more a matter of correct implementation rather than reflecting the need for a change in the law, perhaps some of the impact of such issues might be addressed by a re-calibration and expansion in the competence of the Hearing Officer and the Ombudsman. Such an initiative could lead to more effective decision-making, both from the perspective of the defence and the Commission as the prosecutor.

20. We recognise that it would be difficult for the Commission to adopt 'hard' deadlines in competition law investigations. Then again, it might be useful to have administrative practice timetables published, which could be amended. This type of mechanism may act as a form of 'soft' encouragement to handle cases expeditiously and to terminate non-priority cases more quickly.

F. Remedies

21. We believe that the Commission should be more prescriptive when it comes to Article 7 remedies/injunctions. The case-law allows it to order any kind of positive or negative measures that ensure effective compliance. We see that, in general, the Commission prefers to issue a generally-worded "cease and desist" order, which then can give rise to much acrimony, misinterpretation and subsequent litigation. The Commission surely can do better than merely leaving it to defendants to fill in the details of compliance while claiming in parallel that "*we [i.e., the Commission] cannot tell you how to comply*".

The fall-out for many years from the *Microsoft Case* is a salutary reminder of what should not be repeated. The Commission may be reluctant to be overly-prescriptive for fear that its Decisions may be more vulnerable in a court challenge (*e.g.*, because of a challenge on the grounds of proportionality concerns). However, the current state of affairs is not desirable and undermines the principle of effectiveness in the enforcement of EU competition law.

G. Commitments

22. After many years of administrative practice since the introduction of Article 9, the timing is surely appropriate for the revised Regulation 1/2003 to specify in greater detail the mechanics of tabling and accepting commitments and the desirable policy goals which they should achieve (and be measured against).

23. In addition, the recently adopted *Aspen Decision* represents the first time that the Commission has accepted a form of compensatory commitment. This now provides us with a concrete example of a public enforcement measure with elements of redress, which arguably renders private enforcement unnecessary (at least in the circumstances of that case). The

Commission should take the opportunity to how best to encourage consensual redress mechanisms through its policy on commitments.

24. Finally, given that the greatest obstacle to the acceptance of behavioural commitments such as access obligations is the (often fully justified) view that they will be exceedingly difficult to implement, serious thought should be given to the allocation of responsibilities to National Regulatory Authorities to monitor the implementation of behavioural commitments where the subject-matter of the action falls within their remit (*e.g.*, especially in liberalised/regulated sectors such as telecommunications, energy, postal). This could provide a much more effective means of ensuring the effectiveness of the behavioural remedies. This type of approach has already been endorsed years ago *ad hoc* in a merger case involving the creation of a media platform monopoly in Italy; it may be time to introduce a structured approach to achieving similar results, at least in those sectors with a track record of access remedies fuelling competition.

H. Interim Measures

25. While there is arguably no need for any fundamental change to the prevailing legal standard established in *Camera Care*, perhaps a less onerous standard for intervention might be contemplated for fast-moving sectors where technology or IP rights are involved. Having said that, the *quid pro quo* for the introduction for any such less stringent standard should be that Commission decision-making on the substantive case proceeds far more quickly than has historically been the case, while the effects of the interim measures can be readily overcome in the event of a positive Commission Decision.

26. Where the current text of Article 8 of Regulation 1/2003 should be modified is to incorporate the relevant practice of the Commission in its *Broadcom* Decision.

I. Sector Inquiries

27. The sectoral inquiry tool contained in Article 17 of Regulation 1/2003 has arguably been under-used by the Commission over the years. In other jurisdictions, comparable powers provide a powerful tool to tackle systemic issues in industries where the issue in question does not stem entirely from specific infringements of competition law. Part of the reason for the under-use of the sectoral inquiry tool might be that there is no power to impose remedies under the current system (in contrast to regimes like the UK market investigation mechanism). Given that the Commission has already explored briefly the possibility of introducing a *sui generis* "complex oligopoly" mechanism (only to abandon it in preference for the passage of the *Digital Markets Act*), the sweeping reform of Regulation 1/2003 arguably provides the Commission with the opportunity for the sectoral inquiry power to be expanded to some degree.

28. Even if the Commission were to rely on the current version of the sectoral inquiry tool, such inquiries could still be used more regularly to identify problematic practices and to highlight the importance of issues being addressed (including through the establishment of future enforcement priorities in a given sector). E-commerce and IoT practices are both good examples of sectoral inquiries that have proven useful in that regard.

29. Having entertained the possibility of the sectoral inquiry power being expanded *inter alia* to include remedies, the procedural checks and balances which currently govern sectoral

inquiries would need to be upgraded significantly so that they are analogous to those enjoyed by defendants in fully fledged competition law investigations brought under Articles 101 and 102 TFEU. The evidentiary and legal standards for imposing remedies would need to be very robust, and affected undertakings would need enjoy full rights of appeal. Therefore, moving to a sectoral inquiry regime which includes remedial powers would be more complex and would require a complete re-design of the current regime.

J. Burden/Standard of Proof

30. The aftermath of the recent *Intel* and *Qualcomm* appeals has called into question the manner in which the Commission needs to evaluate evidence and economic analysis in antitrust cases. Especially when conducting an "*effects-based*" analysis or when relying upon the "*as efficient competitor*" test, it is important that the Commission apply the requisite legal standard to establish that the impugned conduct in its investigation is capable of having an anti-competitive effect (*e.g*., by creating conditions of foreclosure). It would be appropriate for the Commission to reflect the need to satisfy that standard in its revisions to Regulation 1/2003.

31. The General Court in its recent *Qualcomm* Judgment established a number of clear principles as regards the standard of proof that needs to be satisfied by the Commission in antitrust investigations. We see a lot of merit in Regulation 1/2003 confirming those principles, beginning with the presumption of innocence and the shift in the onus on the Commission and the defence to prove certain matters as proceedings develop.

32. The opportunity also arises in the review of Regulation 1/2003 for the Commission to establish clear rules as to the application of a counterfactual analysis when assessing the legality of a commercial practice under Articles 101 and 102 TFEU. The use by the Commission of a counterfactual analysis as a benchmark in determining whether or not impugned conduct is problematic from a competition law standpoint is now sufficiently mature to justify an explanation by the Commission of how that approach is applied in its investigations.

33. Although the Commission's fining policy is sufficiently well understood, consideration could be given to two areas for further clarity would be welcome, namely:

(i) Given the number of times on which the European Courts have lowered the Commission's fines imposed in competition cases, some reference to the standards expected by the Courts of the Commission should find their way into Chapter VI of Regulation 1/2003, with the remainder that is not susceptible to legislation being fleshed out by the Commission in its instruments of guidance.

(ii) The application of leniency arrangements in Europe is clearly on the decline. A major cause for that is the risk of private damages. The revisiting of Regulation 1/2003 provides an opportunity to introduce a rule that will amend the *Damages Directive* and introduce full immunity from damages actions for the successful immunity recipient. In particular, the proposal would be to exclude completely the immunity recipient's liability for claims by its direct and indirect contractual partners. This would not dramatically affect the exercise of the right to damages by these persons, since they could still claim compensation for the entirety of the damage suffered by them against the other cartel members, who would remain

jointly and severally liable. As a safety valve, it could be provided that this total exclusion of liability does not apply to the exceptional case of insolvency by one or more of the jointly and severally liable (other) cartel members.

While not affecting the right to compensation, such a solution would enhance the effectiveness of the leniency programme. Ensuring that the leniency programme remains attractive and thus effective is quite beneficial for private enforcement and potential claimants. *First*, the claimants become aware of the cartel infringement, which is more effectively exposed to the public authority by the leniency applicants. *Second*, the facts are established during the administrative proceedings. *Third*, courts or claimants could, under certain circumstances, ask for documentary evidence in the hands of the public enforcer, in order to prove the damage. *Fourth*, a final public decision, depending on the applicable rules, may have a binding effect on the follow-on civil proceeding or may constitute *prima facie* evidence of the cartel violation.

III. CONCLUSIONS

34. Regulation 1/2003 has played an important role in competition policy enforcement for over two decades. It is inevitable that it should require some updating to take due account of best practices and the lessons learned from the European Courts. The changes that the ECLF has proposed are largely evolutionary in nature, as we do not believe that there is a need for any radical overhaul of Commission policy. Our discussion above has proceeded on the basis of the five evaluation criteria cited by the Commission in its Consultation materials, namely: effectiveness; efficiencies; relevance; coherence; and EU added value.

35. While we have highlighted a number of areas where the Commission might consider even an increase in its powers (rather than a mere clarification), in each case we feel that the rights of the defence should be upgraded to act as a counterweight to any such increase in investigative and remedial powers.

36. The review process also offers an important opportunity for the Commission to reflect the logic of the European Court findings in the respective *Intel* and *Qualcomm* cases into the fabric of Regulation 1/2003, as the Judgments in those two cases will have an important impact in terms of the quality of evidence upon which the Commission can rely upon in substantiating its infringement Decisions.

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Annex 1

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