Association des Avocats pratiquant le Droit de la Concurrence

October 6, 2022

REPLY OF THE *ASSOCIATION DES AVOCATS PRATIQUANT LE DROIT DE LA CONCURRENCE* (APDC) TO THE PUBLIC CONSULTATION ON REGULATIONS No 1/2003 AND No 774/2004

1. On 30 June 2022, the European Commission (the "**Commission**") launched a consultation "*on the performance of the EU Regulations which lay out the procedures for the application of EU competition rules*", *i.e.*, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("**Regulation No 1/2003**") and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty ("**Regulation No 773/2004**"; with Regulation No 1/2003, the "**Regulations**").

2. The *Association des Avocats Pratiquant le Droit de la Concurrence* (hereinafter the "APDC") welcomes this opportunity to present observations on these two fundamental pieces of EU competition legislation. As underlined by the Commission in its press release announcing the consultation, Regulation No 1/2003 has remained unchanged for nearly twenty years, apart from a few adjustments linked to the evolving framework for the implementation of EU competition rules in the transport sector. Regulation No 773/2004 has also been amended to a limited extent only, i.e., mostly to adapt the Commission's procedures to the introduction of settlement proceedings and to the adoption of Directive 2014/104/EU on actions for damages for infringements of competition law. Yet, since 2004, the Commission's practices, its policy orientations and the EU and ECHR case law have evolved significantly. A consultation is therefore both justified on the substance and timely.

3. The APDC notes that to a very large extent the consultation focuses on the "*effectiveness*" and the "*efficiency*" of the Regulations, the "*relevance*" of their objectives and their "*EU added value*". While the Commission also intends to assess the "*coherence*" of the Regulations with other EU legislation, EU Courts' case-law and other EU policies, the consultation makes only scarce references to fundamental rights. In addition, certain questions invite contributors to appraise the merits and shortcomings of the Regulations in silos, for instance when they suggest separate assessments of the effectiveness of certain enforcement powers, on the one hand, and the procedural guarantees attached to these powers, on the other hand. This is compounded by the binary answers proposed by the questionnaire, when in fact the questions raised require a complex analysis and therefore also a more sophisticated response than just "yes" or "no".

4. Against this background, the APDC is concerned that replying to some questions in their current form may not provide a fair, accurate representation of the APDC's views on the qualities and shortcomings of the Regulations as they stand. The assessment of complex procedural rules and enforcement powers such as the ones set in the Regulations supposes a more symbiotic review, including a detailed assessment of the capacity of the related rules to maintain a proper balance between effectiveness and adequate procedural guarantees for investigated parties and complainants.

5. As a result, and since the consultation process is still in its incipiency, the APDC has chosen not to reply to every question of the consultation and to supplement its views by means of the present contribution. The APDC's comments will focus on inspections under Article 20 and 21 of Regulation No 1/2003 (**I.**); requests for information under Article 18 of Regulation No 1/2003 (**II.**); statements under Article 19 of Regulation No 1/2003 (**III.**); sectoral investigations under Article 17 of Regulation No 1/2003 (**IV.**); procedural rights of parties and third parties or complainants (**V.**); Commission decisions (**VI.**); fines (**VII.**); informal guidance from the Commission (**VIII.**); cooperation within the European Competition Network ("**ECN**") (**IX**.), as well as the concurrent application and enforcement of Articles 101/102 TFEU and other sets of rules (**X.**).

6. The APDC underlines that the present observations do not purport to describe exhaustively its views on the merits and shortcomings of the current procedural framework for the enforcement of EU competition law. For instance, while this contribution will not contain any developments on the need for a stricter separation between the competent investigating and decision-making bodies within the Commission, the APDC believes that such improvement remains desirable. The APDC reserves the possibility to make more detailed observations on this topic and others at later stages of the consultation process.

I. INSPECTIONS UNDER ARTICLES 20 AND 21 OF REGULATION NO 1/2003

A. Framing the Commission's power to decide alone on inspection

7. As acknowledged by the General Court in *Deutsche Bahn,*[1] the exercise by the Commission of its powers to raid an undertaking's premises "*constitutes a clear interference with the latter's right to respect for their privacy, private premises and correspondence*". This fundamental right has been recognized as a general principle of EU law for decades and is also expressed in and guaranteed by both Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 of the Charter of Fundamental Rights of the European Union.

[1] General Court ("**GC**"), *Deutsche Bahn* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404.

8. Despite this obvious interference with a fundamental right, Regulation No 1/2003 sets up a system under which the Commission is entitled to decide alone on the opportunity to launch an inspection in the premises of an undertaking, without any prior judicial review or any other form of review by an authority independent from the Commission.

9. Several Member States have made a different choice and considered that such a power could not be left to the administration alone. Their legislation thus provides that dawn raid powers are subject to prior judicial authorization.[2]

10. Although the European Court of Justice and the European Court of Human Rights ("**ECtHR**") have not considered to date that the lack of a prior judicial authorization infringes in itself the fundamental right to the inviolability of private premises, the APDC considers that such an authorization is an important safeguard against the risk of arbitrariness.

11. Since reforming the EU system in this way may require a reform of the Treaties rather than of Regulation No 1/2003 only, the latter should at least impose an obligation on the Commission to systematically communicate the authorization obtained from a national judicial authority, under Article 20(7), even when it does not need to rely on such authorization in practice. Currently, when the Commission seeks such a judicial order as a precautionary measure in anticipation of possible opposition from the undertaking being raided, the Commission's agents systematically refuse to disclose it when they do not have to enforce it, in particular to request the assistance of the police. It is obviously unsatisfactory to deprive undertakings of such an important guarantee in these circumstances where the Commission has already obtained prior judicial approval anyway.

12. In addition, the APDC considers that a revised Regulation No 1/2003 should provide that the undertakings targeted by a dawn raid must receive a copy of the indicia of an infringement of competition law justifying the Commission's decision to launch an inspection at the same time they are notified of the Commission's decision, *i.e.*, at the start of the dawn raid (and no matter whether the inspection is carried out or not with the prior authorization from a national judge).

13. In the current system, the Commission does not share with the targeted undertakings the indicia available to it. As a result, several recent challenges against Commission's

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2 For example, Article L. 450-4, first and second paragraphs, of the French code of commerce provides for such prior judicial authorization: "*The agents* [of the competition authorities] *may only visit any premises and seize documents* [...] *upon judicial authorization given by order of the* juge des libertés et de la détention [...]. *The judge verifies that the request for authorization submitted to him or her is well-founded; the request must include all the information in the applicant's possession that are of such nature as to justify the visit. When the purpose of the visit is to establish that violations of* [competition law rules] *are being committed, the request for authorization may include only those indicia that make it possible to presume the existence of the practices for which proof is sought*".

inspection decisions, including *Nexans/Prysmian*[3] and *French retailers*,[4] were driven by the question of whether the Commission had sufficiently serious indicia of an antitrust infringement to justify an inspection. Those challenges have led to measures of organisation of procedure under which the General Court requested the Commission to produce such indicia of presumed infringements which it had in its possession on the date of the contested decision.

14. The current system does not appear to be satisfactory, both from the Commission's and from the undertakings' perspective. Undertakings are arguably incited to lodge an appeal against an inspection decision simply because they may fear that the Commission is going on a fishing expedition. Knowing which indicia the Commission relies on may deter them from appealing if the evidence is strong. The Commission would then be able to save resources currently involved in defending its inspection decisions in such challenges.

15. In addition, the early disclosure of evidence may trigger more (and earlier) leniency applications if the indicia gathered by the Commission are compelling enough. Indeed, it can take sometimes days for the company to analyze the evidence seized in a dawn raid, and the latter may ultimately be less compelling than the indicia that the Commission already holds. This would enhance (and not negatively affect, as the Commission has been arguing in court) the efficiency of its proceedings.

16. In sum, introducing an obligation for the Commission to communicate at the start of the dawn raid the indicia of presumed infringements that justify its inspection decision would:

    (i) increase the level of protection against violations of the fundamental right to the inviolability of private premises as well as the rights of defence by offering a significant additional guarantee to the undertakings targeted by a dawn raid;

    (ii) force the Commission to better prepare its file before launching an inspection and reinforce in this respect the legal soundness of its investigations;

    (iii) enable undertakings from the outset to better measure the merits and legal soundness of the indicia available to the Commission and better understand what the Commission is looking for, which may in turn:

        a. increase the degree of cooperation of the undertakings during the dawn raid;

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3 GC and European Court of Justice ("**ECJ**") in *Nexans* v *Commission*, T-135/09, EU:T:2012:596, and C-37/13 P, EU:C:2014:2030; GC, *Prysmian* v *Commission*, T-140/09, EU:T:2012:597.

4 GC, *Intermarché Casino Achats* v *Commission*, T-254/17, EU:T:2020:459 ; *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458; *Les Mousquetaires and ITM Entreprises* v *Commission*, T-255/17, EU:T:2020:460.

b. increase the number of leniency applications; and

c. reduce the number of appeals lodged against Commission's inspection decisions, in particular by removing the undertakings' incentives to challenge dawn raids with the sole objective to ensure that the Commission is not going on a fishing expedition.

17. Conversely, and contrary to what the General Court ruled in some cases,[5] disclosing the indicia at that stage would not impact the efficiency of the procedure. Indeed, the French Competition Authority has been doing just that for many years, and this has had no impact on its ability to prosecute and sanction numerous cases under Articles 101 and 102 of the TFEU and its French equivalents. In addition, the revised Regulation No 1/2003 could provide that the communication of these indicia is subject to the possibility for the Commission to redact (sparingly) information which would need to remain confidential so as to protect overriding legitimate interests.

Proposal: Regulation No 1/2003 should set an obligation for the Commission to communicate to the undertakings targeted, at the same time it notifies the inspection decision (that is to say at the start of the inspection):

(i) the authorization it obtained from a national judicial authority under paragraph 7, even when it sought such authorization on a precautionary basis and does not need to rely on it in practice; and

(ii) the indicia of presumed competition law infringements which it has in its possession and which justifies its decision to conduct an inspection.

B. Appeal against the conduct of the inspection

18. The Commission's dawn raid powers have been subject to several challenges in the past twenty years. In several cases the General Court or the European Court of Justice fully or partly annulled the Commission's decision, including *Nexans,*[6] *Cseke Drahy,*[7] *Deutsche Bahn*[8] and *French retailers*.[9]

5 GC, *Intermarché Casino Achats* v *Commission*, T-254/17, EU:T:2020:459, paragraph 86.

6 GC and ECJ judgments in *Nexans*, *op. cit*.

7 GC, *Ceske Drahy* v *Commission*, T-325, EU:T:2018:368.

8 ECJ, *Deutsche Bahn* v *Commission*, C-583/13 P, EU:C:2015:404.

9 GC, *Intermarché Casino Achats* v *Commission*; *Casino, Guichard-Perrachon and AMC* v *Commission*; *Les Mousquetaires and ITM Entreprises* v *Commission*, *op. cit.*.

19. In parallel, the case law of the ECtHR relating to inspections (in the antitrust field and beyond) developed significantly. The *Canal Plus*,[10] *Primagaz*[11] and *Delta Perkarny*[12] judgments are amongst the landmark cases in Strasbourg. In these cases, the ECtHR ruled that companies that are subject to an inspection must have the right to challenge the legality of the conduct of the inspection (and not only of the act authorizing the inspection). That case law has been reflected in the national laws of several Member States, for example France, where the companies can challenge a dawn raid within 10 days of the delivery or receipt of the official minutes ("*procès verbal*") of the inspection.[13]

20. In the *French retailers'* case, the General Court confirmed that companies must have a right of appeal against the conduct of inspections by the EC (not just the decision authorizing the raid). While the GC also found that the current system of judicial remedies in the EU, as a whole, allowed for such possibility, this was only on the assumption that the *Akzo* case law,[14] regarding legal professional privilege ("**LPP**"), be extended to other issues that could arise during an inspection, such as the copy of documents which are out of the scope of the inspection or contain personal and protected information.

21. The same interpretation was followed by the Advocate General in his opinion of 14 July 2022 in the *ITM* case.[15] In his Opinion, the Advocate General gives some indications as to how this judicial remedy could be exercised in practice. A company subject to a dawn raid could oppose a specific measure contemplated by the Commission on the ground that it infringes its fundamental rights and then appeal to the General Court any explicit or implicit rejection of the opposition by the Commission (challengeable act).[16] For example if the Commission were to copy documents going beyond the scope of the inspection decision, the company could oppose such copying and if the Commission ignored such opposition and nevertheless copied the document, this would open the possibility to lodge a challenge before the General Court.

22. At the time of the filing of this submission, the Court of Justice has not yet rendered its judgment in these cases. Regardless of whether the Court follows or not the Advocate General, it seems now established that a company subject to an inspection should have a right to challenge the conduct of the Commission during the inspection (as the General

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10 ECtHR judgment in *Canal Plus*, 21 December 2010, n° 29408/08.

11 ECtHR judgment in *Primagaz*, 21 December 2010, n° 29613/08.

12 ECtHR judgment in *Delta Pekárny*, 2 October 2014, n° 97/11.

13 Article L. 450-4, last paragraph, of the French code of commerce: "*An appeal against the conduct of the search and seizure operations may be lodged with the first president of the court of appeal* [...] *within ten days of the delivery or receipt of the minutes and the inventory*" (free translation from French).

14 ECJ, *AKZO*, C-550/07 P, EU:C:2010:229..

15 Opinion of AG Pitruzella in *Les Mousquetaires and ITM Entreprises* v *Commission*, C-682/20 P, EU:C:2022:578.

16 *Ibid*, paragraph 68.

Court ruled in the *French Retailers* case). It is also clear that Regulation No 1/2003 does not contain any provision organizing any such right of appeal, which seems to be left to the general conditions of application of Article 263 TFEU. What complicates matters is that the actions of the Commission during an inspection do not lead to any formal decision. To exercise their right of appeal, companies are thus obliged to provoke a decision by the Commission, which may even be implicit (*i.e.*, if the Commission ignores the opposition of the company[17]). This also means that there could be as many appeals as individual actions opposed by the company, for example:

- an action for breach of the right to privacy if the Commission copies documents that are out of scope;
- an action for breach of the protection against self-incrimination if the Commission asks incriminating questions; and
- an action for breach of the protection of professional privilege if the Commission copies LPP documents.

23. Under Article 263 TFUE such actions may not always be consolidated before the Courts. A company may thus have to form as many appeals as there are potential violations, which would make the exercise of the right to an effective remedy particularly complicated. It would also unnecessarily multiply the number of judicial challenges and thus consume excessive legal resources, both for companies and the Commission.

24. The APDC considers that a solution to this issue would lie with a simple amendment of Regulation No 1/2003 foreseeing that the Commission adopts a decision formally closing the inspection. That decision would contain a list of actions taken by the Commission, list the documents copied by the Commission, include the transcripts of any interview, and report any LPP decision *etc*. The Regulation would also provide for the possibility for companies to challenge this decision before the General Court within two months.

Proposals:

- **Regulation No 1/2003 should set an obligation for the Commission to adopt a decision formally closing the inspection which would list specific and separable acts adopted by the Commission during the inspection (such as interviews etc.) and the documents copied by the Commission.**
- **Regulation No 1/2003 should indicate the judicial remedy available to challenge the conduct of the inspection, *i.e.*, the right to appeal the decision formally closing the inspection, before the General Court, within two months.**

17 *Ibid.*

II. REQUESTS FOR INFORMATION UNDER ARTICLE 18 OF REGULATION No 1/2003

25. The APDC notes that while most requests for information ("**RFIs**") based on Article 18 of Regulation No 1/2003 remain reasonable in size, in certain cases the scope of the data or documents requested has increased tremendously. This may be observed for instance when the purpose of the RFI is to collect (i) vast volumes of transaction/commercial details over a very long period, and/or (ii) electronic documents that the undertaking concerned must identify on the basis of keywords. This sometimes supposes implementing in-depth internal investigation measures, *e.g.*, multiple interviews and forensic research, which in turn may trigger spectacular compliance costs for the undertakings concerned. As a result, the scope of some RFIs has increased to the point where these RFIs – although facially less aggressive than a dawn raid – can become more burdensome and intrusive than on-site inspections based on Article 20 of Regulation No 1/2003.

26. In parallel, the procedural guarantees attached to RFIs have not improved accordingly. As a result, RFIs now create a heavier burden for investigated parties and raise more risks than when Regulation No 1/2003 was adopted.

27. This has at least two consequences for the reform of Regulation No 1/2003.

28. *First*, the APDC believes that Regulation No 1/2003 should clarify the scope of the procedural guarantees attached to RFIs and therefore codify parts of recent case law on this topic.

29. In particular, the principles established in the *Cement* cases should be reaffirmed, including the necessity to indicate the purpose of the RFI "*with sufficient precision*", so as to enable the investigated undertaking to determine whether the information is necessary and allow the EU judicature to exercise judicial review.[18] Otherwise, as noted by Advocate General Wahl in the *Cement* cases, this would create a confusion between sectoral inquiries under Article 17 of Regulation No 1/2003 and RFIs sent under Article 18.[19] This also means that the broader the RFI, the more specific the stated purpose of the investigation should be, and that very broad RFIs should give rise to a stricter control of proportionality than more limited ones.

30. It is not only the purpose of the investigation that must be sufficiently specific, but also the questions themselves. As explained by Advocate General Wahl, vague questions and

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[18] ECJ, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 24 and the case-law cited. See also ECJ, *Schwenk Zement* v *Commission*, C-248/14 P, EU:C:2016:150; ECJ, *Buzzi Unicem* v *Commission*, C-267/14 P, EU:C:2016:151, and ECJ, *Italmobiliare* v *Commission*, C-268/14 P, EU:C:2016:152.

[19] Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2015:694, paragraph 74.

those that request information which are not purely factual and include a value judgement create a risk of providing self-incriminatory answers.[20] They also increase the risk that incorrect, incomplete or misleading answers will be given, which may attract heavy fines.[21]

31. *Second*, the APDC believes that Regulation No 1/2003 or Regulation No 774/2004 should set out a procedure allowing the control of the relevance of documents requested through broad RFIs.

32. In this regard, the *Facebook* Orders of 2020 confirm that catch-all RFIs targeting information that must be selected on the basis of keywords can easily become disproportionate.[22] As already noted above, these RFIs can become more intrusive than a dawn raid, with, paradoxically, less procedural safeguards. Admittedly, during dawn raids, the Commission is allowed to obtain access to a vast amount of electronic documents selected on the basis of keywords. However, the selection is then generally reviewed on site to determine whether the documents are relevant to the case.[23] In practice the purpose of this review is not limited to determining whether the selected documents are within the scope of the inspection decision: its aim is also to identify the documents that may have a substantive interest to establish a potential infringement. Due to time constraints, this normally results in the selection of a more limited number of documents – and therefore less intrusive and less costly measures for undertakings – than very broad RFIs.

33. The paradox appears even stronger if one recalls that: (i) the presence of Commission officials during dawn raids normally lasts a few days at the maximum, whereas the selection of a vast number of electronic documents can take weeks or even months, and (ii) broad RFIs create risks for companies in case they leave aside responsive documents (which can easily happen given the breadth of certain requests), whereas during dawn raids it is incumbent on the Commission – not undertakings – to select and therefore not to miss responsive documents.

34. Against this background, the President of the General Court has made important findings in the *Facebook* Orders, which should be reflected in Article 18 of Regulation No 1/2003 or Regulation No 774/2004, or at the very least in the Commission's explanatory note on inspections.[24]

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20 Opinion of Advocate General Wahl in *Italmobiliare* v *Commission*, C-268/14 P, EU:C:2015:697, paragraph 72.

21 Article 23(1)(a) and (b) of Regulation No 1/2003.

22 GC, *Facebook Ireland* v *Commission*, T-451/20, EU:T:2020:515, and GC, *Facebook Ireland* v *Commission*, T-452/20, EU:T:2020:516.

23 Or later in Brussels but in presence of a lawyer in case of a continued inspection like in the *Power Cable* case (GC, *Nexans France and Other* v *Commission*, T-135/09, EU:T:2012:596).

24 Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003 (https://competition-policy.ec.europa.eu/index/inspections_en).

- *First*, broad requests may lead to the production of documents which are unnecessary to the investigation.[25]

- *Second*, the proportionality of an RFI based on keywords must not be assessed by reference to the scope of the keywords analysed in the abstract, but by reference to the documents that must be produced in response to those terms. In other words, the relevant inquiry does not consist only in determining whether the keywords appear proportionate in view of the purpose of the investigation, but also whether they appear proportionate in view of the number and the nature of the responsive documents.[26] Still put differently, there is no reason to accept as "*inevitable that* [search terms] *may capture some documents that actually prove not to be relevant to the investigation*".[27]

- *Third*, in the presence of broad RFIs, at the very least the same guarantees as those in force during dawn raids should apply.[28] This principle was already established by the *Cement* judgments, in which the duty to detail the purpose of an RFI with a sufficient degree of detail was defined by analogy to the case law on inspection decisions.[29] In the context of a broad RFI, this principle implies that additional measures must be taken to "*ensure respect for the rights of the undertaking concerned in view of the number of documents requested and the strong likelihood that many of these documents will not be necessary for the purposes of the Commission's investigation*".[30]

35. For the purpose of the Commission's consultation, it is important to underline that the need for a protective "*method of verifying the relevance of documents accompanied by appropriate and specific guarantees for safeguarding the rights of the persons concerned*"[31] does not apply only when what is at stake is, like in *Facebook*, the protection of privacy rights. As noted by the President of the General Court, the risk that unnecessary documents will have to be produced is "*all the more compelling in respect*

25 GC, *Facebook Ireland* v *Commission*, T-452/20, paragraphs 39 and 61.

26 *Ibid.*, paragraphs 40-53.

27 *Ibid.*, paragraph 40 (by reference to what the Commission argued before the General Court; emphasis added).

28 *Ibid.*, paragraph 48.

29 ECJ, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 19.

30 GC, *Facebook Ireland* v *Commission*, T-452/20, paragraph 47.

31 *Ibid.*, paragraph 67.

of documents containing personal data",[32] but does not depend on the presence or absence of such data.[33]

36. As a result, while the presence of sensitive personal data creates a particularly sensitive context, the *Facebook* Orders show that more generally it cannot be accepted that RFIs will lead to the production of documents that are not within the scope of the proceedings (irrespective of potential additional, specific concerns concerning privacy). A protective procedure therefore remains necessary even when no personal data is at stake.

37. In practice, the procedure followed in *Facebook* would constitute a good basis:

- The preferred course of action for the Commission should be to narrow down its RFIs (in particular by being more selective on keywords and keyword combination). In many cases, decreasing the number of keywords or defining more restrictive combinations will significantly limit the risk that an RFI is overinclusive.

- In those cases where broad RFIs remain necessary, a good option would consist in creating a virtual data room where Commission officials could assess the relevance of the documents for the investigation, select documents and then – like during a dawn raid – allow the parties to review them before they are copied. As the Commission would be encouraged to select documents on the basis of their relevance (*i.e.*, not only according to whether they are within the scope of the investigation), this would also make its own proceedings more efficient.

- In the case of documents involving sensitive private data, the more stringent procedure defined in *Facebook* (*i.e.*, involving a more limited number of Commission officials) could be applied.[34]

Proposals:

- **Regulation No 1/2003 should codify parts of recent case law on Article 18 of Regulation No 1/2003, in particular on the necessity to indicate the purpose of the RFI "*with sufficient precision*".**
- **Regulation No 1/2003 or Regulation No 774/2004 should be amended to define a protective procedure allowing the verification of the relevance of documents requested through broad RFIs, *i.e.*, to "*ensure respect for the rights of the undertaking concerned in view of the number of documents requested and the strong***

[32] *Ibid.*, paragraph 62 (emphasis added). See also the reference to "*respect for privacy, private premises and correspondence*" (paragraph 57) and, more generally, the case law on the principle of proportionality as applied to investigation measures (See e.g., ECJ, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 76).

[33] GC, *Facebook Ireland* v *Commission*, T-452/20, paragraphs 40-53.

[34] *Ibid.*, operative part.

***likelihood that many of these documents will not be necessary for the purposes of the Commission's investigation*", as contemplated in the *Facebook* Order.**

- **In those cases where broad RFIs are genuinely necessary, a good option would consist in creating a virtual data room where Commission officials could assess the relevance of the documents for the investigation and select documents. Preferably, the Commission officials involved in this assessment should not be the same as those that will be involved in the investigation (much like inspectors are often not involved in the case).**
- **Then – like during a dawn raid – the parties should be allowed to review the documents and oppose their copying. In case of disagreement, the parties should be able to appeal before the General Court.**
- **In the case of documents involving sensitive private data, the more stringent procedure defined in *Facebook* (*i.e.*, involving a more limited number of Commission officials) could be applied.**

III. POWER TO TAKE STATEMENTS UNDER ARTICLE 19 OF REGULATION No 1/2003

38. Article 19(1) of Regulation No 1/2003 states that "*in order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.*"

39. That Commission's power to take statements under Article 19 of Regulation No 1/2003 has recently been subject to challenges in several cases: *Intel*;[35] *Qualcomm*;[36] *and French retailers.*[37] In these cases, the Commission was criticized for not properly recording the statements collected from third parties, contrary to Article 19 of Regulation No 1/2003 (and Article 3 of Regulation No 773/2004).

40. In *Intel*, the Commission argued that it was not obliged to record informal interviews. The Court rejected that argument and ruled that no distinction between formal and informal interviews was provided for in Regulation No 1/2003. The Court found that any interview relating to an investigation *must* be recorded. The Commission only has discretion on the means used for such recording.[38]

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35 ECJ, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 93.

36 GC, *Qualcomm* v *Commission*, T-235/18, EU:T:2022:35, paragraphs185–190.

37 GC judgments in *Intermarché Casino Achats* v *Commission*, T-254/17, EU:T:2020:459 ; *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458 ; *Les Mousquetaires and ITM Entreprises* v *Commission*, T-255/17, EU:T:2020:460.

38 ECJ, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 87.

41. In *Qualcomm*, the General Court confirmed the Court of Justice's ruling in *Intel*[39] and asserted that Article 19(1) applies to "*any interview conducted for the purpose of collecting information relating to the subject matter of an investigation*", and that "*there is nothing in the wording of that provision or in the objective it pursues to suggest that the legislature intended to exclude certain of those interviews from the scope of that provision*."[40] The Commission must record, in a form of its choosing, the content of the interview, whether it has been done in meetings or conference calls. According to the General Court in *Qualcomm*, the Commission must at least "*provide an indication of the content*" and "*nature of information*" discussed.

42. In the *French retailers*' case, the Commission argued that Article 19 of Regulation No 1/2003 did not apply to interviews taking place before the opening of a formal investigation. The General Court agreed that the statements in that case had been collected prior to measures of investigation being taken (*e.g.*, an inspection or an RFI), so that Article 19 of Regulation No 1/2003 did not apply.[41] The judgment is however under appeal and Advocate General Pitruzzella has recommended annulling the General Court's judgment on this point and proposed to find that Article 19 of Regulation No 1/2003 applies as soon as it relates to an investigation.[42]

43. Finally, in *Google Android*, the General Court confirmed the particularly broad scope of Article 19 of Regulation No 1/2003. It held that it is not sufficient for the Commission to make a brief summary of the subjects addressed during the interview. The Commission must be in a position to provide an indication of the content of the discussions which took place during the interview, in particular the nature of the information provided during the interview on the subjects addressed.[43] In addition, the fact that the interviews which the Commission conducted with third parties may have taken the form of meetings with the Member of the Commission responsible for competition matters or a member of her cabinet cannot bring them outside the scope of Article 19 of Regulation No 1/2003, when those meetings are held for the purpose of collecting information relating to the subject matter of an investigation.[44] Finally, the General Court indicated that "*it would be useful and appropriate for the record of each interview conducted by the Commission with a third party for the purpose of collecting information relating to the subject matter of an investigation to be made or approved at the time when that interview is held or shortly afterwards so as to be added to the file as quickly as possible to enable the person accused of an infringement, when the time comes,*

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39 *Ibid.*, paragraph 93.

40 *Ibid*, paragraph 183.

41 GC, *Intermarché Casino Achats*, T-254/17, EU:T:2020:459, paragraphs 196-202.

42 Opinion of AG Pitruzzella in *Les Mousquetaires and ITM Entreprises* v *Commission*, C-682/20 P, EU:C:2022:578, paragraphs 130-161.

43 GC, *Google and Other* v *Commission*, T-604/18, EU:T:2022:541, paragraphs 912 and 930.

44 *Ibid.*, paragraph 920.

to acquaint himself or herself of it for the purpose of exercising the rights of the defence".[45]

44. The APDC invites the Commission to codify this case law (including any upcoming judgment in the *French Retailers* case) in the future Regulation (and the implementing regulation) so as to avoid as much as possible future disputes on the scope of this power of investigation.

45. More generally, the APDC considers that the power to take statements should be framed as follows.

46. *First*, the APDC considers that the wording of Article 19 of Regulation No 1/2003 should make it clear that the Commission has an obligation to *record all interviews* conducted by the Commission in the context of the application of Article 101 and 102 TFEU. While this duty exists irrespective of the wording of Article 19 of Regulation No 1/2003, but rather as a consequence of the more fundamental (and therefore overriding) rights of the defense,[46] it is necessary to restate this general duty in Article 19 as a matter of clarity and transparency.

47. In addition, in light of recent litigation, it seems that it would make more sense to remove the reference to "*subject matter of an investigation*" to avoid discussions about what is an investigation and when it starts.

48. Indeed, the Commission organizes interviews in different forms (phone calls, meetings), and in different contexts (*e.g.*, sector inquiries; handling of complaints; potential or actual investigations). Commission officials are not always in a capacity to know whether the information collected is ultimately going to be used in the context of an individual investigation in application of Articles 101 and 102 TFEU. A general obligation to record all interviews conducted by the Commission would guarantee that the rights of defense of the undertakings concerned are consistently protected. It would also allow to safeguard the Commission's decisions from being annulled only because of procedural violations, which result from unclear rules.

49. This would also help avoid litigation about whether and when the Commission is under an obligation to record interviews. And it would eliminate the risk that the Commission postpones the opening of an investigation to avoid having to record a statement.

50. *Second*, the Regulation (or implementing regulation) should foresee (as it does today) that the recording of the interview must be reviewed by the party that was interviewed, who should be able to make comments. This is an essential guarantee to ensure that the content of the interview reflects the discussions with the party concerned.

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45 *Ibid*, paragraph 933.

46 GC, *Qualcomm* v *Commission*, T-235/18, EU:T:2022:35, paragraphs 276–280.

51. *Third,* the Regulation (or implementing regulation) should provide minimum thresholds about the content of the recording. While an audio recording would ensure that the full content of the interview is recorded, the Commission cannot be held to always organize such a recording (not least because this may jeopardize the anonymity of a witness). Written minutes must be allowed where this is necessary for the purposes of the investigation. However, Regulation No 1/2003 should impose on the Commission a duty to record the content of any interview in all material respects.

Proposals:

- **Article 19 of Regulation No 1/2003 (and Article 3 of Regulation No 773/2004) should, at a minimum, be amended to reflect the case law.**
- **Article 19 of Regulation No 1/2003 (and Article 3 of Regulation No 773/2004) should be amended to ensure that the rules governing the power to take statements apply to any interview conducted for the purpose of applying Articles 101 and 102 TFEU.**
- **The Commission should be obliged to record any interview, but can maintain discretion as to the form of the recording. However, the recording must reflect the content of the interview in all material respects, and the content of the recording must be reviewed by the party who was interviewed (who should be able to make comments if it disagrees with the content). That review should take place within a short time after the interview.**

IV. SECTORAL INVESTIGATIONS UNDER ARTICLE 17 OF REGULATION No 1/2003

52. Article 17 of Regulation No 1/2003 provides a legal basis for the Commission to carry out sector investigations and investigations into types of agreements. Based on such investigations, the Commission "*may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties*".

53. The Commission's powers for such investigations are very broad, as it can request information, take statements, carry out inspections and impose fines and periodic penalty payments (to enforce such powers of inspections).

54. Although the Commission cannot target any individual undertaking in the context of sectoral investigations, it can use its powers to (i) collect information, identify potential infringements and adopt a report setting out an enforcement policy; and (ii) subsequently

launch individual infringement proceedings, based on the information it gathered and the policy it defined in its sectoral investigation[47].

55. This interplay between sector investigations and individual infringement proceedings can raise questions:

- undertakings can find themselves in a situation where (i) they have provided the Commission with significant amount of information on their individual situation, especially as the Commission is generally incentivised to cast a very broad net in the information collected, regardless of the potential issues it identified; (ii) they have not expressed their views on a given set of circumstances, as relevant to their individual situation, but have at most provided general comments on the Commission's preliminary findings;[48] (iii) they may thereafter find themselves facing an individual investigation that seeks to apply a set of policies determined in a sector investigation;

- once the Commission has knowledge of certain (types of) agreements or practices which stems from its sectoral investigation, it can easily send targeted information requests to individual undertakings, requesting the exact same information it obtained in the course of the sector investigation to build its individual infringement case. As a result, whilst the Commission's powers in the context of sectoral investigations may not, in principle, be used to target individual undertakings, in practice, the information provided by undertakings in the context of sectoral investigations can be used against them in subsequent targeted investigations by means of an additional procedural formality.

56. From this perspective and in order to preserve undertakings' rights of defence, the Commission could implement some level of "ring-fencing" between sector investigations and individual infringement cases. For instance, it could ensure that the case teams are separate, and that the information collected is segregated (*i.e.*, that the case team in charge

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47 As was the case in the pharmaceutical sector. See, for instance, Commission press release dated 26 November 2020, *Antitrust: Commission fines Teva and Cephalon €60.5 million for delaying entry of cheaper generic medicine*. The Commission specifies "*Today's decision completes the cycle of pay-for-delay investigations launched with the Commission's 2009 sector inquiry into the pharmaceutical sector. To date, the Commission has fined companies in three other investigations – one concerning perindopril, a cardiovascular medicine, one concerning citalopram, an anti-depressant, and one concerning fentanyl, a painkiller*".

48 Companies can comment on the Commission's preliminary findings in a sector investigation. Yet, such possibility is ill-suited to enter into the details of any given specific situation. Also, companies can be reluctant to directly contribute to the definition of enforcement policies. For instance, in the e-commerce sectoral investigation, the European Commission requested information from 1,900 companies and only 66 stakeholders submitted their views on the Commission's preliminary reports (see, *overview of the sector inquiry into e-commerce*, available at: https://competition-policy.ec.europa.eu/sectors/ict/sector-inquiry-e-commerce_en).

of any individual infringement may not access the information collected in the course of the sector investigation that was not made public in the Commission's report[49]).

57. More generally, should the Commission consider widening its powers in the context of sectoral investigations (*e.g.*, to allow for the direct transmission of information collected in the context of its sectoral investigation to the case team in charge of investigations into individual infringement cases, or to be able to intervene on the market in question following its sectoral investigation), it should ensure that (*i*) undertakings' rights of defence are fully protected, as they are in infringement proceedings; (*ii*) any Commission intervention is based on a finding of an infringement to competition law, in order to respect general principles of EU law, such as legal certainty.

Proposal: Regulation No 1/2003 should set an obligation for the Commission to provide for ring-fencing measures between sectoral investigations and subsequent individual infringement proceedings, such as ensuring that the case-teams are separate and the information collected in the course of the sectoral investigation is not accessible to the case team in charge of the individual infringement proceedings.

V. PROCEDURAL RIGHTS OF PARTIES AND THIRD PARTIES OR COMPLAINANTS

58. In Articles 101 and 102 proceedings, the addressees of a statement of objections will normally be granted access to all documents making up the Commission's file, with the exception of internal documents and confidential information. Parties submitting information to the Commission that may be confidential are requested to provide a non-confidential version of the original documents.

59. However, the Commission acknowledges[50] that in some instances, it may not be possible for the information provider to provide, in a timely manner, a meaningful non-confidential version, whereas granting access to such information may be necessary for an effective exercise of the rights of defence.

60. The Commission's best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU[51] provide for two specific procedures that may be used to facilitate the exchange of confidential information between parties to a proceeding, namely:

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49 Bearing in mind that the Commission's report at the end of a sectoral investigation focuses only on generic issues, presented in the abstract, and are not used to describe the practices of any given undertaking.

50 *See*: Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Text with EEA relevance (europa.eu)., paragraph 6.

51 *See*: Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Text with EEA relevance (europa.eu), paragraphs 96 and 97.

- the so-called "negotiated disclosure procedure", where in the presence of a particularly voluminous file, the disclosing party agrees to grant access to its confidential file to the other parties, provided that the party being granted access to file limits access to the information to a restricted circle of persons, which is to be decided by the parties on a case-by-case basis.

- the data-room procedure, typically used for the disclosure of quantitative data relevant for econometric analysis, where part of the file, including confidential information, is gathered in a room, at the Commission's premises, and made available to a restricted group of external legal counsel and/or the economic advisers of the party.

61. The APDC considers that the use of confidentiality rings, which are a form of negotiated disclosure set out above, has clear benefits to ensure the right to access to file and rights of the defence are effective, without jeopardising a party's confidential information and without resorting to overly burdensome and time-consuming redaction procedures.

62. The Commission's Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU already contain detailed guidelines on the use of confidentiality rings.[52] The APDC suggests that the principle of using confidentiality rings as an efficient means to safeguard the rights of the defence should be enshrined in the implementing regulation in order to increase legal certainty and encourage parties to accept such confidentiality rings.

63. In particular, this would also be an opportunity to (i) foresee the possibility that, where necessary to preserve undertakings' rights of defence, employees of the relevant undertaking have access to the confidential information (*e.g.*, when the confidential information is of a highly technical nature, so that outside counsel may not usefully review such information); (ii) lay out the conditions for such access (*e.g.*, that the relevant employees sign a non-disclosure undertaking, that they can only access the document in a physical data room or without possibility to download or print the documents, *etc.*).

64. Furthermore, the role and independence of the Hearing Officer are mentioned in Article 14 of Regulation No 773/2004 regarding the organisation and conduct of oral hearings. However, to reflect and recall the importance of its functions in competition proceedings besides oral hearings, the APDC suggests that some other main tasks of the Hearing Officer (*e.g.*, to ensure the effective exercise of procedural rights throughout proceedings and that the right to access to file and the undertakings' legitimate interest in

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52 *See*: Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation (europa.eu).

confidentiality are respected) be reflected in the Regulation and that the Hearing Officer's Terms of reference be updated accordingly.[53]

65. For instance, the Hearing Officer could review conflicting claims in relation to confidentiality rings and decide whether undertakings' rights of defence are properly balanced with the right to the protection of business secrets and legally privileged documents.

Proposals:

- **Regulation No 773/2004 should specify that the Commission should balance undertakings' rights of defence and the protection of their business secrets / legally privileged documents by setting up confidentiality rings and that such confidentiality rings could include employees of the relevant undertakings where necessary to safeguard undertakings' rights of defence and subject to appropriate safeguards.**

- **Regulation No 773/2004 should be updated to reflect that the Hearing Officer should have a role beyond the organisation and conduct of oral hearing, in particular to adjudicate conflicting claims in relation to confidentiality rings.**

VI. COMMISSION DECISIONS

66. Generally speaking and subject in particular to the various points raised in this submission, the APDC considers that the current rules of procedure can protect undertakings' rights of defence, even if their application in any individual cases can raise issues.

67. Yet, the APDC would call on the Commission to fully take into account undertakings' rights of defence should it consider any extension of its powers of investigations and sanction. Any such extension should be accompanied by additional safeguards, to ensure that there is no regression on that front.

68. In addition to this general comment, the APDC would like to discuss a specific procedural point relating to hybrid settlement decisions.

69. In its judgment dated 2 February 2022 in the *Scania* case, the General Court reaffirmed that the Commission may engage in hybrid proceedings, even staggered over time, so

[53] *See*: Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20 October 2011, p. 29). See as well: The Hearing Officers (europa.eu) et Mission (europa.eu).

long as, in particular, (i) it does not infringe undertakings' presumption of innocence; and (ii) the Commission acts impartially vis-à-vis undertakings that choose not to settle.[54]

70. This judgment is currently under appeal and the Court of Justice will therefore have the opportunity to address this issue.

71. In any event, the APDC considers that the Commission could adapt its procedural framework to enhance undertakings' confidence in the Commission's impartial decision-making and in the respect of the presumption of innocence, based on the notion that "*justice should not only be done, but should be seen to be done*".

72. To achieve this, any revised version of the implementing regulation could contain specific guarantees for undertakings that do not wish to settle. For instance, such revised regulation could specify that:

- to respect the presumption of innocence, any prior settlement decision (i) should not refer to undertakings that choose not to settle (such a suggestion should be unproblematic as it would merely codify and formalise the Commission's current practice); (ii) should not otherwise affect the rights of non-settling undertakings;

- the Commission should take all relevant steps to ensure that it carries out an impartial assessment of the situation of non-settling undertakings, for example by ensuring that different case-teams are in charge of each set of proceedings (settlement vs non-settlement), as the General Court suggested in in the *Scania* judgement.[55]

73. Such safeguards could be all the more useful that, contrary to many national competition authorities, there is within the Commission no separation between the investigative services and the deciding authority.

Proposal: Regulation No 773/2004 should specify that the Commission should respect the principle of presumption of innocence at all times and take all material steps to ensure that it carries out an impartial assessment of all practices that it is investigating, in particular by relying on different case teams in hybrid proceedings and otherwise ensuring that the adoption of a settlement decision does not affect the rights of non-settling undertakings.

54 GC, *Scania and Others* v *Commission*, T-799/17, EU:T:2022:48, paragraphs 97 *et seq.*.

55 *Ibid.*, paragraph 151: "*It is true that the involvement of the same services in the adoption of both decisions makes it more difficult to ensure that the examination of facts and evidence concerning an undertaking after the settlement decision has been adopted will be carried out in accordance with the 'tabula rasa' principle imposed by the case-law (see paragraph 129 above), which could justify, in order to dispel doubt in that regard, allocating the file to two different teams*".

VII. FINES

74. Pursuant to Article 23 of Regulation No 1/2003, the Commission may decide to impose fines on undertakings that have infringed Articles 101 and/or 102 TFEU. In compliance with the principle of proportionality, the fine is to take into account the gravity and the duration of the infringement, and may not exceed 10% of the undertaking's total turnover in the preceding business year.

75. *First*, contrary for instance to French competition law,[56] Regulation No 1/2003 does not expressly foresee that the fine should be determined according to the individual situation of the relevant undertaking. Yet, in practice and in line with well-established case-law,[57] the Commission does take into account the individual situation of each undertaking, for example when it grants a fine reduction based on an undertaking's procedural choices (settlement or leniency application) or financial situation (inability to pay), or based on aggravating and mitigating circumstances.

76. Consequently, any amendment to Regulation No 1/2003 could be an opportunity to expressly include in Article 23 that the Commission should take into account the individual situation of each undertaking when imposing fines. To further increase legal certainty, any amendment to Regulation No 773/2004 could be an opportunity to detail how the Commission would assess an undertaking's individual situation, thus creating a legal basis for various mechanisms that are currently only foreseen in the Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 (hereafter, the "**Guidelines on setting fines**").

77. *Second*, the APDC suggests further enshrining in the regulation the principle of proportionality, and to specify that such principle applies to all steps of the methodology used for determining the amount of the fine.

78. One example of the various situations where the Commission should apply the principle of proportionality concerns the methodology used for setting the basic amount of the fine.

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[56] According to Article L. 464-2 of the French Commercial Code, "*fines are determined according to the gravity and the duration of the infringement, as well as the situation of the association of undertakings, or the relevant undertaking and the group to which it belongs*".

[57] For instance, GC, *Pometon* v *Commission*, T-433/16, EU:T:2019:201, paragraphs 369-370: "*in the exercise of its unlimited jurisdiction, it is therefore for the Court – in view of the Commission's findings as to the applicant's participation in the single and continuous infringement at issue, as confirmed in the examination of the first four pleas raised in support of this action – to determine the appropriate amount of the exceptional adaptation of the basic amount of the fine, having regard to all the circumstances of the case. That exercise involves, in accordance with Article 23(3) of Regulation No 1/2003, taking into consideration the seriousness of the infringement committed by the applicant and its duration, in compliance with the principles of, inter alia, proportionality, the individualisation of penalties and equal treatment*" (emphasis added).

79. According to the Guidelines on setting fines, in determining the basic amount of the fine to be imposed, the Commission refers to the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates during the last full business year of its participation to the infringement.[58] Yet, the Commission could indicate that the basic amount of the fine should be based on the average value of sales generated by the undertaking in question during the duration of the infringement, rather than on the last business year prior to the decision. Indeed, for infringements lasting several years, taking the average value would better reflect the impact of the practice in question on the market. This being said, since the 10% legal cap ensures the fine an undertaking may be required to pay is proportional vis-à-vis its ability to pay, the APDC considers that the reference year for the 10% legal cap can remain the last financial year preceding the decision.

Proposals:

- **Regulation No 1/2003 should contain a reference to the principle of individualisation of penalties and Regulation 773/2004 should be amended to include a legal basis for all mechanisms for the individualisation of penalties, such as the right for undertakings to request that the Commission assesses their ability to pay.**
- **Regulation No 1/2003 should specify that the principle of proportionality applies to all steps applicable to determine the amount of the fine.**

VIII. INFORMAL GUIDANCE FROM THE COMMISSION

80. The APDC considers that Recital 38 of Regulation No 1/2003, which leaves open the possibility for the Commission to issue informal guidance to guide businesses facing difficulties about the application of Articles 101 and 102 TFEU, should form part of the review of the effectiveness of Regulation No 1/2003. In particular, the question of whether it is appropriate to continue to regulate this possibility in a soft law instrument, i.e., a Commission notice, should be raised.

81. While the APDC welcomed, in its submission of 21 June 2022, the Commission's initiative to launch a public consultation (separate from this consultation) on the draft Communication on informal guidance on novel or unresolved issues arising in individual cases under Articles 101 and 102 TFEU, it expressed a number of reservations. In a nutshell, the main reservations pertained to the need to offer a certain degree of protection to the businesses which will seek informal guidance and the need to construe broadly the conditions under which businesses may have the right to seek such guidance. The Communication in its final version, which addresses, to some extent, some of the

58 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

concerns expressed by the APDC, unfortunately does not address all them or address them only partially.[59]

82. With those unaddressed or only partially addressed reservations still in mind, the APDC fears that the choice of a soft law instrument to govern the Commission's ability to give informal opinions had curbed creativity and resulted in a much less ambitious system than that which could have been created in the context of hard law.

83. One of the possible ambitions with hard law could be to achieve an adequate level of cooperation between the Commission and the National Competition Authorities ("**NCAs**") and national courts in relation to their informal guidance, to further increase the level of protection offered to businesses. The APDC has indeed not seen any change on this aspect in the updated notice on informal guidance. As in the 2004 Notice, paragraph 27 of the 2022 notice simply states that: "*Guidance letters are not Commission decisions and do not bind Member States' competition authorities or courts that have the power to apply Articles 101 and 102 TFEU. However, it is open to Member States' competition authorities and Member States' courts to take account of guidance letters issued by the Commission as they see fit in the context of a case*." In the same vein, footnote 10 of the 2022 notice specifies that: "*[t]his Notice leaves unaltered the possibility for Member States' competition authorities to provide guidance in accordance with their legal framework, in particular where an agreement or unilateral practice corresponds or is liable to correspond to usage that is predominantly limited to one Member State*".

84. Failure to address situations where practices would be implemented by businesses based on the Commission's informal advice and would subsequently be challenged by NCAs or national courts could seriously undermine the effectiveness of the informal guidance system. Conversely, the effectiveness of informal NCA guidance would run up against Member State boundaries in the absence of cooperation between the Commission and the NCAs and national courts and between the NCAs and national courts.

85. Such failure is particularly problematic when legal certainty is sought by businesses in relation to contemplated practices with cross-border implications. This may for instance be the case for practices pursuing sustainability goals since sustainability issues and the means of addressing them may often exceed the boundaries of a single Member State.

86. While the APDC does not minimize the complexity of crafting a more ambitious project in terms of informal guidance, it considers that, at minimum, some crucial questions need to be asked and discussed in order to provide, in the revised regulation, a specific frame for issuing such informal guidance.

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59 Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) (C(2022) 6925 final).

Proposals:

- **The unresolved issues raised by the rather minimalist soft law framework relating to the Commission's informal guidance calls for a more in-depth review of the informal guidance practice.**
- **Regulation No 1/2003 (or another hard law instrument) should provide for a more comprehensive and adequate framework for informal guidance which would *inter alia* ensure an adequate level of cooperation between the Commission and the NCAs and national courts in relation to informal guidance.**

IX. COOPERATION WITHIN THE EUROPEAN COMPETITION NETWORK ("ECN")

87. The European Competition Network (ECN) is an important tool for the harmonized application of Articles 101 and 102 TFEU in all Member States. However, its functioning raises a number of practical issues that are not addressed in the proposed review of Regulations No 1/2003 and 773/2004.

88. The first issue is related to the ***allocation of cases between the Commission and the NCAs*** in the context of the ECN. While Recital 17 of Regulation No 1/2003 states that "*it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings*", in practice, it has not been uncommon for the Commission to "carve out" parts of a practice to allow an NCA to pursue its own parallel investigation.

89. For instance, in the *Consumer detergents* case the Commission investigated and imposed sanctions for a cartel in the sector of heavy-duty laundry detergent powders intended for machine washing and sold to consumers that covered Belgium, France, Germany, Greece, Italy, Portugal, Spain and the Netherlands.[60] However, the Commission carved out from its investigation some of the information exchanges that took place in France between the same parties on the same products. This allowed the French Competition Authority, in parallel, to investigate and impose sanctions for behaviours that arguably took place within the same single and continuous infringement as the behaviours targeted by the Commission.[61]

90. More recently, the Commission conducted unannounced inspections in the metal packaging sector in Germany, France and the United Kingdom to investigate practices

60 Case AT.39579, 13 April 2011, targeting Henkel, Procter & Gamble and Unilever.

61 Case 14-D-19, 18 December 2014, targeting Colgate Palmolive, Henkel, Procter & Gamble and Unilever.

that allegedly "*extended to markets outside Germany, in several Member States.*"[62] However, the final decision by the Commission tackles only behaviours related to the German market,[63] while the French Competition Authority has in parallel opened its own investigation into the same sector.[64]

91. The APDC is aware that the General Court recently found inadmissible Amazon's appeal against the Commission's decision to carve out Italy from the geographical scope of its proceedings to allow a parallel case to be pursued by the Italian competition authority.[65] However, the fact that the Commission decision may not – subject to the outcome of the appeal that is currently pending before the Court of Justice[66] – be reviewed by the Courts does not in any case mean that the Commission should continue to ignore the principles laid out in Recital 17 of Regulation No 1/2003 and put companies in situation where concurrent proceedings are being conducted both at the Commission and national levels.

92. Indeed, such cases may raise serious procedural issues for the parties. In the *Consumer detergents* case, leniency applicants at the EU level where deprived of their immunity because they had failed to apply for leniency in the Member States as well. Although the Commission has argued in the past that it should be the responsibility of undertakings to file for leniency in all relevant jurisdictions, these situations seem to infringe on the principles of legal certainty and go against the legitimate expectations of the parties.

93. In addition, that process creates inefficiencies in the allocation of resources between the Commission and the NCA, as the same companies and sectors are investigated twice. It also entails an additional burden for the targeted undertakings, which are forced to present their defense before two (and potentially more) competition authorities, with two different appeal processes, etc.

94. The APDC therefore believes that it would make sense that once the Commission has started investigating specific players for behaviours in a specific sector, the NCAs be actually relieved of their competence to investigate the same companies in the same sector. This would not prevent the NCAs to bring to the Commission's attention additional behaviours or facts that they believed should be investigated by the Commission, but it would create a one-stop-shop with the Commission once an investigation into a specific sector has been opened, which – it seems to us – was the original intent of the regulation. The same one-stop-shop principle should apply to

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62 *See* https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_18_3662.

63 *See* https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4483.

64 *See* https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/bisphenol-dans-les-contenants-alimentaires-le-rapporteur-general-indique#:~:text=Le%20rapporteur%20g%C3%A9n%C3%A9ral%20de%20l,bisph%C3%A9nol%20A%20ou%20ses%20substituts.

65 GC, *Amazon.com, Inc. and Others v Commission*, T-19/21, EU:T:2021:730.

66 ECJ, *Amazon.com, Inc. and Others v Commission*, C-815/21 P, pending.

leniency proceedings. In that case, filing for leniency with the Commission should create a marker at the level of the Member States, with a responsibility for the companies to complete that marker at the national level if the case is eventually handled by an NCA.

95. On the other hand, now that the ECN+ Directive has been transposed by the Member States, giving all NCAs the power to reject complaints that do not fall within their enforcement priorities, another potential issue has arisen in the event the Commission and all NCAs decline their competence to review a complaint on that basis. Indeed, this could mean that a manifest infringement of Article 101 or 102 TFEU may not be investigated by any competition authority, even if it distorts competition to the detriment of other market players. As a result, the competitive process could be permanently harmed in sectors that are not considered a priority either at the EU level or in any Member States.

96. Although Articles 101 and 102 may also be raised before the national jurisdictions, these jurisdictions do not have the same investigative powers and corresponding resources as the Commission and NCAs – including but not limited to economist teams, the possibility to conduct unannounced inspections to search for evidence of infringements, etc. In many Member States, they also may not have equivalent injunctive powers as those of the Commission and NCAs to make infringements stop.

97. The revision of Regulation No 1/2003 may therefore be the opportunity to establish a more formal setup for the rejection of formal complaint, including (i) a specific timeframe for the Commission or an NCA to reject a complaint, (ii) the obligation to state reasons for the rejection, and (iii) the obligation, if the Commission rejects a complaint that is *prima facie* legitimate based on the fact that it does not fall within its priority, to designate an NCA that will have to investigate the complaint.

98. The second issue relates to the ***contacts and exchange of information between the Commission and the NCAs*** in the context of the ECN. Recital 16 of Regulation No 1/2003 states a wide principle that "*the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential*."

99. While the APDC does not dispute the possibility for members of the ECN to exchange information to ensure the correct application of Articles 101 and 102 TFEU and the corresponding national provisions, it notes that the ECN operates in total opacity even in the context of formal proceedings against undertakings. Companies targeted by an investigation are not aware, even after a statement of objections has been issued, of the existence – or not – of discussions and information exchanges within the ECN regarding the case.

100. The APDC would welcome additional transparency in the functioning of the network. While it is undisputed that secrecy may be necessary at an early stage of the proceedings, once a statement of objections has been issued either by the Commission or an NCA, the

parties should at least be made aware of (i) the existence of contacts within the ECN regarding their case, and (ii) the exchanges of information that have taken place between the NCAs (and/or the Commission). In particular, documents in the case file that come from another authority should be clearly identified as such to allow the targeted undertakings to assess them in their full context.

Proposals:

- **Regulation No 1/2003 should provide for a one-stop-shop with the Commission once an investigation into a specific sector has been opened and extend this proposal to leniency proceedings.**
- **Regulation No 1/2003 should establish a more formal setup for the rejection of formal complaints, including (i) a specific timeframe for the Commission or an NCA to reject a complaint, (ii) the obligation to state reasons for the rejection, and (iii) the obligation, if the Commission rejects a complaint that is *prima facie* legitimate based on the fact that it does not fall within its priority, to designate an NCA that will have to investigate the complaint.**
- **Regulation No 1/2003 should contain provisions which would help to increase transparency in relation to the functioning of the ECN: the parties should at least be made aware of (i) the existence of contacts within the ECN regarding their case, and (ii) the exchanges of information that have taken place between the NCAs (and/or the Commission).**

X. CONCURRENT APPLICATION AND ENFORCEMENT OF ARTICLES 101/102 TFEU AND OTHER SETS OF RULES

101. The APDC would also welcome additional clarity – and appropriate procedural guarantees – regarding the scope of cooperation between the Commission and NCAs when the latter are entrusted with investigative powers under several sets of rules. The recent adoption of the DMA Regulation has created the possibility for NCAs to conduct investigations into – and report to the Commission – possible infringements of obligations under the DMA, particularly in cases "*where it cannot be determined from the outset whether a gatekeeper's behaviour is capable of infringing* [the DMA] *Regulation, the competition rules which the competent authority is empowered to enforce, or both*"[67].

102. Such concurrent application may raise issues both at the stage of the investigation and in the enforcement process.

[67] DMA Regulation, Recital 91 and Article 38.

103. *First*, the permeability between investigations carried out under different sets of rules raises some concerns. Article 12 of Regulation No 1/2003 provides that information exchanged within the ECN can only be used as evidence for the purpose of applying Articles 101 or 102 and in respect of the subject-matter for which it was collected by the transmitting authority. It is not clear how NCAs would partition information gathered (i) for the purpose of the implementation of the DMA (or other sector-specific regulations they may be responsible for implementing) and (ii) collected in application of their powers under Articles 101/102 and their national equivalents.

104. Accordingly, the APDC suggests that:

- investigations carried out by competition authorities under rules other than competition should remain strictly separate from competition law enforcement (and *vice versa*), with structural measures to guarantee the segregation of the information from each procure, so that the undertakings can in each case benefit from the appropriate procedural rights; and

- the legal basis of the investigations of the Commission and the NCAs – and the exchanges of information they could give rise to within the ECN – should be clearly identified and dissociated in each instance.

105. *Second*, at the stage of the enforcement itself, parallel proceedings under Regulation No 1/2003 and other sets of rules, such as the DMA Regulation, should not lead to concurrent sanctions likely to impinge on the principles of proportionality and *ne bis in idem*. The revised Regulation No 1/2003 and its implementing provisions should therefore mirror and reinforce the guarantees provided elsewhere for this purpose.[68] Such guarantees should also extend to parallel proceedings of concurrent sets of rules by, respectively, the Commission and the NCAs (*e.g.*, in the case of Commission enforcement of the DMA Regulation and concurrent NCA enforcement of competition rules against the same undertaking). To the extent separate sanctions are imposed on the same undertaking both (i) under Articles 101/102 and (ii) under other sets of rules at different points in time, such successive sanctions should not give rise to a fine increase on the account of reiteration.

Proposals:

- **The revised Regulations should provide for appropriate separation between investigations carried out by the Commission and/or the NCAs under Articles 101 and 102 TFEU, on the one hand, and under other sets of rules, such as the DMA, on the other hand.**
- **Undertakings being the subject of parallel investigations by the Commission and/or the NCAs under different sets of rules should benefit from appropriate procedural**

68 See DMA Regulation, Recital 86.

guarantees (e.g. clear information on the legal basis, scope, etc., to allow the proper exercise of the rights of defense in each case);

– **In the event of concurrent application of different sets of rules, the revised Regulations (and the accompanying soft law documents of the Commission) should include explicit references and guarantees as regards the principles of proportionality and *ne bis in idem* in the imposition of fines under Articles 101 and 102 TFEU, on the one hand, and under other sets of rules, such as the DMA, on the other hand; conversely, the successive imposition of fines under different sets of rules with similar objectives should not be taken into account for the purpose of a fine increase on the account of reiteration.**