COMMENTS OF THE ASOCIACIÓN ESPAÑOLA DE DEFENSA DE LA COMPETENCIA – AEDC - ON THE REFORM OF REGULATION 1/2003[1]

A. GENERAL QUESTIONS

a. Uniform application and parallel enforcement.

Parallel enforcement by the European Commission (the "Commission"), NCAs and national courts of the competition rules has increased their effectiveness in the EU, resulting in a significant rise in the number of cases in which Articles 101 and 102 TFEU have been applied and those where only national competition legislation was applicable. As national legislation essentially mirrors Articles 101 and 102 TFEU, Regulation 1/2003 has also contributed to a uniform application of competition law in the EU.

The success of parallel enforcement requires reinforcing the mechanisms facilitating a uniform application of Articles 101 and 102 TFEU, particularly Article 11 (4) and (6) of Regulation 1/2003.

The objective of Regulation 1/2003 should also be to eliminate differing results of the application of national and EU law in situations where Article 102 TFEU may apply. There is no longer any justification for Member States adopting and applying in their territory stricter national laws which prohibit or sanction unilateral conduct.

b. Commission's powers of investigation

The Commission's broad investigative toolkit has contributed to a more effective application of Articles 101 and 102 TFEU and of competition law in general, having served as a model for national competition legislation and authorities, both before and after the ECN+ Directive. There is a need to update the tools, especially the power to take statements (see also below), which is more far-reaching for NCAs. The same is true of the possibility of "continued legal inspections" which allow NCAs to retrieve documents from a company's premises and bring them back to their own offices for inspection when dealing with huge amounts of data. By no means should this come at the cost of a loss of procedural guarantees for the parties involved.

c. Handling of complaints

The Commission's decisions on whether to admit or to reject complaints and on the allocation of cases with NCAs, should be processed more swiftly, as they are critical

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for a swift and more effective and uniform enforcement, as well as for all interested parties.

In this connection, it may be questioned whether the distinction between informal and formal complaints is still of much use. One may also take the view that the processing of the latter is too cumbersome (Article 7 procedure) for all the parties involved, particularly since complaints come in many different forms and the distinction between formal and informal ones is getting increasingly artificial. The same result, i.e., filtering the admissible complaint, could be achieved with fewer formalities in a reasonable period of time, without renouncing thereby to procedural guarantees.

d. Time limit and proceedings

The Commission's antitrust decisions address competition concerns, but investigations are generally considered too lengthy. The duration of the proceedings might negatively affect the effectiveness of the decisions as well as the principle of legal certainty or the protection of interested parties' fundamental rights.

Together with quality and relevance, the speed of investigations is an important factor when enforcing competition rules. Investigations should be swift, not least given the rate at which economies and societies are evolving (especially the digital economy). However, investigations are also becoming more complex. Speed is an essential complement to quality and relevance; it cannot replace or compromise in any way these factors. Effective enforcement of the competition rules requires the Commission to adopt decisions within a reasonable timeframe.

To this effect, the ICN Framework on Competition Agency Procedures provides that, as a matter of principle, competition authorities shall endeavour to conclude their investigations and aspects of enforcement proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case. Although reasonability is difficult to assess in general terms, there are several areas where the Commission's practice seems excessively lengthy:

(i) handling of complaints: although paragraph 61 of the Commission Notice on the handling of complaints provides for an indicative and non-binding time frame of 4 months for informing complainants of the action the Commission intends to take, this is seldom the case and sometimes very largely exceeded. This leaves complainants with no alternatives to the Commission's action or inaction. Although complexity may justify flexibility, enabling national alternatives, even if subject to further review, seems desirable once a reasonable period of time has elapsed.

(ii) duration of infringement proceedings: there is no current limitation to the duration of proceedings, other than those deriving from limitation periods foreseen in Article 25. We would very much welcome the introduction of time limits after the formal opening of proceedings, which could be tailored to the particularities/complexities of each case and even extended where necessary.

(iii) publication of decisions: the publication of redacted decisions currently takes months and - quite often - even years. This negatively impacts the rights of interested third parties that may want to seek judicial review or just use the decision as a precedent with full knowledge of its contents. In addition, following recent case-law of the CJEU, it also has the effect of prolonging the duration of the liability of entities in damages cases.

e. Other considerations: informal guidance

We celebrate the recent adoption of the new Commission Notice on informal guidance[2] as the previous Notice has not had any practical value since it was adopted in 2004.

While issuing a guidance letter should remain exceptional, we hope that the new Notice will have a greater practical impact, especially in those situations where companies face genuine uncertainty in the light of novel economic developments. Currently, the lack of predictability and legal certainty derived from the inevitable reduction of precedent as a result of self-assessment is a clear concern for private operators but it also leaves the Commission somewhat in the dark vis-à-vis certain types of agreements (e.g. in the recent evaluation of the R&D Regulation, the notorious lack of recent precedents was advanced by many different stakeholders and it somehow complicated the assessment as to the effectiveness and utility of the BER itself).

We therefore welcome the new Notice on Informal Guidance that sets out less stringent criteria as envisaged in Recital 38 of Regulation 1/2003.

B. INVESTIGATIVE POWERS

a. Requests for information

Distinction between a simple request for information ("RFI") and supply of information by decision (Article 18 of Regulation 1/2003). The distinction between a simple information request and a request to supply information by decision should be clearer, as both of them may ultimately lead to the recipient being obliged to provide the information within a time limit and involve penalties.

When undertakings do not reply to an initial request or reply incompletely or incorrectly, the Commission may, on expiry of the time limit, send an administrative letter containing a formal reminder before requesting the information by binding decision. While it cannot impose a penalty for a total or partial failure to reply (i.e., an incomplete answer) to a simple request for information, it has no alternative but to request the information not supplied, wholly or in part, by means of a binding decision. In the absence of an obligation to reply to a simple request for information, it can be argued that only incorrect or misleading replies may lead to an increase in such fines.

Swift transition from a "paper-based world" to a "digital world". The digital world increasingly poses challenges both to companies and the investigative powers

[2] Commission Notice on informal guidance 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), adopted on 3 October 2022 (2022/C 381/07).

of the Commission, while it also offers opportunities to base the EC's decision on a reliable factual basis.[3]

With regard to the former, the increased use of collaboration platforms and cloud-based tools makes it more difficult for companies to keep, preserve, process, and review data. It has become increasingly important to monitor communications and data with external parties given the greater levels of collaboration. Given the challenges companies are facing with managing emerging data sources, some sort of data and information governance is crucial when it comes to antitrust investigation readiness and awareness. Companies' legal and compliance teams need to develop an understanding of the systems used to communicate and collaborate, as well as the data collection and compliance functions enabled within those systems.

Against this background, it is clear that an increasing number of data sources, such as internal messaging applications but also social media, make it harder to respond comprehensively to RFIs from competition authorities, such as the Commission. This is also so because companies may find it harder to reply to RFIs when their employees increasingly work from home.[4] Tools such as Zoom, Microsoft Teams, Skype, WhatsApp etc. are widely used, with employees in nearly every business or industry often relying on these types of services to conduct their day-to-day business. This trend has made it more difficult to identify all relevant sources of data when responding to RFIs. With competition authorities showing increased awareness of how communication and collaboration systems function within the organization, this lack of preparedness is likely to introduce major challenges for businesses as companies struggle to comply with more specific and detailed requests.

From the Commission's perspective, its RFIs are increasingly based on search terms whereby companies under investigation are required to submit all documents from identified executives/employees that respond to stipulated keyword search requirements, regardless of whether the documents are relevant or responsive to the Commission's investigation. The scope of document requests is potentially wide-ranging, depending on how a party conducts its business, for example by email or by any other communication tools mentioned above and the number of individuals involved in commercial decision-making. In practice, RFIs are likely to relate to specific categories of communications and internal analyses. The problem is that these wide-ranging document requests could be more far-reaching than a traditional 'physical' process, since the usual safeguards that apply to on-site inspections, for example to ensure that certain documents (such as personal information or documents not relevant to the subject matter of the investigation) are excluded, will not necessarily be present or readily accepted by the Commission in relation to electronic searches. This gives rise to the question of converging standards/safeguards for inspections and RFIs, although a priori the requisites for both powers are different.

In recent years, several companies have brought the issue of RFIs delivered by the Commission before the EU courts on the basis that the requested information was not necessary. While it goes without saying that the Commission must respect the

[3] OECD, INVESTIGATIVE POWERS IN PRACTICE - Breakout session 2. Requests for Information: Limits and Effectiveness - Contribution from the European Commission, 30 November 2018, para. 44 (https://one.oecd.org/document/DAF/COMP/GF/WD(2018)74/en/pdf).

[4] GCR Survey Report, Investigations, Data and Compliance – How The Pandemic Impacted Antitrust: A Report on Investigations, Data and Compliance, July 2021.

principle of proportionality in the use of RFI, as in all its administrative actions, it still enjoys considerable discretion in determining what information is 'necessary' for its inquiries. This discretion is not, however, unlimited, and is in any event subject to judicial review by the EU Courts. In *Cementos Portland Valderrivas*,[5] the GC accepted the applicant's argument that even though the Commission is not obliged to disclose to companies the preliminary evidence at its disposal, it must be in possession of information constituting reasonable grounds for suspecting an infringement of the competition rules. In this case, the Court considered that the applicant had put forward factors capable of casting doubt on the reasonableness of the grounds on which the Commission relied in order to issue the RFI and requested the Commission to produce a summary of its file that could be examined in camera by the legal representatives of the applicant.[6] In view of the Commission's broad discretion to decide whether specific items of information are necessary for the investigation, it is not easy to show that the request is disproportionate, even in cases where the undertaking had to provide a broad range of information or invest significant resources in that regard. However, this does not mean that the Commission may embark on a 'fishing expedition' and that the EU Courts would not be prepared to hold, in an appropriate case, that the Commission has exceeded its powers.

Against this background, we propose the following:

- DG COMP has indicated that it is generally willing to discuss with the addressees the scope and the format of the request for information. This would be particularly useful in cases of requests concerning quantitative data.

  By way of a policy decision, we would welcome any additional measure that will help the Commission to consider carefully the appropriate scope and nature of a document request in light of the circumstances of the case. Accordingly, in order to ensure that such requests are proportionate, the Commission should, where practicable and appropriate, share document requests in draft form with parties before issuing such requests. This is particularly likely to be appropriate where the RFI is complex or extensive (and therefore responding may impose a material burden on the parties). Sending document requests in draft can be helpful in prompting parties to identify whether any suggested questions (or other parameters of the request, such as the targeted custodians or the time period) are likely to be irrelevant. It can also be helpful in assessing the likely volume of responsive documents, as the Commission may consider whether it would be appropriate to narrow the scope of a document request if the volume of responsive documents is likely to be disproportionate.

  The same should apply to the format in which the information must be delivered. If companies can allege grounds that certain information is too difficult to deliver in a certain format, the Commission should accommodate these concerns.

[5] Case T-296/11, *Cementos Portland Valderrivas v Commission*, ECLI:EU:T:2014:121, para. 40. See also AG Wahl in Case C-247/11, *HeidelbergCement v Commission*, ECLI:EU:T:2019:232, paras. 70–93 also explained, citing the GC's Judgment in *Cementos Portland Valderrivas*, that the criterion of 'necessity' of 'the information requested is to be assessed in the light of the indicia at the Commission's disposal', and that 'failing any concrete indicia constituting reasonable grounds for suspicion, the adoption of [a request for information] may be considered to be an arbitrary measure of investigation,

[6] Ibid., paras 42 and 23–26

- Given the wide-ranging search terms and likelihood that they would capture many irrelevant documents, the EU Courts held in *Facebook* that without a verification process and specific guarantees to safeguard the parties' rights[7], there was a prima facie case that Article 18(3) of Regulation 1/2003 might have been infringed. Where there are extensive RFIs, which have not been discussed previously with the Commission, companies should be allowed to put forward factors capable of casting doubt on the reasonableness of the grounds relied on by the Commission in making the RFI. The Commission should then produce a summary of its file that could be examined in *camera* at least by the legal representatives of the company.

- In some instances, the RFI operates like a (remote) inspection, since the affected party must produce a large number of documents collected on its servers on the basis of search terms, the relevance of which will only be assessed by the Commission at a later stage (see, for example, the GC rulings in *Facebook*, para. 47). The question is therefore whether a comprehensive RFI, that inevitably captures information that is not relevant to the investigation, would violate the principles of necessity and proportionality if it did not provide for a mechanism for the second step, sorting by relevance. In both cases – the dawn raid and the comprehensive RFI – the Commission first compiles an overview of the existing data, before identifying in these documents those necessary for its investigation and adding them on file. Accordingly, it is not unreasonable to consider that, in the light of the format and scope of the RFI, a level of protection similar to that guaranteed by Article 20 of Regulation 1/2003 should apply (see also GC rulings in *Facebook* para. 48). Companies must be able to be reassured themselves that the Commission only takes relevant documents on file. Thus, safeguard mechanisms similar to those used for dawn raids should then apply. The synchronization of dawn raids and complex RFI processes would be appropriate, and we would welcome it if the Commission were to adjust its practice accordingly. This could mean that para. 14 of the guidance notice on Commission inspections under Article 20(4) of Regulation 1/2003 should be applied to the relevance test for RFIs. The virtual data room procedure for the review of personal documents, which is aimed at ensuring the strong legal protection established in *Facebook*, could serve as a template for the Commission's approach when it issues RFIs in the future.

- The cloud-based storage of the information by companies may require that the Commission powers be adapted to the need to access the relevant data. For example, the use of freezing orders may help the cloud to be accessed without interference during a certain time period. At the same time, given the increasing importance of cloud-based information coupled with the declining volume of physical evidence gathered, there are opportunities to use the powers of the Commission in a way that is less intrusive for businesses and avoid disruption which on-site inspections often involve, for example through the use of (remote) inspections.

[7] T-451/20 E *Facebook Ireland v Commission*, ECLI:EU:T:2020:515 para 53 and T-452/20 *Facebook Ireland v Commission*, ECLI:EU:T:2020:516 para 53.

We welcome the flexible and efficient use of the Commission's powers of investigations, but this should not come at the cost of a loss of procedural guarantees for the parties involved.

b. Power to take statements

More detailed codification of power to take statements (Article 19 of Regulation 1/2003). Article 19 of Regulation 1/2003 empowers the Commission to interview third parties in the context of an investigation and that it must record those interviews in a form of its choosing. That choice could be given clearer parameters as a result of the recent case law in *Intel*[8] and *Qualcomm*[9].

The Commission's own Manual of Procedures states that the procedure for taking statements pursuant to Article 19 of Regulation 1/2003 and Article 3 of the Implementing Regulation 773/2004 applies only when it is expressly agreed between the interviewee and DG COMP that the conversation will be recorded as a formal interview under Article 19. The manual requires interviewers to inform the interviewee of the possibility of recording the interview and the intention to do so in the case in question. It also states that the Commission is entitled to record the meetings but does not once mention any obligation on the part of the Commission to do so.

In its ruling in *Intel (*2017), the CJEU declared that Article 19 empowers the Commission to conduct interviews during investigations. From a due process perspective, there is no reason to distinguish between formal and informal meetings. The rule is intended to apply to any interview conducted for the purpose of collecting information relating to the subject matter of an investigation. The CJEU ruled that there is nothing in the wording of that provision or in the objective it pursues to suggest that the legislator intended to exclude certain interviews from its scope. Moreover, it considered in *Qualcomm* that the Commission was required to record, "*in a form of its choosing, any interview that it conducts for the purpose of collecting information relating to the subject matter of an investigation*." For that purpose, 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. Accordingly, the recording of meetings is thus no longer optional, and failure to take notes constitutes a procedural error.

The obligation to record the meeting in an accessible format should be made clear in a newly drafted Article 19 and/or its Implementing Regulation.

c. Powers of inspection and inspection of other premises

On-site inspections: The recent *Nexans* and *Prysmian* judgments confirmed the legality of the Commission's practice of copy imaging hard drives and examining them in Brussels, provided a reasonability assessment is made and time and capacity constraints require such further examination. The finding is perfectly understandable given the vast and ever-increasing amount of electronic data that must be examined during dawn raids. However, the Court made it clear that recourse to examination at

[8] Case C 413/14 P *Intel v Commission*, ECLI:EU:C:2017:632, paras. 82 et seq.

[9] Case T 235/18 *Qualcomm Inc. v Commission* ECLI:EU:T:2022:358, paras. 171 et seq.

the Commission's premises should not be automatic. A revision of the Regulation may clarify the factors for such reasonability assessment (e.g. only in cases where the on-site inspection lasted more than a given number of days and the amount of documents to be reviewed exceeded a given parameter), thus reducing the Commission's discretionary powers, and include guarantees for respecting rights of defence and the privacy of the undertaking concerned (e.g. the sealed envelope procedure, with no examination unless the companies' representatives are present). The circumstances under which the Commission may decide on an extension of the duration of an on-site inspection also deserve further clarification.

Finally, we would very much welcome that the Commission's decisions on whether documents fall within or beyond the scope of the investigation could be reviewed in a similar manner to how decisions on Legal Professional Privilege are.

Judicial mandates: Articles 20(7) and 21(3) of the Regulation differ on the need for a judicial mandate depending on the premises being inspected. While acknowledging the direct enforceability of Commission decisions authorizing a dawn raid and also national differences on the need for judicial mandates for conducting antitrust inspections, a different regulatory regime depending on the type of premises would seem unjustified under Spanish constitutional law. A general/homogeneous approach regardless of the type of premises and depending only on Member States' procedural/constitutional requirements, to be confirmed with NCAs, would seem preferable.

Conflict between privacy rights and information requests/dawn raids: Documents and information requested or intercepted during a dawn raid by the European Commission or NCAs may contain sensitive personal information (e.g. related to employees, customers, etc.). Disclosure of such sensitive information to the authority may be a breach of the GDPR. It may be advisable to introduce a procedure to balance the risk of accessing sensitive personal data and the Commission's interest in enforcing EU competition law.

In particular, in *Casino*,[10] the GC considered that the company may rely on the protection of its employees as a reason for challenging the Commission's conduct and Akzo offers a possible solution to this issue: the sealed envelope, which could potentially be extended to "sealed" data rooms where documents are transferred while a decision on whether they can be seized is taken.

This is even more relevant as company records and operations have gone digital, so inspectors are using powerful software tools to sift through practically limitless reams of material. But despite relying on keyword searches to sift out unneeded documents, many containing personal data will still be caught in initial searches, particularly taking into consideration mobile phones or computers being used for both private and professional communications; let alone remote working – and an expected increase of employee's home raids – which has blurred the lines between what is material and what is not work-related.

We acknowledge the distinction between documents containing confidential legal advice (as per the *Akzo* solution), in relation to which merely glancing at it could

[10] Case T-249/17 *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission*, ECLI:EU:T:2020:458 ; Case T-254/17 *Intermarché Casino Achats v Commission*, ECLI:EU:T:2020:459 and Case T-255/17 *Les Mousquetaires and ITM Entreprises v Commission*, ECLI:EU:T:2020:460.

undermine a company's defence, and personal data, which we appreciate might justify a more flexible approach.

The adoption of a process similar to that laid down by the GC in the context of the examination of Facebook's documents would be welcomed, i.e. creating a data room where the smallest possible number of legal team members from each side (i.e. the Commission and the undertaking in question) could haggle over the documents in a confidential setting. Special attention should be put into ensuring that these processes are not disproportionally time-consuming, for the undertaking and the legal teams involved.

In sum, we welcome the Commission examining whether there is a right for companies being inspected to challenge officials seeking to seize documents containing personal data, the description of the process to be carried out (should this issue arise) as well as confirmation of what specific data is protected.

Protection of lawyer-client communication (Legal Professional Privilege – LPP) rules

In 2010, the CJEU essentially reinstated the same position adopted by the Court 30 years earlier in *AM&S* regarding the LPP, denying confidentiality protection to legal communications exchanged between in-house counsels and their clients.

This position was reinstated on the basis that "*no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union*"[11] (evolution of national legal systems) and that development of the law of the EU, the rights of the defense and the principle of legal certainty were at that time unable to justify a change in the case-law

However, significant developments have occurred in the last decade that would justify revising the position about the lack of protection of legal communications by qualified in-house lawyers when reviewing Regulation 1/2003:

- First, the confidentiality of communications between in-house lawyers and their clients is increasingly protected in EEA Member States either by means of legislation or court decisions, to the point that there is now a clear trend and most EEA Member States recognize LPP for qualified inhouse lawyers.
- Second, EU law has also evolved as follows:
  - (i) The protection of the confidentiality of communications between lawyer and client is no longer considered to be based only on the client's right of defence, but also on the fundamental right to the privacy of communications and the freedom to conduct a business.
  - (ii) Secondary legislation is adopted that recognizes professional independence can exist and their communications may be subject to confidentiality protection even where the professional in question is bound by an employment relationship. This is particularly the case of the Data Protection Officer under the EU General Data Protection Regulation nº 2016/679 (GDPR; see recital 97 and Articles 37.6, 38.3 and 38.5).

[11] Case C-550/07 P, AKZO Nobel v. Commission, ECLI:EU:C:2010:512, para. 72.

(iii) The CJEU's case law has moved towards a new concept of "independence". This does not mean the absence of any connections whatsoever between lawyer and client, but rather the absence of those connections that have a manifestly detrimental effect on the lawyer's capacity to carry out his or her duties.

- Third, the profession and the role of in-house lawyers have evolved significantly to adjust to changes in legal and regulatory frameworks that have become more complex and international. In-house legal counsels are now much more sophisticated with reporting structures that enable them to safeguard their independence and deal with conflicts of interest, with in-house lawyers generally having direct reporting lines within the legal function, thereby reducing dependency on internal clients, up to the General Counsel who in the majority of cases reports directly to the highest levels within the company (CEO or Board of Directors).

If one of the goals is to codify the existing case law of the CJEU about LPP, the Regulation should make a distinction between DG COMP proceedings and NCA proceedings, which, according to para. 102 of *AKZO*, are subject to different regimes / governed by national law.

Finally, communications between lawyer and client increasingly take place outside "conventional" or "traditional" communication channels. However, it is often impossible to flag this kind of information as potentially confidential. Considering this, some members of the Group consider that the Regulation should establish further guidance as to how legal communications that take place through "unconventional" channels, such as instant messaging platforms, should be granted LLP.

C. PROCEDURAL RIGHTS OF PARTIES AND THIRD PARTIES, HANDLING OF COMPLAINTS

a. Procedural rights

The Commission and the CJEU have defined the procedural rights and obligations in the enforcement procedure under Regulations 1/2003 and 773/2004 by looking at the common traditions of Member States and applying a "lowest common denominator" principle (e.g., legal privilege). However, we consider that a better approach would be for the EU to look for inspiration from the most advanced national systems.

We are convinced that a clearer and more balanced enforcement procedural Regulation would increase legal certainty. In the medium and long run, this would reinforce the effectiveness of the application of Articles 101 and 102 TFEU.

b. Current procedural framework

Enforcement procedure. Given the impact of the Commission's decisions applying Articles 101 and 102 TFEU which can lead to the imposing of fines having a criminal nature, the enforcement procedure should be described in a more complete and detailed manner, to ensure legal certainty for all the participants in the proceedings.

Current system of case allocation. The criteria for case allocation among competition authorities is not always clear and cannot be challenged by the undertakings concerned. In an interconnected world where national boundaries are increasingly blurred, this can result in the diverging application of EU competition

law by NCAs (e.g., parity clauses in platform contracts) or in the artificial allocation of cases (e.g., the "gerrymandering" of market allocations in the Amazon investigation). It is rightly emphasized that Article 11(6) seeks to ensure the "best possible" enforcement and to protect companies from parallel enforcement proceedings, which should not come at the expense of undertakings. There is a real concern that if the Commission were entitled to freely tailor the geographic scope of its proceedings to the benefit of national authorities' ongoing investigations, this could cause a proliferation of parallel actions against the same companies and an inconsistent application of antitrust rules across the EU.

Clarifying and reinforcing the rules on case allocation would strengthen the procedural rights of complainants and of alleged infringers by ensuring that cases are allocated from the outset to the best-placed authority. The rules on case allocation should be codified as part of the procedural Regulation and not only in a Notice, as is the case at present. Also, the parties should at least be given the opportunity to discuss their views as regards the best-placed authority to deal with a particular case and, eventually, the decision should be subject to judicial review.

Also avoiding undue delay in case allocation would be advisable. We have seen cases where the Commission has taken a significant amount of time (more than two years!) to decide it would not retain a case, referring it back to the NCA, which in turn have decided differently - some taken the case, others considering there was not a sufficient interest in pursuing it-.

Finally, unlike the situation at present, case allocation should not have an impact on the potential level of fines that can be imposed. The total level of the fine should not depend on whether a case is handled by the Commission or by one or more NCAs.

c. Rights of defence

Cooperation between the Commission and the competition authorities of the Member States (Article 11.4). In connection with Article 11.4, parties in the national proceedings should have access to the feedback provided by the Commission, possibly subject to some limitations, but at least to the extent necessary to facilitate defence rights. Moreover, feedback should be provided in writing. (Current practice by the Commission of providing oral feedback, as a result of which there is no record at all of it, is not compatible with defence rights).

Access to the Commissions' file (Article 27.2). In terms of efficiency, access to the file could be organized more efficiently. For example, only the information relating to the Statement of Objections ("SO") (both inculpatory and exculpatory) could be redacted, with the remaining information being subject to a confidentiality ring. Accordingly, in order to avoid the lengthy preparation of confidential versions, as a policy decision the Commission could make broader use of confidentiality ring arrangements whereby documents in its file are made accessible to an addressee of the SO in a restricted manner, i.e. by limiting the number and/or category of persons having access and the use of the information being accessed to the extent strictly necessary to enable the exercise of the rights of defence. Such a ring allows for the review of confidential versions of the documents by the external counsel of the addressee of the SO.

In addition, we believe that access to internal documents of the Commission or the NCAs should be allowed as long as these documents are related to the investigation of a potential infringement by the parties concerned and contain no confidential

information. Otherwise, the parties' defence rights might be harmed. For instance, this can be particularly important regarding fines imposed by the Commission or the NCAs, where the authorities have a certain degree of discretion. Thus, the fined parties would need to access internal documents of the authorities in order to be able to verify whether the fine has been properly calculated and is proportionate or, on the contrary, whether it is disproportionate, which therefore means that the different undertakings concerned have not been treated equally.

d. Rights of parties and third parties to investigations

Third party intervention. The notion of "sufficient interest" contained in Article 27(3) of Regulation 1/2003 [and also in Article 5(2) and (3) of Decision 695/2011 on the mandate of the Hearing Officer] has been interpreted very restrictively by the Commission. In practice, it has been equated with the notion of legitimate/individual interest as a condition for legal standing to sue in the EU Courts. No judicial precedent to our knowledge requires such a restrictive interpretation. Although a need for efficiency in antitrust proceedings may suggest the need to limit the number of third parties who may intervene, one could envisage a more participative procedure where the views of third parties affected by certain behaviour could present their views even if they are not given full access to the file or they are not granted the right to reply to the SO.

In the example of the digital world, several operators are present in many intertwined businesses and many different products may be sold in the same "relevant market". However, meeting the threshold of "sufficient interest" is extremely complicated. Excessively limiting intervention in antitrust proceedings leaves antitrust enforcers with a very limited view of so-called digital ecosystems.

D. COMMISSION DECISIONS (Articles 7 to 10 Regulation 1/2003)

a. General comments

Within the decentralized framework provided for by Regulation 1/2003, under Article 105 (1) TFEU the Commission still holds a central role and duty "*to ensure the application of the principles laid down in Articles 101 and 102*".

To fulfil this central role effectively, Regulation 1/2003 empowers the Commission to adopt the decisions envisaged in Articles 7 to 10 (together with the investigation powers provided by Articles 18 to 21) as well as exemption Regulations and to provide informal guidance to individual undertakings (recital 38 of Regulation 1/2003, recently reactivated with the adoption of a revised Notice, see *supra* Section A.e). Furthermore, NCAs' decisions and national courts' rulings applying Articles 101 and 102 do not bind the Commission and even the latter can adopt decisions conflicting with any of those.

By looking at the production of Commission's decisions under Articles 7 to 10 in the last twenty years in light of the powers conferred by these provisions, it is fair to ask whether Commission's tools should be reinforced or better adapted to deal, in particular, with conduct that might have not been considered at the time Regulation 1/2003 was adopted as "most serious infringements" (recital 3). In this regard, it is

noteworthy the underuse of available tools (notably, interim measures and inapplicability decisions) that should lead to consider whether to revisit them or replace them.

b. Article 7: finding and termination of infringements including remedies.

Article 7 empowers the Commission: to find an infringement (ongoing or, provided there is a legitimate interest, a past infringement), to order the undertaking/s concerned to terminate it and to impose behavioural or structural remedies to end the infringement.

To the effects of this consultation, the AEDC does not take a position on whether the Commission's activity under Article 7 in these twenty years shows that it has actually focussed on the "most serious infringements" as intended in Regulation 1/2003. Assuming it has, it is the power to impose remedies (behavioural or structural) under Article 7 what would deserve more attention in terms of reviewing the procedural framework.

Following recital 12, remedies should serve "to bring the infringement effectively to an end, having regard the principle of proportionality".

Beyond the interpretation that can be given – based on existing case-law – both to "effectively to and end" and to the reach of the Commission's powers to design and enforce remedies under Article 7, recent decisions (mainly, applying Article 102) have raised discussions as to the "effectiveness" of remedies imposed, particularly from third affected parties.

Based on the experience gained so far, it might be desirable to: (i) provide for wider consultation, allowing input from market participants (unlike under Article 9 decisions -cf. Article 27(4) - remedies under Article 7 are not subject to any formal consultation procedure); and to (ii) clarify the powers of the Commission to amend or adjust remedies within a clearer procedural framework that includes input from market participants.

As regards the treatment of complaints under Article 7(2), we refer to Section A.c and Section C.d above.

c. Article 8: interim measures

The anticipation of remedies under Article 8 has been an underused power within the Commission's toolkit. However, there might be good reasons why it has been so (in particular, considering the length of infringement proceedings). Furthermore, in view of new *ex ante* tools (e.g., DMA), any proposal to make easier for the Commission to adopt interim measures should be carefully considered, including envisaging – even with the intervention *ex ante* of the General Court, in particular when dealing with novel interpretations of Arts. 101 or 103– the possibility to provide for guarantees for eventual damages in cases the decision is subsequently ruled as unjustified.

d. Article 9: commitment decisions

It has been noted that remedies under Article 9 have outnumbered non-cartel Article 7 decisions, shielding the Commission from judicial review. This, until recently.

It is clear, however, that settlements not only rationalise limited enforcement resources but accelerate the outcomes that should be sought by remedies under Article 7 decisions to the benefit of competition.

On the other hand, by avoiding a declaration on the legality or illegality of the relevant conduct, there is room to question whether Article 7 procedure (infringement decisions pursuant to para. 37 of the Commission's Fining Guidelines) should be made a preferable tool where precedent is absent.

e. Article 10: inapplicability decisions

Inapplicability decisions are non-existent. Since Article 10 decisions are meant to be adopted in "exceptional cases" (recital 14), it merits an explanation on why the Commission has not found in twenty years any exceptional case calling for a clarification of the law and a consistent application throughout the EU.

We understand that Article 10 decisions were conceived as a competition instrument neither intended to promote other public interest considerations nor to alleviate the elimination of a notification system. However, it was not conceived as an instrument just to promote procompetitive conduct. It would appear that this has been the Commission's understanding of this power, not having found so far any conduct deserving promotion. The Commission would have not considered this power as a means to intervene ex post to address inconsistencies in the application of Articles 101 and 102 by NCAs when it has not been able to solve within the framework of the ECN.

E. FINES AND LIMITATION PERIODS

a. Fines under Regulation 1/2003

Significant fines are (and probably must be) a major cornerstone of a sound competition policy. It is important that the European Commission (and the National Competition Authorities) are allowed to impose fines that are not only proportionate in relation to the investigated infringements, but also that convey a real deterrent effect on the market operators: non-compliance with competition law should never be the cheaper option for companies.

In our opinion, substantive fines must be imposed within an overall limit that both deter companies from an anticompetitive behaviour and contribute to its knowledge by the general public (as high fines normally find a more significant place in the news coverage). Procedural fines must also be sufficient to ensure that the investigation powers of the Commission and the national competition authorities are protected.

This being said, we have the following comments on the current regime:

(i) **Consistency**: Considering the structure of application of EU competition law and its possible application to a same case by either the European Commission or the Nacional Competition Authoritues and/or courts. The decision on which

authority is responsible for a case should be based on objective criteria, and companies should not have to face a higher or lower fine in relation to the final jurisdiction. The difference in the level of fines that could be imposed at EU or national level for the same infringement should be based on a common and consistent approach, so the fine would not ultimately depend on which authority assumes competence on one case.

Naturally, it is expected that the European Commission's fines should be higher, as this authority would normally deal with more serious infringements affecting a different number of countries. However, this is not always the case. A common approach or fining guidelines when national bodies apply competition law could be an interesting element to ensure consistency in the application of the law.

(ii) **Proportionality**: After more than fifty years of competition law, it would be advisable to conduct a serious assessment on the 10% maximum fine. This limit has remained unchanged (and unchallenged) since 1962, when the structure of the economic agents was, in general, simpler. This maximum is not proportional to the infringement itself, but to the supposed ability to pay of the infringer. This could lead to a lack of proportionality, as could result into different fines for companies with the same level of involvement from an infringement. The fact that a competition fine could affect differently to companies that have developed the same behaviour and reaped similar benefits could also unduly affect competition in the market.

(iii) **Value of compliance programs**: EU law should reward infringing companies for setting up sound and serious antitrust compliance programs, even to the extent of acknowledging a mitigating circumstance to reduce the fine when the implementation of the compliance program is posterior to the start of the investigation. The standard for this mitigating circumstance would be for the Commission to decide and should have to be adequate to each company. However, the fact that companies are allowed, under certain circumstances to claim a limited reduction of the fine in change for an impulse to the creation of a competition culture is a relevant gain.

(iv) **Possible unfair outcomes**: Finally, the current model raises the possibility of some potentially unfair outcomes

a. Time of the proceedings: Under the current regime, fines are set taking into account the turnover of the infringing companies in the financial year previous to the decision. Taking into account the length of the proceedings before the European Commission, the fine being imposed several years after the investigated facts, when the market circumstances might have significantly evolved. Thus, an infringing company may have greatly improved its market position on competitive merits since the infringement and receive a higher fine than that that could have been imposed at the moment (and even higher than other companies with a more deep involvement on the facts).

   Presently, the Commission sometimes apply a mitigating circumstance for undue delays in the proceeding. However, we propose something different: the decision should include an express assessment on the impact of the fine on the market, and the European Commission should have the ability to adapt the fine to avoid unfair outcomes. We understand that

these assessment would only be applicable on a limited number of cases, but it is important to have the procedural tools to do so.

b. Shareholders: Finally, there is also an issue in relation to the impact of the fine on the shareholders of large companies. When the management of a listed company incurs on anticompetitive practices, the impact of the fine is ultimately felt by shareholders that most of the time not only have no responsibility on the facts, but also a complete lack of control on the management. This is particularly relevant on cases where the management responsible for the infringement no longer work for the company.

b. Limitation periods

The limitation periods set in the Regulation 1/2003 seem proportionate to the seriousness of the infringement. However, in our view, there should be a higher degree of consistency between EU and National Competition Authorities. As already said in relation to fines, the fact that the same case could be assessed either by the Commission or by one or different national competition authorities would request the same limitation periods, so as not to make the investigation of a case dependant on a more stringent or relaxed periods. In Spain, for example, the limitation period of a 101 infringement would be five years, against the four years under Regulation 1/2003. This entails that the success of a complaint or an investigation may depend on which authority decides to take on the case, rather than on the infringement itself.

Since EU Law has already set forth common rules to deal with some of these issues (e.g. limitation period for damages actions or the interruption of the limitation period in the whole EU for an investigation of a single authority) it would be helpful to reach a common ground as to the limitations periods. In our view, this could help authorities to focus on the merits of the case rather than on which jurisdiction has a longer limitation period.

F. COOPERATION BETWEEN THE COMMISSION AND NCAS AND COURTS

a. Cooperation between the Commission and NCAs

As mentioned above, we believe that in order to guarantee the uniform application of Articles 101 and 102 TFEU across the EU, it is necessary to reinforce the mechanisms foreseen in Article 11.

NCAs consultations to the Commission (Article 11.4): we understand that Article 11.4 consultations are rarely replied by the Commission in writing, and that it is common for consultations and exchanges between the NCAs and the Commission to take place orally and in an informal manner. It is also noted that the EC is not using the information on these consultations to intervene under Article 11.6. Therefore, in practice Article 11.4 consultations merely lead to an automatic one-month suspension of the proceedings at national level, which is not justified by the submission of observations by the Commission. It is also noted that there are cases in which divergent opinions have been issued by NCAs across the EU.[12]

[12] See cases related to the application of Article 102 TFEU to mergers and, as mentioned above, parity clauses in platform contracts.

Given these circumstances, proposals are made on the following aspects:

- Compulsory nature of the consultation: it is questioned whether it is reasonable to maintain the compulsory nature of Article 11.4. Some members of the working group propose that these consultations are only made when dealing with novel cases. For instance, it is considered that after so many years of competition law enforcement by NCAs, guidance on practices such as classic cartel cases is not necessary anymore. These members understand that reducing the number of consultations would reduce the workload of the Commission and encourage it to take the time to review novel and relevant cases and provide a written reply.
- Time of the consultation: Article 11.4 establishes that the consultation shall be made at the latest 30 days before the adoption by the NCA of the relevant decision. We understand that making the consultation at a time the proceedings are almost finalised may discourage or even make it completely impossible for the Commission to intervene under Article 11.6. We propose that this consultation is made at an earlier stage, as soon as the decision-making body of the relevant NCA has been able to review the case. At the same time, making a consultation that is only required when adopting an infringement decision at a time in which the parties may still present observations could result under some circumstances in the NCA prejudging the case and thus in a violation of the parties defence's rights. Actually, it is noted that in cases where an oral hearing is held, the Spanish competition authority tends to make this consultation before the hearing.[13] We believe that, in order to respect the parties' defence rights, a second consultation should be foreseen in the Regulation if any change in the proposed course of action is made after the first consultation.
- Access to the information exchanged: the exchanges and discussions between the NCAs and the Commission are very opaque. It is understood that many communications take place during the meetings referred to in Regulation 1/2003 or under informal discussions, which are not disclosed. Consultations made under Article 11.4 and the replies thereto are also kept confidential vis-à-vis the parties of the proceedings. As mentioned above, we believe that access to the feedback provided by the Commission is necessary to guarantee the parties' defence rights. The Commission has insisted over the years in the necessity to keep these exchanges confidential to construct a system where they can have fruitful and constructive discussions with the NCAs. However, even if verbal discussions in which the NCAs and the Commission exchange preliminary views are kept confidential on that basis, it is essential that written replies to Article 11.4 consultations are prepared and are accessible to the parties of the proceedings. We do not consider that sharing the written reply to the referred consultation can have such a negative impact in the preliminary discussions with NCAs. It is normal practice in many areas to disclose non-binding reports that are requested during the course of a proceeding. We believe that verbal guidance should be limited or, at least, be followed by a written reply accessible to the parties. It should also be noted that in a time in which public administrations are taking steps towards increased transparency, it is not reasonable that parties of

[13] See cases S/0644/18 *Radiofármacos*, S/DC0584/16 *Agencias de medios* and S/DC/0565/15 *Licitaciones informáticas*.

a proceeding do not even know if the Commission has provided guidance on their case.

Commission's intervention in NCAs proceedings (Article 11.6): the Commission is not making use of this provision, even in cases where conflicting decisions are envisaged, or similar competition issues arise in several Member States, thus requiring the development of competition policy at EU level.[14] Considering the non-binding nature of the guidance provided under Article 11.4, the Commission should actually intervene under Article 11.6 in certain novel cases even if they are only analysed by a NCA, to the extent that it is expected that the same question arises in the future before other NCAs.

b. Cooperation between the Commission and national courts

EC interventions before national courts (Articles 15.1 and 15.3): it should be analysed whether the Commission is intervening in all the cases in which there is a risk to the coherent application of Articles 101 and 102 TFEU. In addition, the Commission's preference to make *amicus curiae* interventions before courts of last instance should be reconsidered in certain cases, in which a late intervention could lead to the issuance of a high number of judgments of appeal courts and first instance courts that jeopardise the uniform application of competition law (e.g., damages claims in countries with decentralised judicial systems).

Transmission of judgments to the EC (Article 15.2): the EC should make more efforts to enforce the application of Article 15.2 with the view to create a complete database of judgments of national courts, urging Member States to respect this obligation. An updated and completed database of judgments of national courts could help the Commission to monitor the enforcement of competition law by national courts and identify cases in which an *amicus curiae* intervention may prove necessary on appeal. Such a database could also be useful for national courts to identify diverging lines of case-law in other Member States showing the existence of reasonable doubt as to the correct interpretation of Articles 101 and 102 TFEU and requiring the referral of a preliminary ruling to the CJEU.

c. Coherence with other EU legislation and EU policies

Coherence with the EU Merger Regulation: Article 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings excludes the application of Regulation 1/2003 to mergers (regardless of whether they meet the thresholds to be notified to the EC). If the Court of Justice confirms in *Towercast* that a merger could constitute a violation of Article 102 TFEU in line with the traditional *Continental Can* case-law,[15] the cooperation mechanisms foreseen in Regulation 1/2003 would not be applicable and, therefore, that would jeopardise the uniform application of EU law in the few merger cases that are analysed by NCAs under Article 102 TFEU.

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[14] Commission Notice on cooperation within the Network of Competition Authorities, paragraph 54.

[15] C-449/21 *Towercast*; C-6/72; *Continental Can v Commission*, ECLI:EU:C:1973:22.