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Evaluating EU antitrust procedures: EC key findings and future directions

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The European Commission has published its findings on the evaluation of regulations 1/2003 and 773/2004 (Regulations), establishing the procedural framework of the application of Articles 101 and 102 TFEU. This publication is the final step of the evaluation process of the antitrust procedural framework launched by the EC in March 2022 to assess whether the Regulations remain fit for purpose after 20 years. During this process, the EC consulted stakeholders (see our submission here) and held a conference in June 2023, followed by an interactive stakeholder's workshop in October 2023 (which we attended). In this blog post, we discuss the EC's key findings, where we expected more, and next steps.

Key findings

The EC and most participants in the consultation process recognise the Regulations' success in achieving an "*effective, efficient, and uniform application of EU competition rules*". The Regulations replaced the former centralised enforcement system, where companies notified restrictive agreements to the EC for exemptions under Article 101(3) of the TFEU. They introduced direct applicability of antitrust rules, replacing the notification system with self-assessment, and established a decentralised system for parallel enforcement by the EC, NCAs and national courts.

However, 20 years after the Regulations' entry into force, the EC questions the effectiveness and efficiency of certain procedures, considering the economy's digitisation and globalisation, its increased complexity and the need for faster decisions. The new Competition Commissioner Teresa Ribera Rodríguez has been tasked by Ursula von der Leyen to "*strengthen and speed up the enforcement of competition rules*". The EC mentions several procedural inefficiencies:

- **The power to take statements** is too limited as the EC can only interview a "*person who consents to be interviewed*" and cannot impose penalties if the interviewee provides false or misleading information. This power, which is rarely used by the EC, is out of step with interviewing powers of NCAs and is particularly limiting at a time when the EC wishes to open more *ex officio* investigations.
- **More coordination within the ECN** is necessary, in particular "*to avoid unnecessary parallel investigations*". Following the hotel booking cases, an early warning system was introduced for cases that raise novel issues, resulting in 65 early warning notifications since 2016. Striking the right balance between sharing across the whole ECN network, which "*may undermine the outcome of an investigation*", and not sharing, which may create coordination issues later is a challenge.

- **Evidence gathering – Inspections** are too resource-intensive, with 15.6 full-time employees dedicated to inspections in 2023. Digitalisation gives the EC access to much more data, but this did not necessarily increase the EC's effectiveness "*due to the exponential increases in data volumes*". Digital inspections or data freezing orders, discussed during the workshop, could ensure data availability while reducing the burden on companies. **Requests for information** (RFIs) by decision are also inefficient, often taking 40 to 90 days for responses, sometimes longer when preceded by simple RFIs. The prolonged response time suggests that RFIs are not always compliant with the proportionality and necessity principle. The EC agrees that this tool "*could be used more efficiently*" and needs to be updated to accommodate the digital economy. Additionally, it may be beneficial to clarify the application of **data protection rules** to investigations, as these often cause delays. Again, data freezing orders might be the solution.
- **Interim measures** are based on an overly demanding substantive legal test, which requires the EC to show "*serious and irreparable damage to competition*". According to a recent independent report on the use of interim measures by NCAs, there are still some discrepancies amongst NCAs when the legal test is required locally. 15 NCAs have the same legal test as the test under Regulation 1/2003, but 12 NCAs have a less stringent substantive legal test (e.g., *prima facie* evidence of an infringement, irrespective of the harm, required in Austria).

Where we expected more

While the EC's objectives of faster decisions and higher efficiencies are very welcome, it is important that reforming the Regulations does not come at the expense of transparency, fundamental principles of the rule of law or rights of the defendant. On that basis, more emphasis should be placed on the following topics:

- The EC mentions that balancing and protecting both the right to be heard and the right to confidentiality is inefficient. Procedures **granting access to file** and **rejecting formal complaints** are too resource-intensive for the EC and undertakings. By way of example, more than 2 thousand case handler hours are needed to prepare access to file for a single case. **Protecting confidentiality**, especially of leniency documents and business secrets, is crucial to avoid business retaliation and ensure effective antitrust enforcement. Confidentiality rings appear to be a tool that reduces the EC's and companies' workloads, but the risk of leaks and the voluntary nature should be reduced by effective sanctions on undertakings and individuals. The EC's findings do not include concrete solutions in this respect.
- In-house lawyers have a key role in antitrust compliance. Strengthening the **protection of legal professional privilege** by extending legal privilege to in-house lawyers could enable more efficient cooperation between external and internal antitrust counsel in complex investigations and self-assessment exercises. Reforms in the Regulations in this regard could also facilitate further harmonisation between EU Member States.
- The system of parallel enforcement requires **significantly increased transparency** on contacts between members of the ECN. Reasons and timing for reallocation, coordination of RFIs, and exchanges within the ECN must be more visible, trackable, and – consequently – challengeable for companies, as communications within the ECN can have a significant impact on them. However, changes seem unlikely as the report mentions that "*not preserving the confidential nature of such*

ECN exchanges would seriously undermine the open, and thus particularly beneficial, discussions within the ECN."

Next steps

The EC intends to "*reflect on the evaluation and decide whether to launch a process for the revision of the Regulations*". Unlike the transformative introduction of the Regulations 20 years ago, the evaluation results do not suggest a paradigm shift, but some changes in the EC's tools may be expected, and this will be a key priority for Ribera once her appointment is official.