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Evaluation of Regulations 1/2003 and 773/2004

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Opinion

Evaluation of Regulations 1/2003 and 773/2004 - General questionnaire

Fields marked with * are mandatory.

Introduction

Regulation 1/2003 is the result of the most comprehensive reform of procedures for the enforcement of Articles 101 and 102 TFEU since 1962. Its main features are:

- The abolition of the practice of notifying business agreements to the Commission, enabling the Commission to focus its resources on serious violations of the antitrust rules.
- The empowerment of National Competition Authorities ('NCAs') and courts to apply Articles 101 and 102 TFEU in their entirety, so that there are multiple enforcers and therefore wider application of the EU antitrust rules.
- More level playing field for businesses operating cross-border as all competition enforcers, including the National Competition Authorities and national courts, are obliged to apply the EU antitrust rules to cases that affect trade between Member States.
- Close cooperation between the Commission and National Competition Authorities in the European Competition Network (the 'ECN').
- Enhanced enforcement tools for the Commission so that it is better equipped to detect and address breaches of the EU antitrust rules.

In the context of Regulation 1/2003, the Commission further adopted the Commission implementing Regulation 773/2004 (together with Regulation 1/2003, the "Regulations").

A number of significant changes have occurred in market dynamics over the past twenty years and many are potentially liable to impact the way competition rules are enforced. The digitisation of the global economy, for example, has highlighted a potentially increasing tension between the need for prompt and effective intervention and the complexity of antitrust proceedings.

In order to ensure that its antitrust enforcement tools remain fit for purpose, the Commission is launching an evaluation of the procedures for the application of Articles 101 and 102 TFEU, as established by the Regulations.

Purpose of the evaluation

The purpose of the evaluation is to provide a solid basis for the assessment of the performance of the antitrust procedural framework, also in light of changes that have occurred in market dynamics since the adoption of Regulation 1/2003, such as the digitisation of the global economy.

The evaluation of the Regulations has to be seen in the context of the broader review exercise launched in the area of EU competition law in the past years. It will take place roughly ten years after the publication on “Ten years of Antitrust enforcement under Regulation 1/2003” and will allow taking stock of the almost twenty years of experience with the application of the antitrust procedural framework.

More information on the evaluation can be found in the [Call for Evidence](#).

Structure of the public consultation and how to respond to it

As part of the evaluation, the Commission will seek the views of stakeholders on the effectiveness, efficiency, relevance, coherence and EU added value of Regulation 1/2003. To this end, both a short questionnaire and a detailed questionnaire are being published in parallel. The results of this consultation will serve as input for the evaluation. Views are welcome from all stakeholders.

The shorter questionnaire is more suitable for the general public. The detailed questionnaire instead is more suitable for stakeholders with specific expertise and experience in the application of Regulation 1 /2003 and of Articles 101 and 102 TFEU. All topics addressed in the shorter questionnaire are also covered in the detailed questionnaire, which contains additional and more technical questions. Each stakeholder should therefore choose to reply to either the short or the detailed questionnaire.

Both questionnaires are open for 14 weeks, and replies can be provided in all 24 official EU languages. Replies to either questionnaire will be equally considered.

You are now in the shorter questionnaire. If you want to switch to the detailed questionnaire, please click [here](#).

This shorter questionnaire contains high-level questions, grouped by the following evaluation criteria:

- Effectiveness: The Commission will evaluate the extent to which the Regulations have been effective in meeting their objective of effective and uniform application of Articles 101 and 102 TFEU;
- Efficiency: The Commission will evaluate whether its experience in the application of the Regulations has contributed in an efficient manner to the effective and uniform application of Articles 101 and 102 TFEU, in particular for (i) undertakings; (ii) NCAs and (iii) consumers and whether the outcomes associated with the Regulations have been positive;
- Relevance: The Commission will evaluate whether the objective of the Regulations, namely the effective and uniform application of Articles 101 and 102 TFEU, continue to be appropriate, taking into account developments since 2004, for instance the digitisation of the economy and other legislative instruments that have come into force (e.g. the ECN+ Directive);
- Coherence: The Commission will evaluate how well the different components set out in the Regulations operate together, but also whether the Regulations are consistent with other EU legislation, EU Courts’ case-law and other EU policies; and
- EU added value: The Commission will evaluate the extent to which the Regulations, that provide the Commission with important powers in the application of Articles 101 and 102 TFEU, but also empower NCAs to apply these Treaty provisions, have contributed to ensuring the effective and uniform application of these provisions in a manner that goes beyond what would have been achieved by Member States acting alone.

The collected information will provide part of the evidence base for determining whether it will be appropriate to revise Regulation 1/2003 and/or Regulation 773/2004.

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. Please note that your replies will also become public as a whole, see below under Section 'Privacy and Confidentiality.'

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

You are invited to provide your feedback through this online questionnaire. Please explain your responses and, as far as possible, illustrate them with concrete examples. We also invite you to upload any documents and/or data that you consider useful to accompany your replies at the end of this online questionnaire.

In order to ensure a fair and transparent consultation process, only responses received through this online questionnaire will be taken into account and included in the report summarising the responses.

If you encounter problems with completing this questionnaire or if you require assistance, please contact COMP-REG-1@ec.europa.eu.

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian

- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Bundesrechtsanwaltskammer

* Surname

Brüssel

* Email (this won't be published)

brak.bxl@brak.eu

* Organisation name

255 character(s) maximum

Bundesrechtsanwaltskammer

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

Please add your country of origin, or that of your organisation.

This list does not represent the official position of the European institutions with regard to the legal status or policy of the entities mentioned. It is a harmonisation of often divergent lists and practices.

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| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
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| <input type="radio"/> Austria | <input type="radio"/> Finland | <input type="radio"/> Mauritius | <input type="radio"/> Slovenia |

- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
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- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga

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- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
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- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Pitcairn Islands
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- Réunion
- Romania
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- Saint Barthélemy
- Saint Helena
- Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

- Denmark Liberia Saint Lucia

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

Public

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

I agree with the [personal data protection provisions](#)

Effectiveness

1. In your view, has Regulation 1/2003 achieved its objective of an effective and uniform application of Article 101 TFEU in the EU?

- Yes
 No
 Don't know

Please explain your answer

For an objective and uniform application, more case practice of the Commission would be required in particular in vertical and horizontal cases applying Art. 101 TFEU. The publication on guidelines is not sufficient in this regard because they are updated infrequently, are not binding on the national competition authorities (NCAs) or national courts, and do not allow the CJEU to review Commission practice and interpretation of the rules.

The wide use of discretion by the Commission to accept or not accept cases under the criterion "Union interest" tends to cause the Commission to focus on issues of political interest or headline topics of competition law enforcement. However, the Commission is an authority that has the fundamental task of enforcing the Treaty, including Art. 101 and 102 TFEU, which means that the Commission should re-emphasize to adjudicate justice and build its body of case law also beyond the headline cases, because this is what the undertakings and their legal advisors need.

2. In your view, has Regulation 1/2003 achieved its objective of an effective and uniform application of Article 102 TFEU in the EU?

- Yes
- No
- Don't know

Please explain your answer

3. In your view, has Regulation 773/2004 been effective in empowering the Commission to regulate certain aspects of proceedings for the application of Articles 101 and 102 TFEU (notably concerning the initiation of proceedings, the Commission's powers of investigation, the handling of complaints, the exercise of the right to be heard, access to the file, the limitations to the use of information obtained and time-limits)?

- Yes
- No
- Don't know

Please explain your answer

4. In your view, do the following investigative tools provided by Regulation 1/2003 provide for an effective means to detecting and investigating potential infringements of Articles 101 or 102 TFEU?

a. Investigations into sectors of the economy and into types of agreements (Article 17 of Regulation 1/2003)

- Yes
- No
- Don't know

Please explain your answer

b. Requests for information (Article 18 of Regulation 1/2003)

- Yes
- No
- Don't know

Please explain your answer

RFIs under Art. 18 have been used widely by the Commission and in a number of cases, including cases with changing members of the case teams, they have been used excessively and in a way that put unnecessary burdens on the undertakings by, e.g., asking questions that were already asked and answered earlier in the proceedings, by asking questions with short deadlines shortly before the holiday season etc.

c. Power to take statements (Article 19 of Regulation 1/2003)

- Yes
- No
- Don't know

Please explain your answer

This power should be applied more often by the Commission in practice as it provides first-hand information from market participants. In addition, Art. 19 falls short of the rights the ECN+ Directive requires to be granted to NCAs, because Art. 19 limits the rights to ask questions to persons who consent to being interrogated. How can the Commission, e.g., verify the reliability of a corporate statement under the leniency programme in a cartel investigation, e.g., if it does not have any rights to interrogate the persons who allegedly have contributed to the corporate statement?

d. Powers of inspection (Article 20 of Regulation 1/2003)

- Yes
- No
- Don't know

Please explain your answer

See Comment under 5. below.

e. Inspections of other premises (Article 21 of Regulation 1/2003)

- Yes
- No
- Don't know

Please explain your answer

5. In your view, are the provisions of Regulations 1/2003 and 773/2004 adequate to effectively protect the procedural rights of all participants in the Commission's proceedings, i.e. both parties to investigations and other interested parties?

- Yes
- No
- Don't know

Please explain your answer

The defense rights of undertakings subject to the Commission's measures should be strengthened. This is particularly relevant during inspections; undertakings must have an effective right not to incriminate themselves ("nemo tenetur" principle). In this context, the ECJ ruling in Orkem is not sufficiently considered in practice. For example, undertakings must also be able to prevent their employees which do not have the authority to represent them to respond to questions during inspections.

6. In your view, are the following powers granted to the Commission by Regulation 1/2003 adequate to ensure the effective application of Articles 101 and 102 TFEU?

a. To require undertakings and associations of undertakings to bring an infringement to an end

- Yes
- No
- Don't know

Please explain your answer

b. To impose behavioural or structural remedies on undertakings and associations of undertakings

- Yes

- No
- Don't know

Please explain your answer

c. To order interim measures

- Yes
- No
- Don't know

Please explain your answer

As recently discussed in the antitrust community, it is certainly not sufficient for the protection of effective competition if powers that are written into the regulation are rarely used in practice (i.e. in one case only, viz. Broadcom).

d. To make binding the commitments offered by undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment

- Yes
- No
- Don't know

Please explain your answer

e. To find that Article 101 and/or Article 102 TFEU are not applicable to a specific case

- Yes
- No
- Don't know

Please explain your answer

It is a signal of deep mistrust that the NCAs are not empowered to decide that Art. 101/102 TFEU is not infringed in a case before them. This situation also undermines legal certainty. The powers of the national courts in this regard should also be explained much clearer that it is the situation today.

f. To impose fines on undertakings for substantive breaches of Article 101 and 102

- Yes
- No
- Don't know

Please explain your answer

g. To impose fines on undertakings for breaches of antitrust procedural rules

- Yes
- No
- Don't know

Please explain your answer

Efficiency

7. In your view, has the system of parallel enforcement of Articles 101 and 102 TFEU by the European Commission and the National Competition Authorities introduced by Regulation 1/2003 led to more efficient enforcement across the EU, compared to the previous centralised system set up by Regulation No 17?

- Yes
- No
- Don't know

Please explain your answer

The Bundesrechtsanwaltskammer cannot confirm that the enforcement has become any more efficient in Germany, but the overall impression is that the application has become more homogeneous (with the reservation mentioned above that the Commission should devote more resources into the administration of justice by building a stronger body of case practice in vertical and horizontal Art. 101 TFEU cases).

8. In your view, has the removal of the system of notification of business agreements to the Commission resulted in a more efficient application of Article 101 TFEU?

- Yes
- No
- Don't know

Please explain your answer

Yes, but in order to obtain legal certainty undertakings should also have the right to request a “sign-off” decision by the Commission with respect to business agreements of industry-wide relevance or tackling novel legal grounds following a voluntary notification of such agreements.

9. In your view, have the procedures set up in Regulation 1/2003 and Regulation 773/2004 generally contributed to a timely and efficient enforcement of Articles 101 and 102 TFEU?

- Yes
- No
- Don't know

Please explain your answer

No, in particular as regards the efficient enforcement of Art. 102 TFEU. With respect to complaints filed by third parties the Commission should be bound to deadlines to deal with such complaint. Within these deadlines it should also be required to either (i) issue a reasoned decision if it does not intend to pursue a case, or (ii) initiate infringement proceedings following an initial evidence gathering phase, continuously keeping the complaining party informed and involved in such proceedings.

Relevance

10. In your view, are the objectives of an effective and uniform application of Article 101 TFEU of Regulation 1/2003 still relevant?

- Yes
- No
- Don't know

Please explain your answer

The uniform application of Art. 101 TFEU still is not achieved in all instances. In particular there are cases where national courts interpret decisions of the Commission without consulting the Commission as to the proper interpretation of the decision.

The cooperation of national courts with the Commission is addressed in Art. 15 Reg. 1/2003. This article provides in para. 1 that courts of the Member

States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules. However, national courts appear to be reluctant to use the opportunity to approach the Commission with questions regarding the interpretation of its decisions. They rather interpret Commission decisions as they deem appropriate. This may lead to diverging interpretations of the same decision by different national courts. It may also lead to an interpretation of a Commission decision which was not intended by the Commission.

In the cases where they seek guidance on the proper interpretation of Commission decisions, national courts seem to have a preference to apply for a preliminary ruling of the Court of Justice of the European Union who will then interpret the Commission's decision. This prolongs court proceedings unnecessarily as a response of the Commission could be obtained in a shorter period. Case C-588/20 may serve as an example. A national court applied here for a preliminary ruling on the question whether a certain type of product was covered by a fining decision of the European Commission. The Commission would have been well placed to respond to this question.

To remedy this problem, Art. 15 (1) Reg. 1/2003 should be amended to the effect that national courts are put under an obligation to consult with the Commission when they seek clarification on the proper interpretation of a decision of the Commission, and the Commission should be obliged to provide an answer.

11. In your view, are the objectives of an effective and uniform application of Article 102 TFEU of Regulation 1/2003 still relevant?

- Yes
- No
- Don't know

Please explain your answer

Coherence

12. In your view, are Regulations 1/2003 and 773/2004 overall coherent, including with other EU legislation and EU policies?

- Yes
- No
- Don't know

Please explain your answer

Art. 3 Reg. 1/2003 deals with the relationship between EU and national competition law, and Art. 21 of the EU Merger Regulation also includes respective rules. The rules are silent, however, on the applicable rules in cases where the thresholds of national merger control law are not exceeded by a concentration, or where national merger control law does not provide for rules applicable to so-called cooperative joint ventures. In view of the DMA, a close cooperation between the Commission and the NCAs must be ensured, in particular with respect to imposing sanctions, as there could be a risk of violating the “ne bis in idem” principle protecting the undertakings under investigation.

EU added value

13. In your view, have Regulations 1/2003 and 773/2004 contributed to ensuring the effective and uniform application of Articles 101 and 102 TFEU in a manner that goes beyond what would have been achieved by Member States alone?

- Yes
- No
- Don't know

Please explain your answer

Other

14. Is there any other comment related to the application of Regulation 1/2003 and Regulation 773/2004 that you want to bring to the Commission's attention and that has not been addressed in your replies to the previous questions?

- Yes
- No
- Don't know

Please explain your answer

Art. 23 (2) Reg. 1/2003 is vitiated by the conceptual flaw that the 10% cap is applied after the Commission has done its calculation of the fine, whereas it was intended to reflect the financial abilities of the undertaking under investigation, so that in future the 10% cap should be used as the frame within which the Commission will set the fine by applying aggravating and mitigating criteria. In addition, as an incentive to apply compliance measures and to strengthen compliance management systems operated by undertakings, Art. 23 (3) should mention that compliance measures applied by the undertaking are considered as a mitigating factor.

15. If you want to share any documents (e.g. data, research paper, position paper, etc.) which may be relevant for the evaluation of Regulation 1/2003 and Regulation 773/2004, please upload them here. Please make sure you do not include any personal data in the file you upload if you want to remain anonymous

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

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