AEDC

ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA – AEDC –

CONSULTATION ON THE REVISION OF EU ANTITRUST PROCEDURAL RULES – RESPONSES TO THE QUESTIONNAIRE[1]

1. Improving the effectiveness, including the speed, of certain aspects of the Commission's procedures in digitised and complex investigations

(i) Adapting the Commission's investigative tools to the digital world (Q. 1-21)

1. Have you been subject to a Commission investigation in the last 10 years where the Commission made use of its investigation powers under Regulation 1/2003 or have you represented a company that has been subject to such an investigation?

Yes.

The AEDC brings together competition experts active both at the European level and in Spain, with extensive experience in infringement proceedings before the European Commission. Over the past decade, our members have acted in a wide range of professional capacities – lawyers, economists or inhouse counsel – across various economic sectors.

2. Would you have any suggestions for improving the effectiveness of the Commission's investigative tools?

We don't have any further suggestions beyond the options currently being considered.

3. Have you been a recipient of requests for information (or advised on requests for information) under Regulation 1/2003 over the last 10 years?

Yes.

4. Based on your experience, what is the average cost to respond to Commission requests for information under Regulation 1/2003 over the course of one investigation? Please provide any relevant information you have in this regard (e.g. person hours, legal fees, economic consultant fees, IT service providers' fees).

It is very difficult to establish an average cost for replying to a request for information ("RFI") from the Commission as it depends on the specific details of the request for information. However, in practice, replying to requests for information represents a

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significant part of the total costs that a company incurs when facing an investigation from the EC (30-40%).

Requests for information are very relevant for the future investigation and, in general, very broad. They require engaging external staff such as outside counsel, economic consultants, IT service providers and project management teams. This leads companies to incur important economic costs and to divert notable human and time resources.

Some companies regularly receive information requests from the European Commission in the framework of the same infringement procedure. Prior planning and effective management of these information requests would be desirable in order to prevent temporal and material overlaps across different questionnaires and avoidable disruptions in the company's ordinary operations.

RFIs should be always guided by the necessity and proportionality principles on substantial points but also in terms of process.

5. Based on your experience, how many weeks are on average necessary for a complete response to a request for information based on 'search terms' indicating also the average (a) number of relevant custodians for which searches are to be made; (b) number of search terms; and (c) time horizon relevant to the request?

It is not possible to provide an average, but it may take weeks or even several months. The estimated time to respond to a request for information from the Commission based on search terms varies according to the number of search terms, the number of relevant custodians as well as the potential combinations made of these search terms and the relevant custodians to gather the information requested by the Commission. In any case, the resources that need to be allocated are substantial.

6. Considering the existence of a general duty on undertakings that are under investigation to take all appropriate measures to preserve all evidence as might reasonably be available to them, what would be the added value for (a) these undertakings; and (b) the effectiveness of a Commission investigation of including a specific power in Regulation 1/2003 for the Commission to adopt decisions to order the preservation of evidence that would set out the parameters of the evidence preservation requirements?

In principle, it could seem that preservation orders may be particularly necessary for data intensive companies that continuously produce and process massive volumes of information. However, this need is already addressed by Article 26 of the DMA, which provides for the possibility of imposing preservation orders on designated gatekeepers when monitoring compliance with their DMA obligations.

Beyond these situations, the introduction of preservation orders does not have any added value to the effectiveness of an EC's investigation. The companies under investigation are already subject to a general duty of active cooperation with the EC, which includes making available all information relating to the subject matter of the investigation. Moreover, the submission of incomplete information is already punishable by fines of up to 1% of the company's total turnover.

Introducing the possibility of issuing preservation orders would not benefit the investigated companies; on the contrary, it would impose additional burdens to them: i.e. how to comply with evidence preservation requirements included in the order, how to ensure that these parameters comply with the need to clearly determine the scope and the object of the investigation to avoid fishing expeditions, etc. These burdens may be unnecessary given the EC's existing investigation powers.

In practice, preservation orders may result in an improper reversal of the burden of proof regarding the infringement of the duty to cooperate with the EC. Failing to provide a document covered by a preservation order may risk being automatically considered a breach.

The ECN+ Directive does not require Member States to empower NCAs to issue preservation orders either. It is unclear why such power should be granted to the EC.

Additionally, if the Commission eventually decides for this option, the preservation order should respect the principle of proportionality and also of territoriality (i.e., no preservation order should be established for documents that are produced and stored outside the EU with no access to them by the company/employees/directors of the inspected company or that the law in the country of storage prevents the investigated company from providing this information).

7. In your experience (including in other jurisdictions), what would be benefits (e.g. simplifying administrative burden) of the introduction of a preservation order decision power for (a) companies under investigation; and (b) the effectiveness of a Commission investigation? Please provide any relevant qualitative and quantitative information you have in this regard (e.g. savings in person hours, legal fees, economic consultant fees, IT service providers' fees due to subsequent more targeted RFIs, enabled by the existence of preservation order decisions).

The reply to this question is included in our answer above.

8. In your experience (including in other jurisdictions), what would be the additional cost of preserving specific information as identified in an order to retain evidence (as compared to the general duty to preserve information that already exists under the relevant case-law)? Please provide any relevant qualitative (e.g. parameters impacting preservation costs) or quantitative information you have in this regard (e. g. person hours, legal fees, economic consultant fees, IT service providers' fees).

Preservation orders may increase companies' costs as they may require wider exceptions to general data retention policies and more complex monitoring systems.

They may also significantly increase compliance risks of companies. A formal breach on the evidence preservation requirements set out in a preservation order may constitute an infringement regardless of whether the alleged breach has impacted the effectiveness of the Commission investigation or not.

9. Should the Commission have a new power to adopt preservation order decisions, these could be accompanied by sanctioning powers in the event of a breach. What are, in your views, the benefits and costs of such sanctioning powers for (a) companies to which such an order is addressed; and (b) the effectiveness of the Commission's investigation?

If the Commission were to be granted a new power to adopt preservation orders, it should logically be accompanied with sanctioning powers.

However, we reiterate that, under the current regime, the submission of incomplete information is already subject to fines (see article 23 of Regulation 1/2003). Therefore, there is no need to include new sanctioning powers for the EC in this case.

10. Have you been subject to a Commission inspection (or advised on an inspection) under Regulation 1/2003 over the last 10 years?

Yes.

11. Based on your experience, what is the average cost for an undertaking subject to an inspection under Regulation 1/2003? Please provide any relevant information you have in this regard (e.g. person hours, legal fees, economic consultant fees, IT service providers' fees) indicating also the average (a) number of inspected sites (of the same undertaking undertaking); (b) number of inspection day.

Providing an average cost is difficult. However, costs are significant, in view of the number of teams involved in the inspection, the duration of the inspection and the internal follow-ups once the inspection has ended.

12. If the Commission were to be empowered to inspect digital business records without necessarily inspecting physical premises, what would be safeguards equivalent to those currently existing during an inspection of physical premises? Please provide any relevant explanations and reasoning in this respect

Safeguards in case of inspections of digital business records regardless of a physical premise should be significantly higher:

- Inspection of digital data carries a heightened risk of exceeding the scope of the authorization decision. The investigative boundaries of the EC power of inspection should be defined as clearly as possible and robust mechanisms in terms of process should be in place to ensure compliance with those boundaries. Also time deadlines/limits for the inspection should be established.
- To fully comply with the territoriality principle, clear rules on how specific documents held outside the EU should be allocated to the addressee of the

Decision should be set out from the beginning. Indeed, only the documents that are accessible from the premises/with the systems of the investigated company should be accessible to the EC (i.e., if the Commission carries out an inspection concerning a Spanish affiliate, only the digital records that are available from the Spanish affiliate social domicile (even if stored on other country) should be accessible for the EC inspection.

- Inspections of digital data records should be the exception, and the EC should justify the necessity - compared to an inspection in the physical premise of the investigated company – and the proportionality of such a measure in its authorization decision.

13. Based on your experience, what would be the (a) benefits (including reduction of administrative burden, cost reductions) and (b) costs of a Commission power to inspect digital business records without necessarily inspecting an undertaking's physical premises when compared to the current way of conducting inspections? Please substantiate with any qualitative (e.g. level of interference of normal business operations, privacy) and quantitative information (e.g. impact on person hours, travel costs, legal fees, economic consultant fees, IT service providers' fees)?

Costs for companies will increase. Digital business records may be located anywhere in the world. In addition to the current costs, the company investigated may need to engage with various teams based in different countries, potentially under different time zones and data retention policies.

14. Based on your experience, what would be the (a) benefits of inspections of digital business records (without the need for presence at an undertaking's physical premises) and (b) costs for (i) the investigated undertaking and (ii) the effectiveness of the Commission's investigation relative to requests for information based on keyword searches? Please substantiate with any qualitative (e.g. extent of interference, proportionality, privacy issues) and quantitative explanations (e.g. impact on person hours, travel costs, legal fees, economic consultant fees, IT service providers' fees).

The Commission should conduct the inspection of digital business records as it would normally be quicker to collect all the documents within the scope of the inspection order. Inspections should normally take 2 or 3 days, whereas the response to a request for information based on search terms usually takes weeks or even months. Inspection of digital business records without the need for presence at an undertaking's physical premise should not become in practice RFIs based on search terms.

Regarding the undertaking investigated, there is no advantage to it. Conversely, digital inspections will increase its costs. Furthermore, requests for information based on search terms also create a risk for companies as long as it is possible to involuntarily omit relevant documents if they are not able to conduct the search appropriately. Consequently, companies increase the risk of being exposed to high fines.

15. Based on your experience, what would be the impact of the possibility for the Commission to impose preservation order decisions on the following parameters?

Impact on	Negative or very negative	Neutral	Positive or very positive	No opinion
Administrative burden for companies	x			
Flexibility for companies		X		
Costs for your organization	x			
Legal certainty for your organization		x		

16. Please explain your replies to the previous question and, if possible, provide concrete examples of the impacts you indicated.

Please refer to our responses to questions 6 to 9 above.

17. Based on your experience, what would be the impact of the possibility for the Commission to conduct inspections of digital records without the need for presence at an undertaking's physical premises on the following:

Impact on	Negative or very negative	Neutral	Positive or very positive	No opinion
Administrative burden for companies	x			
Flexibility for companies		x		
Costs for your organization	x			
Legal certainty for your organization		x		
Rights of defense	x			

18. Please explain your replies to the previous question and, if possible, provide concrete examples of the impacts you indicated

Preventing that the inspection of digital business record does not amount to a fishing expedition, affecting the investigated company's defense rights, will be challenging.

19. Based on your experience, do companies frequently refuse to make available their representatives for an interview?

No. Interviews can be a helpful tool and a good opportunity for companies to clarify how specific evidence gathered by the EC should be interpreted and for providing additional evidence and context on the facts under investigation.

However, certain ex-employees of a company may not be willing to voluntarily cooperate in the framework of an antitrust investigation.

20. Based on your experience (including in other jurisdictions), what would be the (a) benefits and (b) costs for (i) stakeholders (companies under investigation, complainants, other market participants); and (ii) the effectiveness of the Commission's investigations of introducing a power in Regulation 1/2003 for the Commission to collect information via compulsory interviews when compared to other investigative tools (inspections, requests for information). Please substantiate with any relevant qualitative and quantitative explanations (e.g. impact on person hours, travel costs, legal fees).

The power to conduct interviews set forth in Article 19 of Regulation 1/2003 is currently voluntary and subject to no fines.

In our view, it is reasonable to strengthen the powers of the EC under Regulation 1/2003 to ensure full alignment with its powers under the DMA (Article 22) and powers of NCAs under the ECN Directive (Article 9). Spain has included this new power in article 39 bis of Spanish Competition Law, empowering the CNMC to conduct interviews with any representative of a company or association of companies, any representative of other legal entities, and any natural person, when they may be in possession of data or information that could be necessary for the application of the provisions Spanish competition rules.

Interviews may benefit the Commission as well as the stakeholders as the Commission could obtain a better understanding of the factual elements of the case. As a result, the following steps of the investigation, such as subsequent requests for information, could be more targeted. That would allow reducing the length of the investigation as well as the costs of the stakeholders.

This power may also be particularly helpful in cases where a natural person is no longer an employee of a company and it is not possible for said company to compel him/her to be interviewed by the EC in order to explain and/or clarify certain factual elements in documents in the Commission's file. Investigated companies should have the right to request the EC that it orders the natural person to attend an interview.

In any case, the introduction of a compulsory interview power should be accompanied with all the appropriate measures to safeguard the investigated parties' rights of defence:

- Participants in an interview should always be accompanied by a lawyer.
- Prohibition of self-incrimination (*Orkem* case law) should be strictly observed during the interview.

- We note that in Spain, recording of interviews is voluntary and subject to the discretion of the CNMC, depending on the nature of the interview. Participants are not allowed to record the interview themselves. However, recording—rather than relying solely on written minutes—should be the preferred approach, particularly given the current stage of technological development, where accurate transcripts can be readily generated using AI tools. Exceptions could be agreed between the Commission and the investigated company. The company should, in all cases, have the right to obtain a copy of the recording once the interview has concluded.
- The interview should be carried out with full respect of the object and scope of the decision ordering the interview.
- Regarding the impact on person hours, travel costs and legal fees, they are not fixed as they vary according to the specific circumstances of the case and interviewee.

21. In your view, what would be the impact on (a) stakeholders (companies under investigation, complainants) and (b) the effectiveness of the Commission's investigations if a new compulsory interview power would be accompanied by an ability for the Commission to impose fines for (i) failure to appear at an interview and refusing to respond to questions; (ii) providing false, complete and/or misleading information to the Commission? Please substantiate with any relevant qualitative and quantitative explanations.

If a new compulsory interview power was introduced, it should be accompanied with periodic penalty payments and sanctioning powers in order to make it effective.

We note that Article 23 of Regulation 1/2003 only empowers the EC to impose fines on undertakings and associations of undertakings and not to natural persons. However, investigated companies should not be held responsible for infringements committed by natural persons in general, when they have contravened the indications and instructions given by the company (for instance, an employee that contrary to the instructions given by the company destroys documents or lies in relation to a question posed by the Commission or, despite the efforts and threats posed by the company, he does not attend the interviews). This is in general and much more when, at least natural persons that are not currently employees of the investigated companies and over which the company has no responsibility nor control infringes his/her obligation to attend the interview and to respond to questions and/or provides false, incomplete or misleading information.

(ii) Improving decision-making procedures to allow for effective (and faster) enforcement (Q. 22-34)

22. Would you have any suggestions as to how to improve the effectiveness of the Commission's decision-making powers?

Several improvements could be adopted to enhance the effectiveness of the Commission's decision-making on interim measures ("IMs"). The members of the AEDC considered, among others, the following options: (a) restore the right to request IMs in complaints; (b) introduce amendments to the Commission's Notice Form; (c) establish a DG COMP "Red Team" on IMs; (d) adopt clear enforcement priorities; (e) introduce an iuris tantum presumption for claiming damages by the investigated party when IMs are annulled and/or no sanctioning decision is adopted; (f) some members of the AEDC (not all of them), propose to ease the substantive legal test (test of likelihood of infringement rather than prima facie infringement); and (g) establish a structured procedural framework for IMss. These measures, whether applied individually or collectively, could increase the effectiveness of the EC by facilitating the responsible use of IMs. Each proposed development is further elaborated in the Annex to the questionnaire.

Also, and as proposed by the AEDC in previous submissions, it would be important to establish deadlines on the overall duration of sanctioning proceedings that should guarantee a reasonable timeframe. A possible proposal would be 36 months from the date of starting formal proceedings. In the same vein, it would be important to establish deadlines/timeframe for the adoption of interim measures, so as to avoid that they are used as a tool to further delay the proceedings.

In what concerns remedies under Article 7 Decisions, it would be advisable that the commitments/remedies are market tested before they are decided and put in place. Although this could add some delays in the procedure, it would allow to obtain different views from stakeholders, improve the commitments and provide more legal certainty as to its effective implementation.

23. Based on your experience (including in relation to other jurisdictions), do you consider that there are situations in which interim measures in Commission proceedings would be warranted to avoid a negative impact on competition but could not be imposed as they would not meet the requirements for ordering interim measures as currently established in Article 8 of Regulation 1/2003?

Background

Whilst we agree that the Commission has barely adopted interim measures under Regulation 1/2003 (it only did so in the *Broadcom* case and in the ultimately abandoned *Lufthansa* case in early 2025), the broader context warrants consideration:

- Many situations in which the absence of interim measures could theoretically most likely lead to irreversible market outcomes—such as fast-moving markets with strong network effects, involving sophisticated/novel theories of harm and long investigation periods —are currently addressed through the ex-ante regulatory intervention framework provided for in the DMA.
- Other scenarios falling outside of the scope of the DMA can also be addressed by national courts, which are empowered to adopt interim measures – including

inaudita parte orders, where appropriate. We note that, in Spain, a Mercantile judge ordered interim measures *inaudita parte* against UEFA in application of Articles 101 and 102 TFEU within a record deadline of two days. National courts are particularly well placed to adopt interim measures. They routinely take such decisions across various legal areas and, in the field of antitrust, they are also empowered to declare the nullity of restrictive agreements and to award damages for any harm suffered. This is also explicitly acknowledged by the EC in its Communication for the handling of complaints (OJ C 101, 27.4.2004, paragraph 16).

- NCAs also complement the system and regularly adopt interim measures. The CNMC in Spain has been more prolific in adopting interim measures than the EC.

- In other cases, the lack of adoption of an IM by the EC may stem from the challenges involved in designing the specific IM and, in particular, ensuring its necessity and proportionality. Determining how an infringement should be provisionally terminated or how competition should be preserved is not straightforward. In particular, in cases where a mere cease-and-desist order would not be sufficient and the authority must specify the positive conduct it expects from the investigated company. This task is particularly complex in the early stages of the procedure, when the Commission may lack sufficient visibility into how compliance should be implemented, and its case may not stand before the EU courts.

Procedural framework for IMs. The role of complainants

The current procedural framework excludes a number of relevant scenarios in which IMs could be appropriate but are procedurally unavailable. In particular, the Commission's interpretation of Article 8 of Regulation 1/2003 does not provide complainants with a formal avenue to request interim relief, thereby reducing the institutional pressure on the Commission to consider such measures in complaint-driven proceedings. Between 2004 and 2022, a total of 17 non-cartel cases involving alleged infringements of Articles 101 and 102 TFEU were initiated following a complaint, yet interim measures were not adopted in any of them—despite circumstances that may have justified their use. Complainants and third parties should be allowed to request for interim measures.

Other members of the AEDC believe that granting complainants the formal right to request interim measures and to have the right to receive a formal decision from the European Commission could further increase the Commission's workload and further aggravate the current situation. At present, third parties can informally request the adoption of interim measures, and those with a legitimate interest in the proceedings can influence the IM process by submitting observations on the Statement of Objections and by participating in the oral hearing under Article 13 of Regulation 773/2004. For cases potentially lacking community interest, they can also seek interim measures before their national courts.

The substantive test

In addition, there are situations where interim measures would be warranted to avoid serious distortions to competition but cannot be imposed under the current framework of Article 8 of Regulation 1/2003—primarily due to the strict interpretation of the urgency requirement, particularly in relation to financial harm. As confirmed in IMS Health and consistently applied thereafter, the notion of "irreparable harm" is narrowly construed by the Commission and the EU Courts to encompass only those harms that threaten the very existence of the undertaking concerned (Order of the President of the CFI of 26 October 2001, Case T-184/01 R, paragraph 121). This threshold, while protective of legal certainty, is ill-suited to modern competition dynamics, where market tipping, technological disruption, and aggressive exclusionary strategies can inflict permanent damage without necessarily leading to insolvency.

Article 11 of ECN+ Directive allows NCAs to impose interim measures in cases that do not meet the standard established in *Camera Care*, and many have chosen to do so. Some members of the AEDC consider that the Commission could consider doing something similar for EU interim measures. Indeed, in many cases, purely financial harm—such as a sustained decline in revenue from a key business unit, loss of critical customers, or reductions in R&D investment—may have long-term consequences that cannot be remedied by a final decision adopted years later. Yet under current standards, such harm is rarely deemed "irreparable." To address this disconnect, the Commission could consider introducing a rebuttable presumption of urgency where financial impact surpasses a certain threshold—such as a 30% negative effect on relevant business metrics. This would ease the evidentiary burden on complainants, enhance procedural transparency, and allow the Commission to intervene more effectively in cases where delay would render final enforcement meaningless.

However, other members of the AEDC believe that member States that have alleviated the burden of proof under their own national rules have done so under the conditions and ultimate control of their constitutional systems. This may not be possible at EU level, as per the case law of the Court of Justice setting the necessary conditions for interim measures under EU law. Article 8 of Regulation 1/2003 is precisely based on this case law and any reform of its drafting should respect such case law.[2]

In particular, setting a rebuttable presumption for urgency based on certain percentage of the relevant business metrics of a company may contradict the general principle that the

[2] The EC's Manual of Procedures expressly recognises that Article 8 of Regulation 1/2003 is based on the case law from the Court of Justice, i.e. par. 2 and footnote 1).

burden of proof lies with the authority seeking to impose the precautionary measure, thus limiting the investigated company's freedom to conduct business.

24. Based on your experience, what are the costs and consequences of the current legal and procedural framework for interim measures impacting (i) competition in general, (ii) stakeholders (companies under investigation, complainants, consumers, other market participants)? Please substantiate with any relevant qualitative and quantitative information (e.g. the cost of the time it takes to order interim measures and the legal threshold for the Commission to be able to impose interim measures under Regulation 1/2003, the person hours, legal fees, economic consulting fees for participating in an interim measures proceeding).

The costs of the European Commission not being able to order interim measures more frequently cannot be considered in isolation, as there are, as previously mentioned, other alternatives available to preserve competition in the market.

25. Do you consider that the legal test for ordering interim measures should change? If yes, which change(s) to the legal test for ordering interim measures would you envisage (for example, would you suggest a change to the standard of 'serious and irreparable damage' to competition or another change)?

Comparative enforcement data across Member States (EC Report from the Commission to the Council and the European Parliament on the legal framework for and the use of interim measures by national competition authorities) suggests that procedural simplification is a more effective lever for activating interim measures than lowering the substantive legal threshold. While a less stringent legal test may intuitively seem to promote greater use, the evidence indicates that jurisdictions with simplified procedural frameworks—such as clear timelines, complainant access, and reduced administrative friction—are not only more likely to adopt interim measures but also do so with significantly higher frequency. This implies that removing procedural barriers has a more immediate operational effect, facilitating the practical deployment of interim powers without undermining the rigour or legal certainty associated with substantive assessments. As such, procedural easement represents a lower-risk, higher-impact avenue for reform.

However, as explained above, for some members, the notion of "irreparable harm" in particular re. financial impact is unduly restrictive and fails to account for other forms of serious financial harm that, while not existential, may nonetheless cause lasting and irreversible damage to a firm's competitive position. Significant reductions in revenue from a key business line, loss of strategic customers, or substantial cuts to innovation and R&D budgets can materially distort competition in ways that cannot be remedied *ex post*. Recognising these types of financial impacts within the urgency assessment would allow for a more economically grounded and realistic application of interim measures, particularly in fast-moving or highly concentrated markets.

For some other members, it would not be possible to soften the legal test. As recognised in the manual of procedures of the EC, the legal test in Article 8 of Regulation 1/2003 is based on the case law of the ECJ (*prima facie* infringement of EU antitrust law and urgency derived from a situation that is likely to cause serious and irreparable damage). Changes in the Regulation should not run counter the ECJ's case law and the EU Charter of Fundamental Rights.

This may be the reason why, when granting the EC the power to adopt IMs in the framework of the DMA, the legal test chosen has been similar to the one foreseen in article 8 of Regulation 1/2003 (*prima facie* finding of an infringement and urgency due to the risk of serious and irreparable damage).

26. In your view, what would be the (a) benefits and (b) costs of a potential change to the legal test (as identified in your response to the previous question) for ordering interim measures that would allow for a more effective use of interim measures, for (i) competition in general, (ii) stakeholders (companies under investigation, complainants, consumers, other market participants)? Please provide any relevant qualitative or quantitative information you may have to substantiate your response.

Lowering the substantive legal threshold for adopting interim measures would impose a substantial cost on investigated companies, given the serious impact on their fundamental right to conduct business freely.

27. Do you consider that the procedural framework for imposing interim measures should change? If yes, which change(s) to the procedural requirements for ordering interim measures would you envisage, with a view to allowing for faster proceedings (for example, could access to file be limited only to a limited number of documents, the right to request an oral hearing be abolished or another change)?

Definitely, by (a) Restoring the right to request IMs in Complaints and also by third parties (even if not formal complainants), and (b) Establishing a Structured Procedural Framework for Interim Measures which maintains all relevant current steps, but which significantly reduces the deadlines.

The Commission should adopt a structured procedural timeline —similar to those already introduced by some Member States, such as Spain and Belgium— for the assessment of requests for interim measures. Following is a brief proposal:

1. Acknowledgement of Receipt: Within one week of submission, the Commission should acknowledge receipt of the complainant’s request for interim measures, confirming that the application has been registered and will be processed under Article 8 of Regulation 1/2003.
2. Initial Information Request: Within three weeks of submission, the Commission should notify the undertaking potentially subject to intervention and request any relevant documents, data, or factual observations necessary to assess the prima facie case and the urgency alleged.

3. SO allowing the investigated company to exercise its right of defence through the submission of written comments within a limited deadline.

4. Hearing: A procedural hearing should be convened within two months of the request. Given the limited time to rebut an IM proposal in the SO, an oral hearing constitutes a fundamental procedural safeguard for the investigated company.

5. Final Decision or Rejection: The Commission should adopt its interim decision—or issue a reasoned rejection letter—within four months of the initial request. This deadline ensures timely action while allowing sufficient time for meaningful assessment and procedural guarantees.

28. In your view, what would be the (a) benefits and (b) costs of a potential new procedural framework for interim measures (as identified in your response to the previous question) which would allow for faster interim measure proceedings, for (i) competition in general, (ii) stakeholders (companies under investigation, complainants, consumers, other market participants)? Please provide any relevant qualitative or quantitative information you may have to substantiate your response.

Streamlining the interim measures procedure and generally shortening the deadlines applicable may bring benefits for competition in general. However, the rights of defense and procedural guarantees of the investigated companies must always be safeguarded.

29. What would be, in your view, the impact in terms of cost and/or benefit of the Commission having the power to impose interim measures in situations of extreme urgency without the prior hearing of the party concerned? Please consider this from the specific perspective of (i) companies under investigation and (ii) companies that are prima facie affected by anticompetitive conduct or other third parties. Please provide any relevant qualitative or quantitative information your may have to substantiate your response.

IMs should never be adopted by the EC *inaudita parte*, leaving this particular option available to national courts according to their respective national legal orders and strict constitutional guarantees.

30. Would there be, in your view, a benefit to the Commission having a power to make binding voluntary interim measure offers by parties? And if so, in what way would the parties be incentivised to make such offers?

The possibility to include the power to make binding voluntary interim measures offered by the investigated parties is particularly welcomed.

Benefits for the EC:

- If the investigated company offers voluntary interim measures that are made biding, the risk of appeals would decrease.

- As the precise interim measure would be voluntary (not imposed by the CE), it would not strictly subject to the proportionality principle (as commitments, i.e. *Alrosa* case law).
- The design of the most adequate IM would be easier, as there would be active collaboration from the investigated company.
- This possibility would also facilitate subsequent commitment negotiations that would put an end to the investigation. Voluntary interim measures and commitments are a good complement enduring that the infringement is put to an end as soon as possible.

Benefits for the companies:

- They would bring an end of the infringement and imply a reduction of the final amount of the fine.
- These interim measures could also be considered as a mitigating circumstance (as per para 29 of the Guidelines on the method of setting fines, i.e. termination of the infringement and/or effective cooperation with the Administration).

In order to maintain the incentives of companies considering the submission of voluntary interim measures, the power of the EC may be accompanied with a clear statement that:

- Offering voluntary provisional measures does not imply a recognition / does not constitute a presumption that the investigated conduct is illegal; and
- the company can reserve its right to defend the lack of infringement in the main investigation.

31. Based on your experience (including in other jurisdictions), what would be the benefits; and (b) costs of a deadline for the parties to submit a binding commitments offer following the adoption of an opening decision outlining the Commission's preliminary concerns for (i) companies under investigation; (ii) the effectiveness (including duration) of the Commission's investigations; (iii) other stakeholders? Please provide any relevant qualitative or quantitative information your may have to substantiate your response.

AEDC members cannot provide estimates in terms of costs. Nonetheless, it is considered positive in terms of effectiveness and enforcement that a deadline is established.

32. Would you consider a deadline running from the adoption of the opening decision detailing the Commission's preliminary concerns as appropriate for the party(ies) to submit a binding commitments proposal? Please explain your answer and indicate (if relevant) what period in months you would consider as an appropriate deadline.

A deadline should only run from the adoption of the opening decision detailing the Commission's preliminary concerns if the antitrust concerns are well detailed and explained. However, many times the opening decisions are scarce of explanations and therefore, it would be more respectful with the rights of defence that the deadline starts courting as from the date of the Statement of Objections. As regards the relevant period, it may depend on the type of proceedings and the situation in which they are proposed (before/after the SO).

The EC should be also subject to time limitations when providing feedback to the investigated company so that the overall deadline remains limited.

33. Should any proposal submitted by the party(ies) under a deadline system be binding and final for the parties, with the exception of a one-time amendment possibility addressing shortfalls identified in the results of the formal market test? Please explain your answer.

Yes, parties should be able to submit further proposals in view of the market test, and not necessarily only one time. If the amended proposal is subject to further market test and the Commission's views are not positive, the parties should be allowed to provide further proposals until they are no more subject to a market test.

34. A consequence of a binding deadline for parties to offer commitments would be that commitments submitted after such a deadline could not be accepted by the Commission. What do you consider the (a) benefit; and (b) cost of this consequence for (i) companies under investigation; (ii) the effectiveness (including duration) of the Commission's investigations; and (iii) other stakeholders. Please provide any relevant qualitative or quantitative information your may have to substantiate your response.

It would be advisable that the Commission retains some flexibility to accept commitments after the deadline, although no obligation to accept them. This would ensure that the parties try to meet the deadline but of for any reason this is not feasible and the commitments submitted after the deadline are satisfactory, the Commission may decide to accept them in any event, therefore achieving the efficiencies sought with this procedure.

(iii) Improving access to file procedures that are currently resource-intensive and time-consuming

35. Have you been involved in an access to file process in Commission proceedings in the last 10 years (at any stage of those proceedings)?

Yes, we have participated regularly in proceedings before both the European Commission and the Spanish Competition Authority over the past ten years, including access to file processes.

36. Would you have any suggestions as to how to improve the access to file system in Commission investigations?

In addition to either Option 1 or 2, and in light of the likely concerns of undertakings regarding a shift to a system based on confidentiality rings, the Commission may consider an appropriate investigation process and sanctioning mechanism for breaches of confidentiality obligations, based on proportional criteria and the defence of the rights of all the parties involved.

As the right of defence belongs to the companies themselves, and not to their external advisors, confidentiality rings should not be restricted to external counsel alone. Both external and some in-house legal counsel, who are subject to professional and regulatory confidentiality obligations, should be granted access. At least a limited number of in-house counsel must be included, given their knowledge of the relevant business and markets.

In certain cases, a differentiated system of confidentiality rings may also be appropriate, allowing external counsel to seek instructions effectively from their clients and, where strictly necessary, extending access to selected key employees subject to relevant firewalls.

37. Based on your experience, what is the cost to companies for the preparation of non-confidential versions of documents for access to file in a Commission investigation? When replying, please also consider any interactions with DG Competition and the Hearing Officer in relation to companies' confidentiality claims. Please provide a qualitative indication as well as any possible quantification (e.g. person hours, legal fees, internal costs).

In addition to addressees of Statements of Objections, third parties receiving requests for information may also be required to prepare non-confidential versions of documents. Such requests can vary widely: from questionnaires of several dozen to over one hundred questions with annexes, to the production of hundreds of documents or aggregated datasets. On rarer occasions, keyword-based searches across IT repositories have been required, potentially producing thousands of documents.

Although the stakes are generally lower for third parties and given the coercive power of a request by Commission decision, the most significant cost may arise from interactions with DG Competition and with the Hearing Officer regarding confidentiality claims. These exchanges, due to their legal complexity, are usually conducted by external counsel, although larger undertakings may rely on in-house competition lawyers. Such costs would, most likely, not be reduced by the introduction of the proposed Option 2 to the system. Depending on the scope of the request, the overall burden for a third party may range from tens to several hundred hours of work, with a significant share devoted to legal review of confidentiality issues.

38. Based on your experience, what is the cost to investigated companies of an access to file process in a Commission investigation (e.g. preparing nonconfidential versions, reviewing the file, making requests for further access to DG Competition

and to the Hearing Officer)? Please provide a qualitative indication as well as any possible quantification (e.g. person hours, legal fees, internal costs).

In a smaller case file, an undertaking might need to prepare non-confidential versions for approximately 500 to 1,500 pages. This task alone would normally require around hundreds of hours of work (normally from paralegals and junior associates). In addition, it is prudent to budget a further several dozens of hours of senior counsel time for interactions with DG Competition and the Hearing Officer, resulting in a significant workload for each undertaking. The specific workload depends on the defence strategy decided by the undertaking and its legal counsel and could vary significantly depending on the involvement.

In a larger case file, an undertaking may need to prepare non-confidential versions for around 5,000 to 10,000 pages, which typically requires thousands of hours of review and redaction work. Interactions with DG Competition and the Hearing Officer may add another hundred or more hours of senior counsel involvement, bringing the total workload to approximately over a thousand hours per undertaking.

In both cases, the firms involved may propose, as is usual in these medium and larger case files, a rate per page tariff for the task of preparing non-confidential versions of the file rather than an hourly fee, lowering the costs for the undertaking. However, the effort estimated in hours, and the total workload, remains the same as described above.

39. Based on your experience (including in relation to other instruments or other jurisdictions or in the context of voluntary confidentiality rings in Commission competition investigations), what would be the (a) benefits and (b) costs for addressees of statements of objections of obtaining access to file via mandatory confidentiality ring? Please differentiate between Option 1 and 2 and compare with the baseline scenario, providing qualitative and quantitative information where possible (e.g. person hours, legal fees, internal costs).

In a smaller case file as described in the previous answer, only about 10 to 30 percent of the documents included are typically cited in the Statement of Objections. Preparing non-confidential versions of this limited set of documents would require roughly an order of magnitude fewer hours than under the current system. Even if billed on an hourly basis rather than the previous, the overall workload would remain modest.

However, some of the resources saved by reducing the number of non-confidential versions to only those documents cited in the Statement of Objections may need to be reallocated. External counsel would have to review the file with less contextual material regarding the undertaking’s conduct during the period under investigation, which could increase the time required for legal analysis and factual background reconstruction.

It is worth noting that providing access to all relevant evidence in a timely manner is indispensable to protect the rights of defence of the parties subject to a competition investigation. Access allows parties to prepare their defence, present their case effectively, and address the allegations against them. Investigated parties require access to all evidence collected by the Commission and placed on its file, not only evidence referred to in the Statement of Objections or otherwise supportive of the preliminary or final conclusions of the Commission, but also other evidence which could be exculpatory.

Access to file should also be given remotely via a secure platform. Physical data rooms are inefficient, resource intensive, and raise significant security challenges.

It is also essential that confidentiality is protected in the access to file process. As noted in the consultation documents, the process for creating and granting access to non-confidential versions of documents on the Commission's file is highly resource-intensive, time-consuming and costly. The burden has increased with digitalisation and the increasing volume of data/documents.

Confidentiality rings

There are clear advantages of the use of confidentiality rings for access to file: in particular, they are likely to reduce the burden - in terms of time, resources and cost - of producing non-confidential versions of all material on the file while ensuring access to parties.

Multiple levels of confidentiality rings are possible depending on the level of confidentiality accorded to different material. This is common, for example, in proceedings before the UK Competition Appeal Tribunal.

Confidentiality rings could be limited to legal counsel of the parties in the first instance, but this must be both external legal counsel (who are generally bound by ethical and regulatory confidentiality obligations) and in-house legal counsel (who may also be bound by ethical and regulatory confidentiality obligations) - it is important that (at least a limited number of) in-house legal counsel also have access since external counsel is unlikely to have sufficient knowledge of the business/markets at issue. This is also necessary to allow external counsel to effectively seek instructions from their clients. It may also be necessary to extend access to key employees for this reason. Without such access, the parties' rights of defence cannot properly be respected.

In addition, given the focus on economic arguments and analysis in competition law proceedings by the Commission, in most cases the parties' economists are also likely to need access to certain documents and data in order to carry out economic analysis to support parties' ability to respond to the Commission's allegations.

Non-confidential versions of documents could be created for a wider group of individuals as considered necessary by legal counsel for the rights of the defence. However, as producing non-confidential versions is time-consuming, the Commission should allow enough time for parties to prepare and submit them. The time allocated should also take into account the volume of documents to be redacted.

40. Based on your experience (including in relation to other instruments or other jurisdictions or in the context of voluntary confidentiality rings in Commission competition investigations) what would be the (a) benefits and (b) costs for information providers of a system of mandatory confidentiality rings? Please differentiate between Option 1 and 2 and compare with the baseline scenario, providing qualitative and quantitative information where possible (e.g. person hours, legal fees, internal costs).

Requests for information are generally more detailed and specific than documents seized during inspections and therefore have a higher probability of being cited in the Statement of Objections. Although more difficult to quantify, it is reasonable to presume that a greater proportion of documents produced pursuant to requests for information will require non-confidential versions.

Based on our experience, approximately 30 to 40% of documents provided in response to an information request typically require non-confidential versions for a questionnaire with a normal range of questions and annexes. The preparation of such versions usually requires less than a dozen of hours of work, although this is a lower estimate, which could increase depending on the complexity of the answers. In these circumstances, a system of confidentiality rings is unlikely to alter the burden significantly for undertakings, since the practical workload remains broadly the same.

41. Would information providers have concerns about providing certain types of information in confidential versions in a mandatory confidentiality ring (for example, leaks of confidential information)? If yes, how would these concerns be alleviated? In your view, is a system of sanctions for breaches of confidential information necessary for the operation of confidentiality rings? What would these sanctions be and against whom should they be imposed?

Information providers are likely to have concerns about disclosing particularly sensitive material within a mandatory confidentiality ring. These concerns may revolve around the risk of leaks, misuse, or inadvertent disclosure - especially when the information is highly sensitive (e.g. trade secrets, commercial strategy, pricing, customer data, etc.).

Such concerns could be alleviated by measures including: (i) The use of secure data rooms for the review of highly sensitive material (e.g. complex economic data or strategic business information), (ii) Detailed confidentiality undertakings: each confidentiality ring member should sign a robust confidentiality agreement, including clearly defined obligations and liabilities; (iii) Redaction and tiered disclosure: redaction of particularly sensitive content and/or a tiered disclosure approach, where some information is only shared with a "higher confidentiality tier" within the confidentiality ring or in a separate confidentiality ring; (iv) Monitoring and auditing: include the ability to monitor use, track access, and conduct audits to detect improper handling or breaches early; (v) Use of secure platforms: require all disclosures to be made via secure document review platforms with watermarking, access logs, and download restrictions; and (vi) The establishment of sanctions for breaches of confidentiality obligations, as indicated in our response to question 36 and 42.

While data rooms are costlier and more complex to administer, they are highly effective in safeguarding confidentiality, with strict access and extraction restrictions. Their use should therefore be limited to the most sensitive categories of information. Establishing and managing such data rooms can add dozens of hours of technical and legal work to a case.

As an alternative, a system of sanctions for breaches of confidentiality obligations within mandatory confidentiality rings is a proportionate and efficient safeguard. Such a system would only apply in case of an actual breach and would not otherwise burden undertakings. However, it would require that the Commission be vested with investigative and sanctioning powers, as it is the institution responsible for establishing and managing the case file, granting access, and tracking which individuals have accessed or downloaded documents.

42. In your view, should the Commission have a general power to investigate and sanction undertakings or their advisors in case they breach confidentiality obligations in the context of Commission investigations?

As a necessary safeguard for undertakings disclosing confidential information, the Commission should have a general power to investigate and sanction undertakings or their advisors in the event of a breach of confidentiality obligations. Modern IT systems would allow the Commission to track in detail which members of a confidentiality ring accessed or extracted particular documents.

Such a power would need to be exercised subject to appropriate procedural safeguards and proportionality requirements, as it could significantly affect the disclosure of defence strategies by undertakings' counsel. The Hearing Officer should be able to review such matters, and sanctions should be subject to appeal before the EU Courts. Given the importance of the duty of cooperation, penalties would be potentially significant, and the risk of such sanctions would justify the allocation of senior counsel time (dozens of hours per case) to ensure compliance and training of all individuals with access.

Enforcement directly against private persons (external counsel, experts) is not practiced by the Commission, as the general rule. Sanctions would therefore need to be imposed on the undertaking on whose behalf the individual had access to the confidential information.

43. Compared to the current system, do you consider that a system for access to file under Option 1 or 2 would (a) better ensure the rights of defence; (b) better safeguard the confidentiality of information provided by other undertakings; (c) allow for a more efficient access to file procedure compared to the baseline? In your reply, please consider not only access to file during Commission proceedings, but also any possible litigation before the EU courts.

Option 1 appears to strike a more appropriate balance between efficiency, rights of defence, and confidentiality. This limited access, combined with the possibility of extending disclosure, recognises that while external counsels play a central role in these proceedings, it is the undertakings themselves that enjoy the rights of defence (including the right to be heard and the right of access to file). They should therefore have at least a limited knowledge of the relevant material, enabling them to participate meaningfully in their defence strategy. As the Court held in Case 107/82 AEG-Telefunken v Commission, documents not mentioned in the Statement of Objections are not relevant for the purpose of establishing an infringement. Accordingly, the right of defence would be preserved by granting access to both confidential and non-confidential versions (as determined case by case) of the documents cited in the Statement of Objections, while external counsel would be granted access under confidentiality rings to the remainder of the case file. In this regard, a system that includes the use of confidentiality rings where appropriate would help to improve the access to file process, but the confidentiality ring cannot be limited only to external counsel. Such an approach impedes the ability of parties to properly exercise their rights of defence for the reasons explained above. Usage of confidentiality rings could also assist in enabling access to file to be given remotely via a secure platform. Physical data rooms are inefficient, resource intensive, and raise significant security challenges. Remote access therefore improves the process overall.

It is worth noting that as regards to cases that end up before the courts, some involving multiple parties, in particular, it may be necessary to make a wider range of documents available, and thus non-confidential versions may need to be created at that later stage.

Other competition authorities adopt similar approaches, such as the UK Competition and Markets Authority (CMA) or the Competition and Consumer Protection Commission (CCPC) in Ireland. To ensure effective access to the file, undertakings should have a reasonable opportunity to review documents relating to the matters covered by the Statement of Objections. Accordingly, they should be provided with the most relevant documents, i.e. those expressly relied upon in the Statement of Objections (the "key documents"). Non-key documents should be accessible to external counsel under confidentiality rings, with the possibility of requesting additional disclosure where necessary for the defence.

According to public statements by the CMA, key documents have represented approximately 5–15% of examined case files. A streamlined access system focusing on such documents could therefore reduce disclosure obligations by over 85%, reducing workloads by hundreds of hours per case and generating significant efficiency gains for all parties. As a safeguard, full access to both key and non-key documents would remain available to external legal counsel within confidentiality rings, ensuring the right of defence and access to potential exculpatory evidence.

(iv) **Simplifying the procedure for the participation of complainants and third parties in competition investigations**

44. In your view, how could the procedure for third party participation in Commission competition proceedings be improved?

Generally, the procedure works satisfactorily and requires limited changes. The main concerns relate to the length of proceedings and the lack of communication, sometimes for long periods (as noted in the consultation documents), leaving parties in the dark.

The following general improvements might be considered:

Removing complainants' right to a fully reasoned rejection decision (which would still mean the Commission would be required to provide adequate, even if brief, reasoning for its decision) would reduce the administrative burden on the Commission and allow it to reject unmeritorious complaints more easily and quickly, thus freeing up resources.

A process for formal updates to the parties at given times would make the process more transparent and improve communication and feedback.

In addition, the procedure for third-party participation in Commission competition proceedings could be improved in the following ways:

a. Regarding informal complaints:

Informal complaints may be an interesting path to bring potentially anticompetitive practices to the attention of the European Commission, especially in cases where the complainant fears commercial retaliation, and thus wishes to avoid submitting a formal complaint or disagreements around confidentiality claims.

However, while informal complaints allow a degree of flexibility, they are also associated to legal uncertainty as regards the investigation of the complaint, its timeframe and the ways of guaranteeing the continued participation of the complainant. In order to limit this uncertainty, informal complainants could receive a reasoned informal answer from the European Commission within a reasonable time-limit on whether the information provided is enough to justify further action from the European Commission.

b. Regarding the threshold for being considered an interested third party:

Currently, third parties other than formal complainants must demonstrate a "sufficient interest" to be considered interested third parties under Article 27(3) of Regulation 1/2003. In practice, this threshold is strict and difficult to meet. Whereas the reasonability of this limitation is beyond doubt in terms of managing complex antitrust cases with multiple participants, this strict interpretation of the third-party intervention may lead to limited knowledge of newly created multi-sided markets.

45. Have you (either as an organisation or as a legal representative) submitted a formal complaint via Form C under Regulation 1/2003 over the last 10 years?

Yes.

46. Based on your experience:

a. **What would be the average the cost (e.g. person hours, legal fees, economist fees, and any internal business costs including business time devoted to draft and submit the complaint) of preparing a formal complaint using Form C? and**

AEDC members cannot provide estimates in terms of costs. The costs a complainant may incur may depend greatly on their expectations on the complaint's success and their commercial need for the Commission's intervention towards the infringement. As the results of the complaint may be uncertain despite prior informal contacts with the Commission, companies may decide to limit the associated legal costs and thereby the amount of resources devoted are frequently not comparable to the amount devoted by a potential infringer. In any case, submitting a solid complaint requires a great deal of involvement by the company and a significant amount of legal costs.

b. **What is the average cost (e.g. person hours, legal fees, economist fees, and any internal business costs including business time devoted to handle the complaint) of handling a possible rejection process by the Commission (i.e., including exchanges with the Commission, drafting a reply to an Article 7(1) Regulation 773/2004 pre-rejection letter and (if relevant) a potential appeal against a rejection decision)?**

Again, it may very much vary depending on the interests of the client to pursue the complaint, which in turn may depend on whether its outcome is existentially critical for the business. In our experience, in most cases where a rejection is formally or informally notified, clients would normally desist from any appeals as the Commission's discretion may be very difficult to discuss in Court. Therefore, resources devoted to discussing rejection are not always relevant.

47. Have you (either as an organisation or as a legal representative) submitted an informal complaint to the Commission concerning a possible antitrust infringement or have you (or an organisation you represented) been admitted to the proceedings as an interested third person over the last 10 years?

Yes.

48. Based on your experience what is the cost (e.g. person hours, legal fees, economist fees, and any internal business costs including business time devoted to draft and submit the complaint) of preparing one informal complaint query?

AEDC members cannot provide estimates in terms of costs.

49. Based on your experience (including in other jurisdictions), what would be the benefits and costs (e.g. reducing complainants time and legal costs, simplifying administrative burden) of removing the right to a rejection decision) for (a)

complainants; and (b) the Commission's procedure for handling complaints? Please provide any relevant qualitative and quantitative information you have in this regard (e.g. savings in person hours, legal fees and time).

In practice, the right to a rejection decision may be substituted by a significant delay in the response (which limits the utility of the complaint) or other disincentives, which complainants tend to accept given the Commission's discretionary powers. Therefore, maintaining the right to a rejection decision, where needed, seems a reasonable guarantee of due process. While few complaints are formally rejected and even fewer are appealed, the existence of this right acts as an important safeguard on the Commission's discretion and ensures transparency.

It is worth noting though, as explained above, that removing the right to a fully reasoned rejection decision would reduce the administrative burden for the Commission, allowing it to reject unmeritorious complaints more easily and quickly. However, the Commission should still be required to adopt a rejection decision with sufficient reasoning, even if brief (in particular for unmeritorious complaints), so as to allow the complainant to know the reasons for the decision and to exercise its judicial rights.

50. In your view, should the procedural rights currently attributed to formal complainants (i.e., the right to a non-confidential version of the statement of objections and to request participation in any oral hearing) be extended to other categories of complainants and/or third parties? Please indicate the benefits and costs of such a harmonisation of procedural rights for (a) complainants, (b) third parties, (c) investigated companies and (d) the effectiveness/efficiency of the Commission procedure providing both relevant qualitative and quantitative explanations where possible (e.g. impact on person hours, legal fees and time).

Given the demanding threshold for third-party intervention and the potential significance of such intervention for the investigation, yes, complainants' rights should be extended to other third parties. Fears of commercial retaliation may frequently be the reason for informal contacts or non-active participation in a file. When a company pursues third-party intervention and meets the applicable thresholds, it should be granted basic procedural rights such as access to the file or participation in oral hearings. Obviously, this impacts the length and efficiency of the procedure, but this has already been balanced when assessing "sufficient interest".

51. In your view, how could the current formal complaints procedure be changed to reduce the burden both on complainants that wish to submit information to the Commission and the Commission (e.g. indicating potential formalities that could be removed)? Please indicate the benefits, costs and impacts of your suggestion for complainants; and (b) the efficiency of the Commission's investigations providing both relevant qualitative and quantitative explanations where possible (e. g. impact on person hours, legal fees and time)

Greater transparency during informal contacts between the EC and potential third-parties or complainants, allowing them to know in which cases the authority considers there to be sufficient evidence to investigate in depth and in which cases it does not, thereby avoiding (i) the expenditure of time and resources incurred by formal complainants and (ii) the expenditure of time and resources incurred by the EC when it has to explain the reasons for not formally initiating an investigation and subsequently adopting a formal rejection decision.

2. **Policy options addressing risks of fragmented competition law enforcement in relation to stricter national laws on unilateral conduct**

52. Have you been subject to, or otherwise been affected by (e.g., as complainant or interested third party), an investigation by a National Competition Authority under stricter national law on unilateral conduct within the meaning of Article 3(2) second sentence of Regulation 1/2003 in the past 10 years?

Yes.

If yes, please explain in more detail the type(s) of investigation(s) and the nature of your organisation's involvement in terms of costs and/or benefits, providing quantification when possible.

As an association that brings together different operators who may have different interests, we can just aggregate experiences and we cannot go to details.

53. Have you been party to any private enforcement before national courts of stricter national law on unilateral conduct within the meaning of Article 3(2) second sentence of Regulation 1/2003 in the past 10 years?

Yes

If yes, were you a:

Applicant

Defendant

Other

If 'Other', please explain.

Please explain in which case(s) and what was the impact on you in terms of costs and/or benefits, providing a quantification when possible.

As an association that brings together different operators who may have different interests we can just aggregate experiences and we cannot go to details.

Please refer to our extended note attached.

54. Based on your experience, in a scenario where the current system for Member States to adopt and apply stricter national laws on unilateral conduct within the meaning of Article 3(2), second sentence of Regulation 1/2003 would be maintained, would adapting the existing coordination and information exchange mechanisms between competition authorities under Regulation 1/2003 so that these cover the application of such stricter national laws on unilateral conduct be likely to lead to more coherent, effective and complementary enforcement of available competition law instruments throughout the EU internal market?

Yes

The existing coordination and information exchange mechanisms between competition authorities regarding stricter national laws on unilateral conduct, would need to be adapted, in particular, as regards the following areas: extending the scope of the ECN, considering modification of case allocation rules and clarifying information exchange rules and joint investigation frameworks.

In addition to considering expanding/refining Option 1 as suggested in our extended note attached, the existing coordination, cooperation and information exchange mechanisms are mainly triggered by the application of Articles 101 and 102 TFEU. To extend these mechanisms to the application of stricter national laws, their scope should expressly cover cases based on national law that affect trade between Member States:

- The NCAs should have to notify the Commission and other NCAs the initiation of formal investigations into unilateral conduct under a “recorded” stricter national law that involve companies which practices have cross-border effects.
- Additional or new criteria for case allocation when confronting these cases, such as whether an NCA is the best placed to investigate conduct that primarily affects its domestic market, even if the legal basis is a stricter national law or whether it should be the Commission.
- The information exchange mechanisms between NCAs and the Commission could be adapted to ensure information can be shared for cases based on stricter national laws. To these effects, as long as the relevant conduct or practices fall within the ambit of competition law and has an effect on trade between Member

States, the legal basis for information exchange would have to be widened to cover investigations under stricter national laws.

However, the above proposed extended coordination and information exchange mechanisms in the ECN to cover stricter national rules could not be sufficient to procuring a more harmonised and consistent approach as national courts, which do not participate in the ECN, would continue to have a role in enforcing stricter national rules.

Additional mechanisms supported by the members of the working group who primarily support Option 2 could be the following: (a) Member States would be required to notify the Commission for approval of any stricter national laws on unilateral conduct; and (b) NCAs would be required to notify the Commission for approval, draft decisions applying such stricter national rules (for instance, along the lines of Article 11(4) of Regulation 1/2003). This would be similar to the procedure under the Merger Regulation (Regulation 139/2004, Article 21(4)), pursuant to which Member States must communicate to the Commission public interests they wish to protect that fall outside the scope of that Regulation, and the Commission must assess their compatibility with the general principles and other provisions of EU Law before they can be protected.

In addition, the existing coordination, cooperation and information exchange mechanisms should also need to be reinforced regarding the application of Articles 101 and 102 TFEU by National Competition authorities. Earlier coordination and a reinforced role from the Commission is necessary when the investigation by one NCA may give rise to the same undertaking/s being subject to a patchwork of different rules within the EU regarding one and the same activity (even if the geographical market is regarded as national). Not only this runs counter the uniform application of EU competition rules, but this insufficient coordination also has the paradoxical effect of calling into question the achievement of the internal market.

On a side note, this may also be considered for actions taken at a national level by the competition authorities concerning the DMA or stricter rules than the DMA but which are aimed at the same purpose and apply to the same companies as the DMA (gatekeepers). A similar system of consultations could be developed).

55. Further to your response to question 54 above, what would be the costs and benefits? If possible, please illustrate your answers with concrete examples (including quantification) of the impact you indicate as well.

As an association that brings together different operators who may have different interests we can just aggregate experiences and we cannot provide concrete examples to illustrate costs and benefits.

Being subject to or involved in an investigation under stricter national rules on unilateral conduct within the sense of Article 3(2), second sentence of Regulation 1/2003, carries both significant costs and potential benefits for companies. These outcomes depend of course on the company's role, whether it's the target of the investigation or the complainant.

56. Based on your experience, what would be the costs and benefits if the current system for Member States to adopt and apply stricter national laws on unilateral conduct within the meaning of Article 3(2), second sentence of Regulation 1/2003 were to be discontinued? In your answer, where relevant, please elaborate on specific aspects of such possible impact as regards a. administrative burden, b. level and type of costs incurred or prevented by your organization, c. level playing field throughout the EU internal market and d. overall effectiveness of competition law enforcement in the EU. If possible, please illustrate your answers with concrete examples (including quantification) of the impact you indicate as well.

The current system, in which Member States can adopt and apply stricter national laws on unilateral conduct, undermines the benefits of the otherwise harmonised system that applies across the EU. The provision in Article 3(2) second sentence of Regulation 1/2003 negatively affects the uniform application of EU competition law as it leads to a patchwork of national rules, to regulatory barriers between EU Member States and to increased costs and other inefficiencies for companies operating across the EU.

Experience has demonstrated, for instance in relation to the stricter German regulation of certain unilateral conduct, that the existence of different national rules or legal tests in relation to unilateral conduct poses challenges from a level playing field perspective. A proliferation of stricter national rules with different legal requirements can lead to diverging outcomes across the internal market and legal uncertainty for undertakings operating cross-border. It also encourages forum shopping.

In addition, there is little or no relevant case-law or guidance on the scope of Article 3(2) of Regulation 1/2003 or a clear overview of rules covered by it. Thus, the scope of the possibility for stricter national laws on unilateral conduct is not entirely clear in practice - for example, what conduct may be covered by particular rules, or which national laws qualify as 'stricter national laws' pursuant to Article 3(2). This creates legal uncertainty.

A fully harmonized approach would procure or facilitate the coherent application of Article 102 TFEU across the EU and reduce legal uncertainty and administrative and compliance burdens for business. Ensuring legal certainty through a harmonised and uniform approach to Article 102 TFEU across the EU is in line with the objectives in the Draghi Report and the Mission Letter of EU Commissioner Teresa Ribera to ensure that EU competition law and policy supports European companies to innovate, compete and lead world-wide. Disparate rules and the legal and administrative burden they entail impede companies from realising these objectives.

A uniform system would:

- **Reduce complexity**: removing the ability for Member States to apply stricter national laws would simplify the legal framework, reducing the need for businesses to navigate a patchwork of national rules in addition to EU law. This would streamline compliance and enforcement processes.
- **Lower compliance costs for businesses**: businesses, especially those operating cross-border, would benefit from a single set of rules, reducing the need for multiple legal assessments and compliance strategies tailored to different Member States. The proliferation of stricter national rules has led to legal uncertainty and increased compliance costs.
- **Ensure a level playing field throughout the EU internal market**: the current system results in fragmentation and a "patchwork" of rules, undermining the aim of a level playing field across the EU single market. Undertakings should be subject to the same rules on unilateral conduct regardless of where they operate in the EU.
- **Ensure better overall coherence and effectiveness of competition law enforcement in the EU, and increase legal certainty**: enforcement of abuse of dominance rules would be more consistent if all authorities applied the same substantive provisions. This would enhance legal certainty.

For a different view on the benefits of full convergence, we refer to our extended note.

Additional remarks (Q. 57-60)

57. Do you have any further comments on this initiative on aspects not covered by the previous questions?

The following points not covered by previous questions are relevant.

Expansion of the cartel settlement procedure to abuse of dominance cases and other non-cartel Article 101 infringements (eg. vertical restraints)

The Commission should consider expanding the settlement procedure to include abuse of dominance cases and other non-cartel cases under Article 101 TFEU (at least vertical restraints). Although the Commission has applied in the past a flexible approach thereto based on paragraph 37 of the Fining Guidelines, legal certainty would be accrued if a clear framework for settlement in Article 102 cases were stablished.

Benefits would include procedural efficiencies and better resource allocation: faster resolution, reduced administrative burden (abuse of dominance investigations are often complex and lengthy, with significant legal and economic analysis required and vertical restraint cases are frequently below the radar of the competition authorities as distributors do not want to confront their suppliers). It would:

- Incentivise undertakings to cooperate with the Commission, leading to quicker resolution of cases and earlier restoration of competition in the market.
- Reduce the administrative burden on both the Commission and the parties involved.
- Provide greater legal certainty for businesses, as the outcome would be agreed and therefore be less likely to be subject to lengthy appeals.
- Encourage a culture of compliance and proactive engagement with the Commission.
- Make it easier to find suitable and effective remedies via commitments proposed by the parties which in turn may even further reduce the fine (see some vertical restrain cases in which the Commission has accepted commitments and this has notably reduced the amount of the fines as a mitigating factor).

Power to impose remedies

Remedies are a useful tool to address infringements of the competition rules. The case law of the European Courts and the Commission's past practice are clear, however – it remains for the parties (not the Commission) to determine how to remedy infringements in a proportionate manner.

This must continue to be acknowledged by the Commission when articulating potential remedies in decisions, or in discussions with parties.

The provision in Article 7 of Regulation 1/2003, under which structural remedies can only be relevant either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy, should remain. It might be helpful to clarify that it is (again) for the relevant party, and not for the Commission, to decide whether a behavioural remedy would be more burdensome, and to establish procedural safeguards in this regard.

Structural remedies are generally very invasive and the Commission should accept that the use of structural remedies should remain exceptional.

Cooperation within the ECN

Differences in priority setting and enforcement approaches have resulted in differences between NCAs in enforcement activity or types of instrument used. An example is the hotel booking cases, in which different NCAs took different approaches, as a result of which the parties involved had to interact with multiple authorities in parallel and the uniformity of their business models was challenged. It is essential that coordination and discussions within the ECN take place to ensure a consistent approach across the EU, and that cases with effects across multiple Member States be dealt with by the European Commission so as to avoid risks of fragmentation in the internal market and inefficiencies due to the same markets/conduct being investigated in several Member States, with possibly diverging outcomes.

In this regard, consideration should be given to introducing a provision similar to that in Article 4(5) of the Merger Regulation, allowing parties to request referral to the Commission in cases where three or more NCAs are investigating the same potential restriction of competition (on the presumption that the potential restriction will affect trade between Member States).

Written observations by the Commission in NCA competition proceedings

Article 11(4) of Regulation 1/2003 establishes that no later than 30 days before a decision requiring that an infringement of Articles 101 or 102 TFEU be brought to an end, accepting commitments or withdrawing the benefit of a block exemption, NCAs must inform the Commission and provide relevant information and documents. Pursuant to Article 11(5) of Regulation 1/2003, NCAs may consult the Commission on any case involving the application of EU Law.

These procedural mechanisms allow the Commission to share its views with NCAs and/or to relieve NCAs of their competence to apply Articles 101 or 102 TFEU by initiating its own proceedings. However, often the Commission only shares its views with the relevant NCA. These discussions are often informal and do not result in any document recording the discussion/views that is added to the NCA's administrative file. Nevertheless, such exchange of views may influence the final decision taken by the NCA. This undermines full respect of investigated parties' rights of defence, since they are unaware of what was discussed between the Commission and the NCA and are thus unable to submit their views or respond. To ensure that the rights of defence of investigated parties are fully respected, the content of such discussions and any conclusions or advice given by the Commission to an NCA should be (at the very least) summarised in written form, incorporated in the NCA's and/or Commission's administrative file as appropriate, and shared with the investigated parties. The parties should have an opportunity to submit their views before a final decision is adopted.

58. Do you have any comments on the notices and guidelines relating to the Regulations (see, specifically: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/legislation-notices_en)?

Not at this stage.

59. If you wish to submit documents (for example, data, research paper, position paper) that you consider to be relevant for a possible revision of the Regulations, please upload them here. Please make sure that you upload only non-confidential versions. If the uploaded documents support your replies to any of the previous questions, please indicate the numbers of those questions.

[N/A]

60. Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

- Yes