

**PREPARATION OF THE REPORT ON THE FUNCTIONING OF REGULATION
1/2003
QUESTIONNAIRE**

I. INTRODUCTION

Regulation 1/2003¹, the cornerstone of the modernisation of the European Union's antitrust enforcement rules and procedures, entered into application on 1 May 2004. Article 44 of Regulation 1/2003 provides that the Commission shall by 1 May 2009, i.e. after five years of application, report on the functioning of Regulation 1/2003.

One of the key objectives of Regulation 1/2003 was to ensure more effective enforcement of EC competition rules in the interest of consumers and businesses while reducing bureaucracy for companies that operate in Europe. To this end, Regulation 1/2003 abolished the notification to the Commission of agreements for the application of Article 81(3) of the Treaty, a system which had become unnecessarily bureaucratic. Regulation 1/2003 also seeks to bring about a more level playing field for businesses as all enforcers are obliged to apply the EC competition rules to cases that affect trade between Member States. Regulation 1/2003 has also enabled Member States' courts and competition authorities to make a greater contribution to the enforcement of the EC competition rules. It has established close cooperation between public enforcers in the European Union with respect to work-sharing, mutual information about pending cases at different stages of the procedure and the exchange of information. After more than four years of application in practice, the Commission is interested in learning about stakeholders' practical experience with the application of Regulation 1/2003, which should provide key input for the preparation of the Report.

The present consultation gives interested parties the opportunity to provide input about their experience relating to the various issues at stake. Some questions are primarily addressed to the business community and their representatives who have had direct experience of the implementation of Regulation 1/2003. Other stakeholders are invited to comment as they consider appropriate. The Commission will analyse the outcome of this consultation as part of the factual basis for the preparation of the Report, alongside its own experience of applying Regulation 1/2003, feedback from national competition authorities and courts as well as any other relevant sources.

II. HOW TO CONTRIBUTE TO THE CONSULTATION

Interested parties are invited to reply to the questionnaire with details of their experience, irrespective of whether it relates to part of, or all, the issues raised. Any input beyond the scope of the questionnaire will also be welcome.

Replies can be submitted in all official EU languages. Given the possible delays in translating comments submitted in certain languages, translations of the replies in one of the Commission's working languages (English, French or German) would be welcome.

¹ Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1, 04.01.2003.

The deadline for replies is 30 September 2008. Replies should be sent to the European Commission, DG COMP, Antitrust Registry, 1049 Brussels, preferably via email to COMP-GREFFE-ANTITRUST@ec.europa.eu . **It is important that all replies clearly indicate "HT 1374 – Report on Regulation 1" as subject matter.**

DG COMP intends to make the replies to this questionnaire accessible on its website. Therefore, **if respondents do not wish their identity or parts of their responses to be disclosed, this should be clearly indicated** and a non-confidential version should be submitted at the same time. In the absence of any indication of confidential elements, DG COMP will assume that the response contains no confidential elements and that it can be published in its entirety.

PART 1 – DIRECT APPLICABILITY OF ARTICLE 81(3) EC

One of the key aspects of Regulation 1/2003 was the introduction of the direct applicability of Article 81(3) EC.

1. To your knowledge, how has the application of Article 81(3) in accordance with Article 1 of Regulation 1/2003 worked in practice? Have you encountered any particular issues in relation to the direct applicability of Article 81(3) EC that you would like to highlight? In your reply, please provide details / references for any cases referred to where possible and specify whether these issues related to: (i) the assessment made under Article 81(1) EC; (ii) the application of the four conditions of Article 81(3) EC; (iii) the burden of proof rule in Article 2 of Regulation 1/2003; or (iv) any other matter.
2. In your experience, how have companies and their legal advisors addressed the assessment of agreements, decisions and practices under Article 81(3) EC after the entry into application of Regulation 1/2003? How do you evaluate the impact of direct applicability on undertakings?

PART 2 – RELATIONSHIP BETWEEN EC COMPETITION LAW AND NATIONAL COMPETITION LAW

Article 3 obliges national competition authorities ("NCAs") and national courts to also apply Articles 81 and 82 when they apply national competition law to agreements and abusive practices which may affect trade between Member States. Agreements which may affect trade between Member States and which are not prohibited under EC competition law cannot be prohibited under national competition law. The latter so-called 'convergence rule' does not apply in the field of unilateral conduct.

1. In your experience, how were the obligation to apply EC competition law and the convergence rule complied with by NCAs and courts? Please explain your answer.
2. Have you been involved in proceedings before NCAs or national courts where the question of relying on EC competition law as legal basis for enforcement action, the parallel application of both national competition law and Articles 81/82 EC and/or the criterion of effect on trade arose²? If so, please specify the nature of the issues encountered and provide details where possible.
3. To what extent do you consider that Regulation 1/2003 succeeded in creating a level playing field and that agreements or practices capable of affecting trade between Member States are assessed consistently by the Commission, NCAs and national courts across the EU? Please illustrate any views expressed with concrete examples. In your experience, how do undertakings take account of the existence of provisions in national competition laws that differ from Article 82? Is there evidence that undertakings' EU wide business strategies are affected by the application of such rules? If you consider that that is the case, please provide details.

² Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101/81, 27.04.2004.

4. Have you been involved in proceedings before a NCA or a national court where the fact that national competition provisions on unilateral conduct were stricter than Article 82 EC arose? If so, please provide details about the relevant provisions, the issues encountered and specify what the outcome was where possible.

PART 3 – ENFORCEMENT BY THE COMMISSION

Regulation 1/2003 introduced certain new investigation powers for the Commission (notably the power to take statements, the power to seal premises during inspections, the power to inspect other than business premises; cf. Articles 17ss of Regulation 1/2003). The Regulation also created a new set of decisions, which are contained in Chapter III of Regulation 1/2003. The rights of complainants before the Commission are set out in Article 7(2) of Regulation 1/2003, Chapter IV of Regulation 773/2004³ and the Notice on the handling of complaints by the Commission.⁴

1. Please specify, to the extent possible, if you have been involved in Commission enforcement procedures based on Articles 81 and/or 82 EC, including sector inquiries. How do you evaluate the effectiveness and efficiency of the Commission's procedural framework? Please explain your answer.
2. Please specify to the extent possible if you have encountered practical or legal issues or difficulties in the context of a Commission investigation. Please specify in particular, if you encountered any issues or difficulties in respect of the Commission using the powers introduced by Regulation 1/2003.
3. Please specify to the extent possible if you have been involved in Commission procedures aimed at the adoption of a decision in accordance with Chapter III of Regulation 1/2003 where particular issues or difficulties arose.
4. In your experience, do you consider that the possibilities for complainants to be involved in proceedings for the application of Articles 81 and 82 EC by the Commission are working efficiently and effectively? In procedures involving one or several complainants, do you consider that the rights of the parties concerned (notably in view of protection of business secrets and confidential information) are sufficiently protected?

PART 4 – ENFORCEMENT BY NATIONAL COMPETITION AUTHORITIES

Regulation 1/2003 fully empowered NCAs to apply Articles 81 and 82 EC as a matter of public enforcement alongside the Commission. Article 5 lists the decisions that a NCA can take when applying Articles 81 and 82 EC. Otherwise, procedures and sanctions applied by NCAs are largely governed by national laws. In recent years, significant convergence across Member States has been observed.

³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings pursuant to Articles 81 and 82 of the EC Treaty, OJ L123/18, 27.04.2004.

⁴ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101/65, 27.04.2004.

1. Have you been involved in proceedings for the application of Articles 81 and 82 EC before NCAs? Based on your experience, how do you evaluate the enforcement action taken by the NCAs? Please illustrate your answer with reference to concrete examples where possible.
2. The institutional structure of the NCAs varies between Member States (e.g. one body with exclusive competence to investigate and decide; the division of the investigation and decision-making between two bodies; the NCA acts as a prosecutor with prohibition and/or fine decisions being imposed by national courts; and/or sectoral regulators have competence to apply Articles 81 and 82 EC to the sector for which they are competent). In your experience, does this raise any issues and if so, please specify.
3. Based on your experience, do you consider that the procedural framework applicable to NCAs' proceedings works efficiently and effectively? Please specify your views by authority and by subject matter (e.g. powers of investigation, types of decision, deadlines etc) as appropriate.
4. Have you encountered legal or practical difficulties due to specificities in the investigation powers, types of decisions and/or any other aspect of the procedures of individual authorities and/or due to differences of such matters between different authorities? If so, please explain in detail.
5. Please specify if you have been involved in proceedings before a NCA where particular issues or difficulties arose in relation to the imposition of sanctions (administrative, criminal or other) on undertakings for substantive violations of Articles 81 and 82 EC (e.g. the basis for calculation, criteria applied in setting a fine, modalities of judicial review). If so, please provide details to the extent possible.
6. Please specify whether you have been involved in proceedings where particular issues or difficulties arose with regard to sanctions imposed on natural persons⁵ (pecuniary sanctions, custodial sanctions, disqualification orders or other) by NCAs in the context of the application of Articles 81 and 82 EC. If so, please provide details to the extent possible.
7. Have you had experience with proceedings before national courts reviewing decisions of NCAs? Have you encountered any issues that you wish to report? Please specify as appropriate.

PART 5 – COOPERATION IN THE EUROPEAN COMPETITION NETWORK ("ECN")

Regulation 1/2003 foresees close cooperation between the Commission and national competition authorities within the European competition network (ECN). The Regulation 1/2003 enforcement regime is a system of parallel competences. Criteria for the work sharing between public enforcers are set out in the Commission Notice on Cooperation within the

⁵ This does not include the possibility of imposing a fine on a natural person in its capacity as undertaking (e.g., a fine imposed on a small owner-run business).

*network of competition authorities.*⁶ *The Regulation provides for a set of cooperation mechanisms including notably the power to exchange information; the power to use such information in evidence, subject to certain safeguards; the power to grant assistance with fact-finding measures (Articles 12, 22). Moreover, Article 11 provides for a number of mechanisms which seek to ensure coherent application, in particular, the obligation on NCAs to notify new cases and envisaged decisions involving the application of Articles 81 and 82 EC; the Commission's obligation to inform NCAs; and the Commission's power to initiate proceedings, with the effect of ending the competence of NCAs to deal with the same case.*

Article 16(2) of Regulation 1/2003 stipulates that NCAs, when ruling on agreements, decisions and practices under Articles 81 and 82 EC which are already the subject of a Commission decision, cannot take decisions which would run counter to the decisions adopted by the Commission.

1. Have you been involved in proceedings for the application of Articles 81 and 82 EC before the Commission or a NCA where you considered that the authority dealing with the case was not well placed to do so? If so, please specify, giving reasons.
2. Have you been involved in proceedings for the application of Articles 81 and 82 EC before the Commission or a NCA in which the issue of reallocation from one authority to another arose? If so, please provide details, e.g. whether you were acting as complainant or defendant and specify the outcome where possible.
3. Have you encountered any issues or difficulties with respect to parallel action by two or more NCAs?⁷ If so, please provide details.
4. Have you been involved in proceedings before the Commission, NCAs or national courts in which a lack of coherent application of Articles 81 and 82 EC was specifically invoked? If so, please provide details and specify the outcome where possible.
5. Have you been involved in proceedings before the NCAs in which the application of Article 16(2) has been explicitly raised? If so, please provide details and specify what the outcome was where possible.
6. Have you been involved in proceedings for the application of Articles 81 and 82 EC before the Commission or NCAs in which the issue of the exchange of information pursuant to Article 12 was raised? If so, please specify to the extent possible, highlighting any particular issues or difficulties.
7. Have you been involved in proceedings for the application of Articles 81 and 82 EC before the Commission or NCAs in which you are aware that information exchanged was used in evidence pursuant to Article 12? If so, please specify to the extent possible, highlighting any particular issues or difficulties.

⁶ Commission Notice on cooperation within the network of competition authorities, OJ C101/43, 27.04.2004 ('Network Notice').

⁷ Paragraph 12 of the Commission Notice on cooperation within the network of competition authorities, *ibid.*, specifies: "Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately."

8. Have you been involved in proceedings for the application of Articles 81 and 82 EC in which you are aware that information exchanged between ECN members was used in evidence to impose sanctions on natural persons pursuant to Article 12? If so, please specify to the extent possible, highlighting any particular issues or difficulties.
9. The Network Notice contains a number of principles regarding the position of leniency applicants, including, inter alia, the principle that an ECN member will only transmit information voluntarily submitted by a leniency applicant to another ECN member if specific conditions are met.⁸ Please outline whether you have had practical experience of these principles, with reference to concrete examples where possible, and specify whether you consider that these principles constituted a sufficient safeguard for leniency applicants.
10. Have you been involved in proceedings for the application of Articles 81 and 82 EC in which you were aware that investigations or fact-finding were carried out by one NCA on behalf of another NCA or the Commission pursuant to Article 22? If so, please specify to the extent possible, highlighting any particular issues or difficulties.

PART 6 – COOPERATION BETWEEN COMPETITION AUTHORITIES AND JUDICIAL AUTHORITIES

Pursuant to Article 10 EC, the Commission and national courts have a mutual duty of loyal cooperation with a view to attaining the objectives of the EC Treaty. Article 15 enumerates the most frequent types of assistance given: the transmission of information and the giving of opinions by the Commission (Article 15(1) and interventions by the Commission or the national competition authorities as amicus curiae (Article 15(3)). With the exception of Article 15(3), cooperation between national competition authorities and national courts is primarily governed by national procedural law.

1. Have you been involved in proceedings before national courts where the issue of Article 15 arose? If so, please specify to the extent possible, highlighting any particular issues or difficulties. Please also provide any comments you may have regarding the use and/or scope of Article 15.
2. Do you have experience with civil litigation where the relevant procedural framework obliged/empowered or limited/prevented (e.g., rules protecting leniency applicants) the Commission or a NCA to/from transmitting information obtained in a competition proceeding for the application of Articles 81 and 82 EC to national courts? If so, please provide details to the extent possible.
3. Have you been involved in proceedings before the Commission or a national competition authority where the issue of transmitting information to a national court for purposes of private litigation arose? If so, please specify to the extent possible, highlighting any particular issues or difficulties.
4. Are you aware of situations where the transmission of information obtained in competition proceedings for the application of Articles 81 and 82 EC to a judicial

⁸ Paragraphs 37-42 of the Commission Notice on cooperation within the network of competition authorities, *ibid.*

authority was sought for the purpose of criminal prosecution? If so, please provide details and indicate the outcome to the extent possible.

PART 7 – INTERNATIONAL COOPERATION

Discovery/disclosure rules in third countries may oblige undertakings which are/have been involved in proceedings for the application of Articles 81 and 82 EC before the Commission or a NCA to reproduce before authorities of third countries (including judicial authorities, competition authorities and arbitration tribunals) information which forms part of the Commission's or the NCA's file.

1. Have you been requested to provide documents which form part of the Commission's or a NCA's file with respect to proceedings for the application of Articles 81 and 82 EC by authorities of third countries? If so, please provide details to the extent possible, specifying whether you provided the solicited documents to these authorities.
2. Based on your experience, how do you evaluate the impact of third country requests as mentioned in the previous question? How do undertakings and their advisors take account of / react to the situation described? Please specify your reply.

PART 8 – OTHER QUESTIONS

1. Please report on any other experience you deem relevant in view of preparing the Report on Regulation 1/2003 and which is not covered by the questions above.

Thank you!