ClientEarth

October 2025

EU antitrust procedural rules – Revision

ClientEarth and Simon Holmes' position paper – call for evidence

We are grateful to the Commission for the opportunity to provide feedback in response to the Commission's ideas on potential revision to the EU antitrust procedural rules – as set out in Regulation 1/2003 and Regulation 773/2004 (the "Feedback Request").

We are aware that major corporations (and the lawyers and consultants advising them) will be commenting on many or most of the issues in the Feedback Request. As in our contribution to the evaluation in 2022, our response only focusses on particular aspects where ClientEarth, as an environmental NGO, can add value. We will therefore limit our own comments to two issues which are likely to be most relevant to SME's and third parties – including civil society and NGOs such as ClientEarth.

These are:

A. *iv) Simplifying the procedure for the participation of complainants and third parties in competition investigations"*; and

B. *"Policy options addressing risks of fragmented competition or enforcement in relation to stricter national laws on unilateral conduct".*

A. iv) The participation of complainants and third parties in competition investigations

As indicated in our contribution to the evaluation in 2022, the revision of Regulation 1/2003 is an opportunity to clarify that (in practice) the Commission receives complaints – so far generally considered as "market information" – from, and hears, a broad range of stakeholders and not just the usual stakeholders (corporates and their competitors). Obvious examples are consumer groups and NGOs with specialist knowledge of relevance to the competition law analysis and impacts on consumer welfare (in the broader and correct sense of that term).

As the Commission rightly says *"information from complainants is important for the Commission to detect potential infringements."* We would add to this that such information is equally important if the Commission is to be able to conduct an informed and balanced evaluation of the issues during the course of the investigation.

This is particularly the case where the complainant is an undertaking operating within the market in question, or is a representative of civil society with substantial and acknowledged expertise on particular issues relevant to the proper functioning of that market in line with EU priorities and policy objectives – such as the protection of consumers or the decarbonisation of the EU economy.

It is important not to reduce the rights of complainants and third parties, or to reduce their incentives to bring vital information to the Commission's attention – particularly in view of the (overly) narrow interpretation that has been given to the concept of the "legitimate interest" that those entitled to make a complaint must have.[1]

In these circumstances we would strongly oppose Option 1 (*"Abolish formal complainants' right to a rejection decision abolish formal complainant's rights to a rejection decision"*) and would favour Option 2 (*"Harmonise the rights of non-investigated parties in competition proceedings harmonising the rights of non-investigated parties* […]*"*).

In support of this we would particularly make **five points**:

1. It is a fundamental principle of human rights law that the rights of defence must be fully respected.[2] Given the fundamental nature of the rights of defence these rights must not be interpreted restrictively. In our submission this means that the rights of defence are not limited just to the specific undertaking(s) which are the subject of the investigation.

2. Only if a complainant receives a rejection decision giving reasons for that decision can the rights of defence be fully respected. The obligation on the Commission to give reasons for its decisions in all competition proceedings (and indeed more widely) is laid down in Article 296 TFEU and has been consistently confirmed by the European courts.[3] We also share the views that the *"the value of judicial review should not only be measured by its outcomes, but also by how it compels by the Commission to meet its duty of care and duty to state reasons."*[4]

[1] Article 7(2) of Regulation 1/2003 as interpreted by the Commission. See the Commission's Notice on the handling of complaints [2004/C 101/05] at paras 33 to 40 and especially para 38.
[2] See, in particular, Article 48 (2) of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights.
[3] See, for example, Case 73/74 *Transocean Paint* at paras 30 to 35.
[4] Or Brook, Katalin J Cseres, Ben Van Rompuy, *Abolishing Formal Complaints? Balancing Technical Expertise and Efficiency with Democratic Accountability in the European Commission's Decision-Making*, Journal of European Competition Law & Practice, December 2023, available at https://doi.org/10.1093/jeclap/lpad056, Section II.C.3.

3. Articles 7 and 8 of Regulation 773/2004 set out a careful balance between, on the one hand, the interests of complainants and their rights of defence and, on the other hand, the Commission's interest in an efficient system which is not more resource intensive than is necessary and proportionate.

4. We note from the Commission's "Summary report of NCA feedback on the evaluation of Regulations 1/2003 and 773/2004" ("The NCA Feedback Report") that:

    a. "there was general agreement among the NCAs that the legal framework for the protection of procedural rights was efficient"; and

    b. "NCAs considered the procedural rights in Regulations 1/2003 and 773/2004 still relevant and found them overall coherent with other EU laws and policies"[5]

5. We also share the views that abolishing the formal complainant's rights to a rejection decision is not an appropriate solution to an issue resulting from a lack of effectiveness and staff resources.[6] Instead, we also believe that other avenues may be explored in order to improve the overall existing system: (i) establishing guidance on priority cases, (ii) introducing the possibility of informal contacts with complainants before filing a formal complaint and (iii) introducing more stringent admissibility conditions by means of a higher informational threshold (if so, together with a special status of complainants for representative organisations acting in the public interest).[7] We also endorse the idea of supporting civil society organisations and other representative organisations through financing and organising capacity building and training to support higher quality complaint filings.

In light of the above, we see no justification for abolishing formal complainants' right to a rejection decision (Option 1).

We would welcome the harmonisation of the rights of complainants and interested third parties (Option 2) but we note the following comments for consideration regarding Option 2:

- Currently, complainants need to demonstrate a legitimate interest in order to be closely associated with the proceedings, while interested third parties only need to demonstrate a sufficient interest to be heard in writing. It should be clarified how the rights can be aligned if these notions remain distinct.
- Interested third parties already have the right to be informed of the nature and subject matter of the proceedings although the provision of a non-confidential version of the statement of objections to interested third parties is currently at the discretion of the Commission;[8] we suggest that it is systematically provided to interested third parties as part of their right to be informed. They can also request participation in an oral hearing although complainants are more likely to be found

[5] See page 6 of the NCA Feedback Report. We acknowledge that NCAs said that the protection of procedural rights of parties should be balanced with procedural efficiency but, in our view, the appropriate balance is already provided by articles 7 and 8 of Regulation 773/2004.
[6] Or Brook, Katalin J Cseres, Ben Van Rompuy, *Abolishing Formal Complaints? Balancing Technical Expertise and Efficiency with Democratic Accountability in the European Commission's Decision-Making*, Journal of European Competition Law & Practice, December 2023, available at https://doi.org/10.1093/jeclap/lpad056, Section V.
[7] *Ibid*.
[8] Wouter Wils, *Procedural Rights and Obligations of Third Parties in Antitrust Investigations and Proceedings by the European Commission*, World Competition Kluwer Law International, November 2021, available at http://ssrn.com/author=456087, Section VI. C, p. 50.

'appropriate' to be heard orally and the decision is up to the Hearing Office;[9] ClientEarth would welcome clarification on how the right to be heard orally may be improved for interested third parties.
- ClientEarth also supports the view that the notion of sufficient interest for interested third parties does not need to be of economic nature[10] and would welcome express recognition that civil society organisations can improve the knowledge and understanding of the Commission and reinforce its capacity to act in the public interest.

We conclude that Option 2 should have added value for interested third parties and could certainly not compensate for Option 1 (we note the *"and/or"*).

B. Stricter national laws on unilateral conduct

We would support Option 1 concerning improving the existing coordination and information exchange mechanisms between NCAs and the Commission under Regulation 1/2003. We would **not** support Option 2 which proposes to discontinue the current system permitting stricter enforcement of some unilateral conduct under national laws.

We would make **five points** in relation to this:

1. Stricter national laws on unilateral conduct (as permitted by Article 3(2), last sentence of Regulation 1/2003) helps to fill an important lacuna in the European system of competition law enforcement. Article 102 TFEU is (no doubt for good reasons) only relevant when an undertaking has a "dominant position". National laws prohibiting certain unilateral conduct can be relevant in circumstances where there is no such dominant position but where the unilateral conduct in question can be seriously detrimental to the proper functioning of a market. As the Commission illustrates in the NCA Feedback Report, an example of this would be the "prohibition of abuse of (relative) market power in cases of economic dependence"[11] (e.g. refusal to supply a crucial input or subjecting supply to unfair conditions).

2. As the Commission acknowledges in the NCA Feedback Report such provisions can be *"based on provisions of national constitutional law and, as such, can be important in particular also for the private enforcement of competition law"*[12]. If such national laws were prohibited, this would therefore run counter to the Commission's policy of encouraging private enforcement as a complement to public enforcement (and counter to the Commission's concerns over the resource intensity of certain aspects of public enforcement of EU competition law by the Commission).

3. As the Commission states in its Feedback Request that Option 1 (which involves adapting the existing coordination and information exchange mechanisms between competition authorities under Regulation 1/2003 so that these cover the application of stricter national laws on unilateral conduct) would *"ensure the coherent, effective and complementary enforcement of available competition law instruments".* We agree with this as it enables the Commission to harness the resources of NCAs throughout the EU (consistent with the principle of subsidiarity and modernisation) without compromising the integrity of the system as a whole.

[9] *Ibid*.
[10] *Ibid*, Section VI. B.1, p. 44.
[11] See page 11 of the NCA Feedback Report.
[12] See page 11 of the NCA Feedback Report.

4. Furthermore, the NCA Feedback Report confirms that *"according to the NCAs, the provisions on cooperation had been adequate and appropriate for the effective and uniform application of Articles 101 and 102 TFEU across the EU."*[13]

5. The NCA Feedback Report also acknowledged that *"situation where parallel investigations by different competent regulatory authorities raised concerns of a potential violation of the ne bis in idem principle, it is not very common yet".*[14]

In summary we submit that:

- there is considerable value in the current system by which Member States can tackle certain unilateral action causing harms which fall outside the ambit of Article 102 TFEU;

- in practice there is little evidence of this causing difficulties (except to those guilty of infringing the national laws in question);

- any difficulties that could potentially arise could be well addressed by the sort of proposals outlined under Option 1; and

- discontinuing the current system would be totally disproportionate to the potential harms that could theoretically be envisaged.

For any enquiry, please contact:

Catherine Derenne
Juriste – State aid & Competition
cderenne@clientearth.org
www.clientearth.org

Co-author and adviser:

Simon Holmes
Legal adviser, ClientEarth
Member, UK Competition Appeal Tribunal
Visiting Professor in Law, Oxford University
Co-chair of the International Chamber of Commerce (ICC)'s Sustainability and Competition Taskforce

[13] See page 10 of the NCA Feedback Report.
[14] See the "Concluding remarks" in the NCA feedback Report.