

COMMENTS TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON THE REVISION OF EU ANTITRUST PROCEDURAL RULES

The logo for Ius Omnibus features the text "ius omnibus" in a blue, lowercase, sans-serif font. A vertical dotted line passes through the center of the word "omnibus", extending above and below the letters.

SUBMITTED BY CONSUMER ASSOCIATION IUS OMNIBUS

I. IUS OMNIBUS

Ius Omnibus (Ius), with registered office at Second Home Lisboa, Mercado da Ribeira, Av. 24 de Julho, 1200-479 Lisbon, Portugal, is a non-profit association, created in March 2020, with the aim of promoting and defending the rights and interests of consumers in the European Union. It is a consumer protection association registered and recognized by the Portuguese Government and the European Commission as a qualified entity under Directive (EU) 2020/1828, which has filed several class actions in the field of consumer protection.

Ius' interest in participating in this public consultation on the reform of Regulations (EC) No. 1/2003¹ (Regulation 1/2003) and (EC) No. 773/2004² (Regulation 773/2004) stems from its commitment to the effective defense of consumer rights. These Regulations constitute the essential procedural framework for the investigation, processing, and resolution of infringements of competition rules in the European Union, regulating aspects such as the Commission's investigative powers, the rights of defense of the parties, the processing of complaints, and cooperation with national authorities.

Given that the correct application of these rules has a direct impact on the existence of fair, innovative, and competitive markets, with immediate effects on the quality, price, and diversity of goods and services available to consumers, Ius considers it essential to

¹ Regulation (EC) No 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

² Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

contribute its vision and experience. Its participation seeks to contribute to the reform strengthening the *enforcement* framework, ensuring more agile and transparent procedures that are adapted to the challenges of digitalization and the protection of European consumers' interests.

II. The public consultation

The European Commission has launched a process to evaluate Regulations 1/2003 and 773/2004, which establishes the procedural framework for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). After almost 20 years in force, it is appropriate to reflect on the effectiveness, efficiency, consistency, relevance, and European added value of these rules, in a context profoundly transformed by the digitalization of the economy, the globalization of markets, and the emergence of new business models.

The review therefore represents an opportunity to strengthen the capacity of European institutions and national competition authorities to act with greater agility and consistency, while ensuring consumer protection, procedural transparency, and the creation of a fairer competitive environment.

III. Comments

This section contains lus's comments and contributions to the public consultation:

1. TOWARDS A MORE EFFECTIVE USE OF INTERIM MEASURES IN THE EUROPEAN ANTITRUST FIELD

The use of interim measures in the field of competition law and European reveals certain shortcomings that affect their functionality, ultimately hindering effective competition and proper consumer protection.

Firstly, the first problem is identified in the wording of Article 8 of Regulation 1/2003. This article states that "*in cases of urgency justified by the risk of serious and irreparable damage to competition, the Commission may, acting ex officio, adopt precautionary measures.*" The wording of the article leaves no room for doubt: precautionary measures may not be applied at the request of a party, which creates a clear disincentive for affected individuals to offer evidence to the European Commission (EC), which has two negative consequences:

- (i) The EC is slower in identifying situations likely to cause serious and irreparable damage to competition. In the area of provisional measures, the value of the

instrument lies in its immediacy. However, the complexity of the Commission's internal procedures and the lack of agile protocols cause delays that, in practice, neutralize the usefulness of these measures.

- (ii) The EC is less effective in this detection task, as it lacks the evidence to support the "*periculum in mora*" (danger in delay) that must underpin any precautionary measure. In this regard, although the aforementioned Article 8 requires the existence of a serious and irreparable risk, sufficiently clear criteria and objective parameters have not been established to anticipate in which cases this condition will be considered to be met. The absence of clear guidelines has a negative effect on both the EC and market operators: for the former, because it limits its scope of action to obvious and extreme situations, reducing its preventive capacity; and for the latter, because it introduces legal uncertainty and a lack of predictability, weakening confidence in the system.

As a result, provisional measures are often considered an exceptional tool compared to ordinary procedures, which means that these mechanisms are used very marginally³. Proof of this is that the last precautionary measure was adopted five years ago in case AT.40608 Broadcom⁴.

In conclusion, our proposals for improvement can be summarized as follows:

- Introduce the possibility that precautionary measures may be requested by the parties and not only by the Commission acting ex officio. Currently, the parties may request in writing that the Commission agree to a precautionary measure, but there is no formal request mechanism with its own appeal system. In turn, this proposal would also entail a natural development of precautionary justice and greater depth in the requirements for applying these measures in European competition proceedings;
- Strengthen the criteria for *periculum in mora*, with guidelines that allow for greater legal certainty for both economic operators and victims of anti-competitive behavior.
- Streamline the processing of such proceedings through shorter deadlines and simplified protocols that prevent the tool from losing effectiveness due to unnecessary delays.

³ Case [T-184/01 R IMS Health v Commission](#), EU:T:2001:259, para 144.

⁴ Case [AT.40608](#), Commission Decision of October 16, 2019. Between May 1, 2004 (entry into force of Regulation 1/2003) and the end of 2023, the Commission adopted 220 enforcement decisions [Commission's evaluation of Regulation 1/2003 and Regulation 773/2004 (n 3), p. 28].

2. ACCESS TO FILES AND CONSUMER LEGITIMACY: TOWARDS A MORE TRANSPARENT AND BALANCED FRAMEWORK

Access to much of the information contained in the files is decisive in bringing subsequent actions for damages, a crucial mechanism for the defense of consumers who suffer damage as a result of anti-competitive infringements. In this specific section, we consider it necessary to go a step further than what is established by the EC in the consultation guidelines.

The EC, in the options it suggests as lines of reform, proposes access by a limited number of third parties. We consider, however, that this is insufficient and that the conditions under which a document may or may not be disclosed must be properly defined. The reason for this is simply to ensure a certain degree of legal certainty for consumers and those potentially affected by competition infringements. If a set of clear criteria is not established, it would be easy, as we explain below, for institutions to resort to general assumptions and vague justifications, which would greatly hinder access by those affected to documents in a file held by the EC.

In this regard, there are two procedural obstacles that make it difficult for consumers and individuals to obtain compensation for damages: first, access to administrative files themselves and, second, standing to request access to them.

2.1. The tension between the confidentiality of documentation and the right of access to administrative files

In this regard, the first problem to highlight is that the treatment of document confidentiality and access to the file can prolong proceedings for years. In this regard, the current regulation is based on the premise that access does not necessarily have to cover the entire investigation file and may be limited to documents containing information clearly relevant to the matter of provisional measures. This restrictive approach gives rise to extensive debates about the information to which consumers can have access, which delays these proceedings; however, in the meantime, consumers continue to suffer damages that are difficult to repair.

The case law of the Court of Justice of the European Union (CJEU) has been clear in pointing out the limits of these restrictions. In the case of *De Capitani v Parliament*⁵, the CJEU stated that the EC must explain how the disclosure of the requested documents could specifically and effectively harm the interest protected by the exception. Access to documents cannot be denied if there is an overriding public interest in their disclosure. In this regard, a position of restricting access to certain information without specific justification is not valid. Likewise, in its cases *Commission v Agrofert Holding*⁶ and *Commission v Éditions Odile Jacob*⁷, the CJEU annulled EC decisions for failing to justify the denial of access to a file. It follows from

⁵ Case [T-540/15](#), ECLI:EU:T:2018:167.

⁶ Case [C-477/10 P](#), EU:C:2012:394.

⁷ Case [C-404/10 P](#), EU:C:2012:393.

this case law that a general or abstract position of restricting access, or the systematic use of general presumptions, is not valid.

In conclusion, on this point, our proposal for improvement is as follows: to precisely define the criteria according to which information may be consulted by those concerned. The EC should avoid an overly formalistic approach which, in practice, renders effective judicial protection meaningless. It is essential to clearly define the objective criteria that determine when information can be considered confidential and when, on the contrary, the public interest in its disclosure should prevail.

In this regard, and although it goes beyond the scope of this public consultation, considerations relating to access should be assessed in the light of the provisions of Regulation (EC) No. 1049/2001⁸. The right to transparency must be guaranteed and confidentiality interpreted more restrictively, so as to allow access to non-confidential documents. Ideally, access should be granted to the non-confidential version of such documents, without the possibility of declaring a document or part of a file confidential in its entirety unless the reasons justifying such a measure are proven.

2.2. Towards a qualified right of standing for consumer associations

The second problem we referred to is the standing to request access to the file. Currently, access to the file in competition proceedings is limited to the companies under investigation, while consumers and their associations have no direct standing; they can only submit written comments and the EC may decide to show them limited information. This leads to a lack of transparency, inequality of arms, and difficulties in bringing collective actions for damages.

The current paradigm creates a mismatch between the European Union's legal system and that of the other Member States, where there is a trend in favor of access to competition files. We highlight the case of Sweden, which allows any citizen, without the need to prove an overriding public interest, to access the non-confidential version of the file.

In Spain, the Council for Transparency and Good Governance, the highest administrative body in this area, has also come out in favor of allowing consumer associations to access the non-confidential version of a competition sanctioning file. This means that the confidential nature of the information is declared rigorously, rather than on the basis of assumptions that could lead to a lack of defense.

To strengthen consumer protection, it would be advisable to grant consumer associations a qualified right of access, at least to non-confidential summaries and key documents on the impact on prices or quality. In this regard, consumer associations can play an essential role in channelling the views and interests of many consumers. This would avoid the risk of overburdening the Commission with a multiplicity of individual requests for access to the

⁸ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of May 30, 2001, regarding public access to European Parliament, Council, and Commission documents

file, since instead of processing potentially thousands of applications from individual consumers, the institutions would interact with a limited number of representative organisations.

In this way, efficiency and procedural economy would be preserved, while ensuring that the collective voice of consumers is effectively heard in competition proceedings.

Besides reducing the eventual burden for the Commission, access to the file by consumer associations also enables clearer information for consumers. Administrative files can often be complex and hard to analyse for those not familiar with administrative law and the matter at hand.

Thus, allowing consumer associations to previously simplify and facilitate the assessment for consumers benefits both (i) consumers, as it provides them with simpler and accessible information, and (ii) the Commission, as it also brings EU citizens closer to the work done by the Commission and the role it has in safeguarding the Single Market.

All in all, consumers should also be able to make informed comments, have a quick way to challenge denials, and have greater access after final decisions, in coordination with Directive 2014/104/EU on damages (Directive 2014/104/EU).

In this way, the right to access the file would cease to be merely residual and would become a real tool for consumers to participate in the defense of competition and obtain more effective protection against anti-competitive practices.

The procedural framework must be consistent with Directive 2014/104/EU, so that confidentiality restrictions do not block collective actions by consumers. In this regard, the current wording of both Regulations ignores one of the aims of Directive 2014/104/EU, as indicated in recital 6 of that regulation, which emphasizes that *"In order to ensure the effectiveness of private enforcement by individuals under civil law rules and the effectiveness of public enforcement by competition authorities, it is necessary that both instruments interact to ensure the maximum effectiveness of competition rules. It is necessary to regulate **how these two forms of enforcement are coordinated in a coherent manner**, for example in relation to the **conditions of access to documents** held by competition authorities. Such coordination at Union level will also prevent divergence between the applicable rules, which could jeopardize the proper functioning of the internal market."* Excessively limiting access to files weakens this interaction and may jeopardize the proper functioning of the internal market.

Furthermore, restrictions on access to information also have a negative impact on justice, as they require in many cases disclosure requests and subsequent damage claims to be brought without prior information on the viability of the lawsuit and the damage suffered by consumers. Shifting the burden of these requests to the courts is negative from an



administrative point of view, but it also has an impact from a more European perspective, since the institutions of the Union, in this case the Commission, can overwhelm and affect the normal functioning of the courts of the Member States. In other words, it goes beyond the sphere of the European Union institutions for other bodies to take on requests that could be properly handled within the EU.

We consider it necessary, ultimately, and in order for the EC to duly justify the refusal of access to a file, to emphasize more expressly certain modifications that should be taken into account. In this regard, it appears that the reform of Regulations 1/2003 and 773/2004 could conflict with some CJEU case law if each case is not explicitly regulated. In particular, we refer to the CJEU judgment of June 19, 2018, *Baumeister* case⁹, in which the CJEU establishes that, for the purposes of Regulation 1049/2001, it is valid for the EU institution required to grant access to a document to rely on general presumptions applicable to a category of documents when similar general considerations may apply to requests for disclosure relating to documents of the same nature. We consider that, for the purposes of Regulation 1/2003, it would be advisable to avoid recourse to general presumptions, so that the EC must provide express justification in most scenarios, with recourse to general presumptions being marginal (for which it relies on abundant case law: the judgments of July 1, 2008, *Sweden and Turco v. Council*¹⁰, and of July 16, 2015, *ClientEarth v. Commission*¹¹).

This idea is intertwined with the conclusion reached by the CJEU in another relevant judgment of February 27, 2015, *Commission v. EnBW*¹², establishing that in proceedings under Article 81 of the EC Treaty, there may be a general presumption that the documents in the file are covered by the exceptions relating to the protection of commercial interests and the purpose of the investigation. According to the CJEU itself in this judgment, this should not exempt it from justifying the refusal, but given that, in accordance with the previous judgment, that justification could be based on general presumptions, it is reasonable to think that in certain scenarios access to documents may be refused on vaguely justified grounds, which is detrimental to those affected in proceedings of this nature.

Consequently, the future reform must incorporate additional safeguards that oblige the EC to provide express and individualized justification, reserving general presumptions only for very exceptional cases. This would strengthen legal certainty, allow for effective control by the courts, and ensure that the principle of proportionality is correctly applied in each case.

In conclusion, our proposals for improvement can be summarized as follows:

- Precise definition of confidentiality: clear and objective criteria must be established to differentiate between truly sensitive information (such as trade secrets) and information of general interest to consumers. This distinction would prevent the

⁹ Case [C-15/16](#), ECLI:EU:C:2018:464.

¹⁰ Case [C 39/05 P and C 52/05 P](#), EU:C:2008:374, paragraphs 48 to 50.

¹¹ Case [C 612/13 P](#), EU:C:2015:486, paragraphs 68, 69, and 77.

¹² Case [C-365/12 P](#), ECLI:EU:C:2014:112.

excessive use of confidentiality clauses as an argument for denying access, while ensuring the legitimate protection of the commercial interests of the companies under investigation.

- Qualified right of access for consumer associations: consumer associations, as representative entities recognized by European and national legislation, should have a right of access to certain parts of the file, at least in the form of non-confidential summaries and key documents relating to the impact of the conduct on prices, quality, or consumer welfare. This would enable them to play an active role in defending competition, reduce inequality vis-à-vis the companies under investigation, and facilitate the exercise of collective actions for damages.
- Informed comments: the current framework limits consumers' ability to submit comments without sufficient information to do so on a sound basis. Recognizing minimal but meaningful access to information would enable them to make more informed comments, resulting in a more balanced, transparent, and effective procedure. In addition, a streamlined procedure should be put in place to challenge refusals of access, thereby strengthening judicial review of EC decisions.
- Extended access after final decisions: once administrative proceedings have been concluded, greater access to files should be guaranteed, in particular where the information is necessary for the preparation of damages actions under Directive 2014/104/EU. This extended access must be consistent with the purpose of that Directive, which is to facilitate effective redress for damage resulting from anti-competitive conduct. In turn, it would allow consumers and their associations to have access to essential evidence without having to face unjustified confidentiality barriers.

These proposals seek to rebalance the system, ensuring that the protection of legitimate business interests does not become an insurmountable obstacle for consumers. At the same time, they would strengthen transparency, improve consistency between public and private enforcement of competition law, and ensure greater efficiency of the regulatory framework for the benefit of the internal market and end users.

3. COORDINATION BETWEEN THE EC AND NATIONAL COMPETITION AUTHORITIES

Following the entry into force of Regulation 1/2003, EU antitrust rules have been enforced by the EC and national competition authorities in a multi-level enforcement system¹³. The digitization of the economy poses the challenge of ensuring proper coordination between

¹³ Fazio, Emanuele. 2022. "Adapting Competition Law to the Digital Transition. Two Challenges." *European Papers* 7, no. 3 (December 23): 981-992: <https://www.europeanpapers.eu/europeanforum/adapting-competition-law-to-digital-transition>

the EC and national authorities so that competition rules are not applied in a fragmented manner. However, while this model is expected to be applied to combat the challenges of the digital economy, its effectiveness cannot be taken for granted.

Experience shows that the mere existence of a decentralized framework does not automatically guarantee its effectiveness in rapidly changing contexts such as the digital one. Online platforms, multisectoral digital markets, and technological ecosystems generate cross-border problems that cannot always be resolved efficiently if each national authority acts according to different criteria. In this regard, proper coordination between the EC and national competition authorities is essential to preserve the unity of the internal market and regulatory predictability.

In this regard, following the recommendations proposed by the EC itself, in order to address the future risks of fragmentation and legal uncertainty posed by the significant challenges of digital objectives, the EC Communication "*A competition policy fit for new challenges*"¹⁴ proposes a broader use of top-down measures, specifically communications, guidelines, and block exemption regulations, in order to guide national competition authorities and stakeholders in the digital transition. These instruments play a key role in providing uniform enforcement criteria that guide both national competition authorities and stakeholders.

In this context, it is equally appropriate to strengthen the role of the European Competition Network (ECN), which is the institutional infrastructure designed to ensure cooperation between the EC and national competition authorities. The ECN should evolve into an even more active and transparent forum for sharing guidelines, digital analysis methodologies, and common monitoring tools. It is also essential to coordinate the application of competition rules with other recent regulatory frameworks, such as the Digital Markets Act (DMA) and the Digital Services Act (DSA), given that many of the practices of large platforms simultaneously affect competition and user protection. Smoother interaction will help to strengthen legal certainty and provide more comprehensive protection for European consumers.

In conclusion, our proposals for improvement can be summarized as follows:

- Strengthen the use of top-down instruments (communications, guidelines, block exemption regulations) as a mechanism to ensure consistent enforcement.
- Promote permanent forums for the exchange of information and common guidelines between the EC and national competition authorities, which serve to share best practices and resolve possible divergences.

¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. A Competition Policy Fit for New Challenges, November 18, 2021, [COM\(2021\)713](#).

- Use digital tools and advanced analysis systems to monitor the application of the regulations and ensure consistency between the EC and national competition authorities.

IV. Conclusions

After almost two decades of applying Regulation 1/2003 and its implementing regulation 773/2004, experience shows that, although these instruments have made it possible to build a solid system for defending competition in the European Union, there are procedural shortcomings that limit their effectiveness in the face of current challenges, particularly those arising from the digital economy.

Firstly, interim measures have proven to be an underused tool. The current configuration, which only allows for their adoption ex officio by the EC, discourages those affected from providing evidence and delays intervention in markets where the damage to consumers can be serious and irreparable. It is essential to allow requests from interested parties, strengthen the criteria for adoption, and establish rapid and digitized procedures, especially in digital markets dominated by platforms with structural power.

Secondly, access to files remains a fundamental obstacle for consumers and their associations. The current regulation, which reserves direct access to the companies under investigation, creates a lack of transparency and inequality of arms, making it difficult to bring damages actions. Directive 2014/104/EU requires that those affected be able to obtain effective redress, which is only possible if qualified and timely access to relevant information is guaranteed. The case law of the CJEU has reinforced this right, invalidating EC decisions that generically restricted access without sufficient justification. It is therefore recommended that clear confidentiality criteria be defined, that enhanced access be granted to consumer associations, and that transparency be increased following final decisions.

Thirdly, coordination between the EC and national competition authorities must be deepened. The multilevel model established in 2004 has been positive, but the digitalization of the economy poses risks of regulatory fragmentation. The ECN+ Directive (2019/1/EU) has already strengthened the powers of national competition authorities, but uniform application must be ensured through top-down instruments (communications, guidelines, exemption regulations) and the use of shared digital platforms for information exchange.

Finally, it is essential to strengthen the European added value of the system. Only coordinated and uniform enforcement can ensure that all EU consumers enjoy the same level of protection, regardless of the Member State in which they reside. In this regard, it is



recommended to create a central repository of procedural precedents and best practices, to strengthen the participation of consumers and associations in consultations and hearings, and to align the procedural framework with other key rules such as the DSA, which introduces transparency obligations for platforms that can complement competition enforcement.

In conclusion, the proposed reforms would make it possible to:

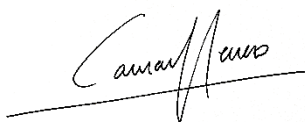
- Activate mechanisms more quickly to protect consumers from immediate harm.
- Ensure fair access to the information necessary to take remedial action.
- Avoid regulatory fragmentation in a cross-border digital economy context.
- Strengthening the legitimacy of the system through transparency and user participation.

In this way, the procedural framework for the defense of competition will not only adapt to the new challenges of the digital single market, but will also ensure that European consumers—as the ultimate beneficiaries of competition policy—receive more effective, consistent, and tangible protection in their daily lives.

For Ius Omnibus,



Lena Hornkohl, President of Ius Omnibus



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