

European Tech Alliance

Position on the revision of Regulations 1/2003 and 773/2004

October 2022

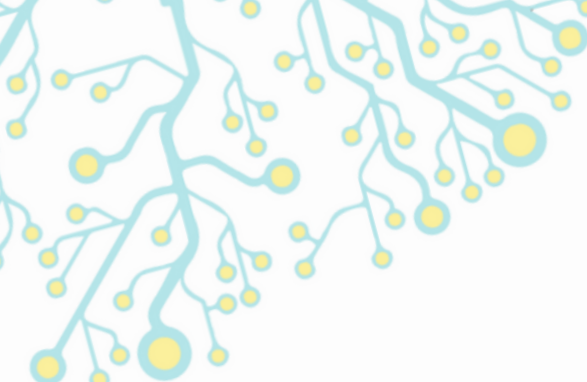
The EUTA and its members welcome the European Commission's decision of updating Regulation 1/2003, which concerns the application of EU competition law, as well as Regulation 773/2004, which details EU procedural rules in antitrust investigations.

The upcoming revision will contribute to adapting the almost 20 years old framework to make sure the implementation and execution of antitrust mechanisms are fit for the digital era. This is an excellent opportunity to take better account of the evolution of global markets and to make sure European tech companies can thrive, providing more legal certainty while facilitating a more coherent approach to competition enforcement.

In our opinion, the revised Regulations 1/2003 and 773/2004 should consider the following elements:

1) Ensure consistency on antitrust decisions across the EU: the currently existing decentralized enforcement framework, which was introduced by the above-mentioned regulations, has significantly increased the role of National Competition Authorities (NCAs) and courts in the enforcement of EU competition rules. Although it has been beneficial to bring more convergence on the rules themselves, it has also created a huge enforcement disparity

between different Member States in different areas, for instance market definition or Most Favoured Nation Clauses (MFNs). Indeed, currently the regulation gives room for national competition authorities to interpret competition rules in dissimilar ways and use distinct criteria to define markets and different bases to assess effects. This creates a dangerous situation of legal uncertainty, creating a detrimental impact in both EU's



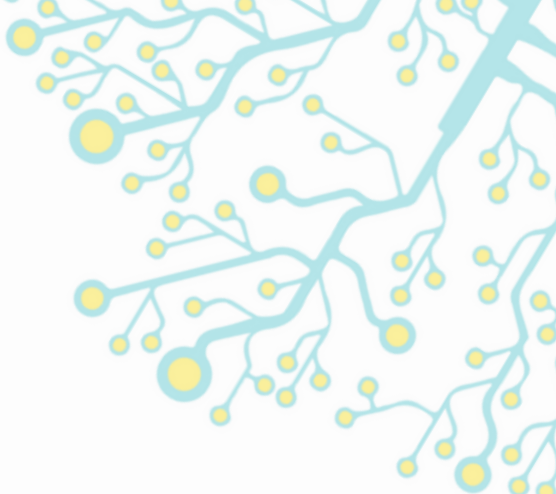
harmonization of competition law and more generally, on the well-functioning of the digital single market.

In a context where the relationship between national and European law is becoming more and more complex and where the number of stakeholders is continuously increasing, it is absolutely key to make sure that EU businesses have clarity on which of their commercial practices could potentially be deemed as problematic from a competition perspective. This is not only important for legal certainty, but because it causes a disparity where some NCAs often look at narrowly defined national markets that do not reflect business reality and over-scrutinize national champions, which compete fiercely with global digital companies. This unlevelled playing field exacerbates the gap between EU players and other global companies.

- 2) **Ensure that NCAs conduct by effects analyses when looking at potential competition infringements:** an effects-based analysis entails a deep factual investigation of the market to identify the economic consequences of a particular action. This analysis should also take into account the evidence, reports, and information submitted by

the investigated parties. This exercise is key to avoiding prohibiting practices that have a beneficial impact or that do not harm both consumers and other companies. We recognize the European Commission's efforts to devote substantial time and resources to conduct proper by effects analysis of the conducts it identifies as potentially problematic. Unfortunately, not all NCAs have the capacity to do so, due to budgetary and staff constraints, leading to wrongly considering some conducts as by object. This leads to over enforcement and the creation of barriers to innovation and growth.

- 3) **Encourage NCAs to explore the commitments route in abuse of dominance investigations:** in the last years, most investigations at EU level into suspected infringements (excluding cartels) have been resolved with commitment decisions, which usually have proven to be effective in solving existing competition concerns (both in terms of speed and remedies). This trend has unfortunately not been followed by NCAs, which seem to still have a certain reluctance to use this mechanism.



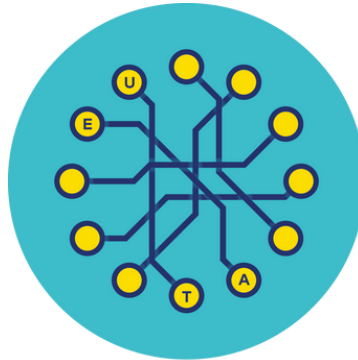
4) Provide adequate means to the NCAs to properly address the new challenges of the digital economy:

Digital markets have enabled the emergence of new business models and new products and services that largely rely on the use of data coupled with complex technologies. This has had the effects of (1) making some anti-competitive practices harder to uncover as it requires extensive technical knowledge and (2) creating tensions with data protection laws, especially when gatekeepers leverage their own data protection law interpretation for the benefit of their own businesses and

significantly reduce competition. To address these new challenges, it is therefore necessary that (1) NCAs are sufficiently equipped by recruiting more staff with the necessary technological expertise and by creating specific digital units to understand better new digital practices and that (2) NCAs can easily coordinate their work with that of data protection authorities through a specific forum/network/hub where the effects of some practices can be assessed jointly from a competition and data protection perspective as opposed to acting in silos.

The EUTA therefore encourages the European Commission to use this review to lead an alignment across the network of NCAs, so all relevant competition authorities in the EU have a homogenous interpretation and enforcement of competition law, in particular when it comes to market definition, finding of infringements via *by effects* analysis and the use of the commitments route in the digital space.

Such an approach will, in our view, not only support the development of a competitive global market in the digital age where EU tech companies can fairly operate, but it will also help EU competition authorities to be more targeted and efficient, benefitting a proper use of public resources when fitting antitrust offenses and thus protecting both companies and consumers.



European Tech Alliance

About the EUTA

The EUTA gathers major European digital champions and scaleups successfully built across Europe, with a total of 35 companies from 16 European countries.

Our objective is to create a better future for Europe through technology and based on shared EU values: we aim to contribute to our local economies and build a sustainable, greener, innovative and inclusive Europe for future generations.

With the right legal framework and policies that enable innovation and fair competition for all players, Europe can continue to prosper and produce more global European digital champions in the future.