ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
SCHUMPETER PROJECT ON COMPETITION POLICY

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# COMMENTS OF ITIF

to the

European Commission

Brussels, Belgium

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| In the Matter of:<br><br>Consultation on the Revision of EU Antitrust Procedural Rules | ) | Public Comment |

October 2, 2025

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## INTRODUCTION

On July 10, 2025, the European Commission (Commission) launched a call for evidence and public consultation on the revision to its antitrust procedural regulations, specifically Regulation 1/2003 and its implementing regulation, Regulation 773/2004."[1] This followed the issuance of a working document in September 2024 which summarized the findings regarding the workings of the antitrust procedural regulations and found that while the regulations were generally effective, issues remained about the importance of ensuring uniform competition law standards across the European Union (EU), as well as the need for faster and more efficient investigations.[2] In its Call for Evidence For An Impact Assessment, the Commission outlined several proposed options to address these concerns upon which interested stakeholders could provide feedback.[3]

The Information Technology and Innovation Foundation (ITIF), the world's top-ranked science and technology policy think tank, greatly appreciates the opportunity to respond to the Commission's call for evidence. In general, ITIF believes that the antitrust procedural framework can be improved by measures that create a less burdensome and more objective evidentiary process, as well as provide investigated parties with greater access to the Commission's complete file. Moreover, to avoid fragmentation, ITIF believes it is pivotal that the Commission expand its well-established convergence rule into the area of unilateral conduct, as well as consider other measures that prevent overreach by national competition authorities.

## IMPROVING THE EFFECTIVENESS, INCLUDING THE SPEED, OF CERTAIN ASPECTS OF THE COMMISSION'S PROCEDURES IN DIGITISED AND COMPLEX INVESTIGATIONS

### Adapting the Commission's Investigative Tools to the Digital World

Both Option 1—which would introduce an independent and self-standing power for the Commission to adopt decisions ordering the preservation of digital and physical information—and Option 2—which would adapt the existing Commission inspection power so that it is independent from the power to enter physical premises and means of transport, and adapt the power to conduct inspections so that it covers all business

[1] Press Release, Commission seeks feedback for the revision of EU antitrust enforcement framework (July 9, 2025).

[2] Press Release, Commission publishes findings of evaluation of EU antitrust enforcement framework (Sept. 4, 2025).

[3] European Commission, Call For Evidence For An Impact Assessment (July, 10 2025).

records regardless of the storage location of the data—would unnecessarily expand the Commission's investigatory powers and create costs that are likely to far outweigh any evidentiary benefits. Specifically, whereas Option 1 would open the door to overly burdensome information preservation requests, Option 2 appears to sanction a problematic extraterritorial application of the Commission's procedural rules. By contrast, Option 3 provides a much less onerous way for the Commission to gather additional and timely information, provided that all basic procedural due process protections are given to witnesses.

### Improving Decisionmaking Procedures to Allow for Effective (and Faster) Enforcement

Rather than reduce burdens for the Commission to implement interim measures, as Option 1 contemplates, the Commission should prioritize reforms, such as Option 2, that incentivize final and consensual resolutions between the Commission and an investigated party. Moreover, to foster more effective enforcement, the Commission should take steps to ensure that the factual record examined by a reviewing court is the product of objective evidentiary standards rather than the mere exercise of the Commission's discretion as to what is included. For example, the Commission should consider adopting a standard whereby all relevant, material, and reliable evidence is admitted into the record unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other similar prudential considerations.

### Improving Access to File Procedures That Are Currently Resource-Intensive and Time-Consuming

ITIF believes that the Commission should prioritize greater access to file procedures while also minimizing the procedural burden on investigated parties. While Option 1 would give third parties greater access to file procedures, it would come at a cost to investigated parties, who would have to produce a significantly greater number of non-confidential materials. By contrast, whereas Option 2 would not appear to result in similar burdens on investigated parties, it limits confidential file access to external advisors. As an additional option, the Commission should consider ways to give greater access to the confidential file to investigated parties' in-house counsel, which would allow them to better understand the grounds for the Commission's case without imposing any increased burdens associated with having to make extensive redactions for third parties.

### Simplifying the Procedure for the Participation of Complainants and Third Parties in Competition Investigations

The concern about regulatory capture—here, third parties influencing competition law enforcement—and resultant false positives could be mitigated to the extent that, through Option 1, the Commission is not forced to issue a rejection decision to all formal complainants. By contrast, Option 2's idea of harmonizing the rights of interested third parties with complainants risks increasing false negatives by disincentivizing the bringing of formal complaints by allowing third parties to free-ride on the efforts of complainants.

## POLICY OPTIONS ADDRESSING RISKS OF FRAGMENTED COMPETITION LAW ENFORCEMENT IN RELATION TO STRICTER NATIONAL LAWS ON UNILATERAL CONDUCT

### Option 1

The Commission's proposal in Option 1 to adapt 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 in order to ensure the coherent, effective and complementary enforcement of available competition law instruments is not sufficient to counteract the risk of fragmentation posed by stricter national laws on unilateral conduct. As an alternative, the Commission should consider ways for it to more decisively engage with national competition authorities on the implementation of stricter laws surrounding unilateral conduct that include, where appropriate, having the final power to define remedies that are consistent with community-wide competition law standards. Indeed, with respect to unilateral conduct enforcement by member states in digital markets, this is particularly important in view of the Digital Markets Act and its *ex ante* approach to competition enforcement.

### Option 2

The Commission's proposal in Option 2 to discontinue the current system as described under section B is consistent with these broader concerns about an inadequate ability for the Commission to prevent fragmentation amidst increasingly strict enforcement of unilateral conduct laws by national competition authorities, particularly in the digital markets that the Commission is now regulating. As such, rather than attempt to modify its existing procedural framework, the Commission should clearly and definitively extend its convergence rule in Article 3(2) of Regulation 1/2003, which currently applies to concerted practices, to national laws proscribing unilateral conduct. Ensuring that Article 102's already stringent abuse of dominance standards constitute a ceiling for unilateral conduct liability in Europe will not only limit fragmentation but also likely lead to a reduction in false positives by reducing overzealous enforcement at the member state level—ultimately benefiting European consumers and innovation.

## CONCLUSION

The revision of Europe's antitrust procedural regulations presents an opportunity to strengthen the internal market by promoting enforcement that is more coherent, proportionate, and efficient. We urge the Commission to adopt a procedural design that minimizes burdens on, and increases access to, investigated parties, as well as drives greater uniformity in European unilateral conduct enforcement.

Thank you for your consideration.

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