

Unclassified

English - Or. English

25 November 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from BEUC

- Session II -

8 December 2020

This contribution is submitted by BEUC under Session II of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: oe.cd/dmkt.

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JT03468983

Abuse of dominance in digital markets

- Contribution from BEUC -

1. Introduction

1. BEUC welcomes the opportunity to contribute on the Roundtable on “Abuse of dominance in digital markets”. We consider that the question of abuse of dominance in digital markets is particularly important and relevant, and we appreciate the opportunity to promote and advocate for a consumer-centric competition policy agenda. Our focus in analysing this topic will be on EU competition law and enforcement from a consumer perspective. Although some concerns have been raised regarding over-enforcement in digital markets, we have seen little to no evidence of such over-enforcement.

2. **Importance of digital markets.** Today, an ever-increasing percentage of commercial interactions occurs in digital markets. Consumers shop on online marketplaces, download mobile apps on their smartphones, listen to music on streaming platforms, book their hotels through online price comparison websites, and interact with one another on social media platforms. These are just some of the numerous digital activities that consumers conduct daily. Digital markets have now taken a central place in the lives of consumers who spend an ever-growing amount of time using digital and online services. Therefore, BEUC considers it is essential that the welfare and well-being of consumers is both safeguarded and strengthened.

3. **What are digital markets?** In this submission we understand digital markets as markets whose competition dynamics are defined by characteristics such as big data, big analytics, network effects, the presence of multi-sided platforms, zero or subsidised prices, controlled digital ecosystems and switching costs for consumers.¹ Although we can identify in these markets key economic features such as the presence of digital online platforms, these features can also exist in other markets such as data supply in connected devices.

4. **Dominant online platforms.** In recent antitrust investigations, competition agencies have concluded that certain online platforms held a dominant position. Some online platforms are referred to as ‘gatekeepers’, when they oversee key access points to online services and have the ability to restrict the access of third parties to the online platform that connects them to a substantial number of online users, both business and private. We consider that such platforms merit particular attention because their intrinsic characteristics – strong economies of scale, direct and indirect networks effects, collection of large amounts of data, a significant user base and multi-sidedness – make them more likely to acquire substantial market power. Although we will essentially focus on online and digital platforms in this Roundtable paper, any company can become a gatekeeper for its market when it has the ability to define the conditions and the rules under which third parties can reach consumers and vice-versa, thereby acting as a private access point (i.e. the gatekeeping function) to critical online services. In addition, online gatekeepers have the capacity to entrench, and even strengthen, their position as an essential point of access to online and digital products and services. They can use the intrinsic characteristics of the market to raise barriers to entry and to hamper or prevent the emergence of new rivals. They are also sometimes able to leverage their position as a

¹ Organisation for Economic Co-operation and Development, ‘Abuse of Dominance in Digital Markets’ (2020) 7.

gatekeeper in one market to enter, and capture, new markets without expending the resources normally required to achieve this.

5. **Dark patterns and behavioural economics.** As shown by our members' studies (e.g. Which? in the UK and Forbrukerrådet in Norway), the collection of user data is often done by companies, which can include dominant platforms, engaging in dark patterns and manipulation of choice architecture to ensure consumers continue supplying data even if this might be against their interests.² In addition, certain online platforms have taken advantage of the bounded rationality of consumers. Therefore, in abuse of dominance cases in digital markets, we consider it important to take into account the demand-side perspective and the insights of behavioural economics (e.g. the power of defaults).³ Such consideration should apply not only when competition agencies determine the existence of a dominant position and an abuse, but should also intervene in the design of remedies, as we explain below.

6. **Competition law and consumer welfare in the digital era.** Competition law has a crucial role to play in maintaining and improving consumers' welfare and well-being in the digital era. With the rise of digital behemoths, we note a corresponding erosion of consumers' freedoms.⁴ Digital platforms employ various practices such as increasing friction and switching costs or exploiting consumers' behavioural biases thereby discouraging or preventing users from migrating to competitors.⁵ A platform can also limit the interoperability of its product or service with that of rivals even if it would benefit the consumer. In the end, these practices lead to higher barriers to entry and expansion for rivals: if users find it complex and time-consuming to switch to a competitor even if the services it offers are better, then this competitor will not be able to lure and attract new users to develop a profitable business.

7. **Antitrust proceedings against online platforms.** In recent years, the European Commission (hereinafter the 'Commission') has opened multiple antitrust cases against dominant undertakings in digital markets. In 2017, 2018, and 2019, the Commission imposed three fines on Google for abusing its dominant position regarding respectively Google Shopping, the Android operating system, and Google AdSense.⁶ Those three

² Which?, 'Control, Alt or Delete? The Future of Consumer Data: Main Report' (2018) Policy Report <<https://www.which.co.uk/policy/policy/digital/2659/control-alt-or-delete-the-future-of-consumer-data-main-report>>; Forbrukerrådet, 'Deceived by Design: How Tech Companies Use Dark Patterns to Discourage Us from Exercising Our Rights to Privacy' (2018) <<https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>>.

³ Amelia Fletcher, 'The Role of Demand-Side Remedies in Driving Effective Competition A Review for Which?' (2016); Amanda P Reeves and Maurice E Stucke, 'Behavioral Antitrust' (2010) 86 *Indiana Law Journal*; Maurice E Stucke, 'Behavioral Economists at the Gate: Antitrust in the Twenty-First Century' (2007) 38 *Loyola University Chicago Law Journal* 513.

⁴ BEUC, 'The Role of Competition Policy in Protecting Consumers' Well-Being in the Digital Era' (2019) <https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf> accessed 14 November 2020.

⁵ Michal S Gal and Daniel L Rubinfeld, 'Access Barriers to Big Data' (2017) 59 *Arizona Law Review* 339.

⁶ European Commission, 'Antitrust: Commission Takes Further Steps in Investigations Alleging Google's Comparison Shopping and Advertising-Related Practices Breach EU Rules' (2016) IP/16/2532; European Commission, 'Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine' (2018) Press release IP/18/4581; European Commission, 'Antitrust: Google Fined €1.49 Billion for Online Advertising Abuse' (2019) Press release IP/19/1770 <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770> accessed 2 November 2020.

decisions are particularly relevant for consumers since the practices sanctioned by the Commission had the effect of limiting consumer choice and hampering innovation. At the end of 2019, the Commission reportedly launched an early investigation into Facebook's data collection practices and its online classified ad services on Facebook Marketplace.⁷ In June 2020, the Commission launched an investigation into the iOS App Store⁸ and Apple Pay.⁹ Finally, in November 2020, the Commission sent a statement of objections to Amazon regarding its use of non-public third-party sellers' data to the advantage of Amazon's own retail business.¹⁰ The Commission also indicated it was launching a second investigation into Amazon for possible abuse of dominance for allegedly artificially favouring its own retail offers and independent sellers that were using Amazon's logistics and delivery service. These selected examples demonstrate that the Commission is stepping up its investigative and enforcement efforts against large platforms.

8. **Competition law protects consumers.** The practices and behaviours described above are often the result of a failure by the market to deliver alternatives that would benefit consumers. In this context, competition law could have a positive impact on those markets dynamics that are not safeguarding consumers' interests. Competition law in Europe is not only concerned with harms inflicted on rivals and the competitive process, but also directly on consumers. Unlike a rebate scheme for microchips that only has an indirect effect on consumers, many digital and online platforms directly interact with their final users, i.e. the millions of consumers that go online. This consumer-facing characteristic facilitates the possibility of exploitative abuses that directly harm consumers by charging higher prices – even if not in monetary form, offering less choice and innovation, or providing products and services of lower quality than would normally exist in competitive markets. Adequate enforcement, encompassing appropriate and, where necessary, new theories of harm to meet the new challenges that digital markets raise, could restore competition to these markets that have been insulated from competitive pressures. BEUC considers that competition law is a valuable and flexible instrument to address some of the market failures mentioned above. However, antitrust investigations usually last years before a decision is adopted, which is not optimal in fast moving digital markets and might be too slow to prevent irreparable harm. This situation could be improved by greater use of interim measures as was successfully done by the Commission in the *Broadcom* case¹¹ and by other

⁷ Foo Yun Chee, 'Facebook in EU Antitrust Crosshairs over Data Collection' *Reuters* (3 December 2019) <<https://www.reuters.com/article/us-eu-facebook-antitrust-idUSKBN1Y625J>> accessed 23 November 2020; Sam Schechner Pop Emily Glazer and Valentina, 'EU Deepens Antitrust Inquiry Into Facebook's Data Practices' *Wall Street Journal* (6 February 2020) <<https://www.wsj.com/articles/eu-deepens-antitrust-inquiry-into-facebooks-data-practices-11580994001>> accessed 23 November 2020; Javier Espinoza, 'EU Focuses Antitrust Probe on Facebook's Online Classifieds Service' (6 April 2020) <<https://www.ft.com/content/ec00a3e7-c648-4ddc-9eef-64b2cf384073>> accessed 23 November 2020.

⁸ European Commission, 'Antitrust: Commission Opens Investigations into Apple's App Store Rules' (2020) Press release IP/20/1073.

⁹ European Commission, 'Antitrust: Commission Opens Investigation into Apple Practices Regarding Apple Pay' (2020) Press release IP/20/1075 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075> accessed 20 November 2020.

¹⁰ European Commission, 'Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its e-Commerce Business Practices' (2020) Press release IP/20/2077.

¹¹ *AT 40608 - Broadcom* (European Commission).

national competition agencies.¹² To prevent harms from arising in the first place, however, given the particular characteristics of some digital markets, we believe that the introduction of *ex-ante* regulation of gatekeepers as well as widening the toolbox of competition authorities is essential.¹³

2. Antitrust remedies in digital markets

9. **Relevant market, dominance, abuse... remedies?** In its call for contributions, the OECD raised important and compelling questions regarding abuse of dominance in digital markets. In addition, in its in-depth report, the OECD analysed many of the critical issues involved in applying abuse of dominance law to digital markets.¹⁴ BEUC believes that those are crucial questions for competition authorities, academics and practitioners alike to consider and answer; nonetheless we would like to focus here on the subject of antitrust remedies in digital markets. As the decisional practice stands now, remedies, both in their design and in their implementation, do not appear to be working optimally for consumers.

10. **Remedies as an afterthought?** In general, the topic of remedies has garnered much less attention than the questions of defining the relevant market, the concept of dominance, or the typology of abuse.¹⁵ We consider this an unfortunate oversight since designing effective remedies is essential to achieve proper enforcement of competition law. A remedy that is too lax, too strict, too late, too complex, too difficult to monitor, ill-designed or ill-implemented will have little impact on the anticompetitive effects it was supposed to eliminate. In the worst case, a flawed remedy could damage competition instead of restoring it.¹⁶ Therefore, designing effective and appropriate remedies is as important as defining the relevant market, establishing dominance and qualifying the suspected behaviour as an abuse. In addition, we believe that if new theories of harms in digital markets are developed, then competition authorities should also devise new remedies for those same markets, or potentially brush the dust from old unused structural remedies such as divestiture for example.

¹² See e.g. *Décision n° 20-MC-01 du 9 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a et l'Agence France-Presse* where the French Autorité de la Concurrence imposed interim measures on Google regarding its alleged abuse of a dominant position for refusing to negotiate in good faith and imposing unfair trading conditions on French news agencies and publishers. The decision was appealed by Google and was upheld in its near entirety by the Court d'Appel de Paris on 8 October 2020.

¹³ Agustin Reyna, 'To Tame the Giants, the EU Needs to Step up Competition Enforcement' (*BEUC Consumer Corner*, 22 June 2020) <<https://www.beuc.eu/blog/to-tame-the-giants-the-eu-needs-to-step-up-competition-enforcement/>> accessed 20 November 2020; BEUC, 'Digital Service Act (Ex Ante Rules) and New Competition Tool' (2020) <https://www.beuc.eu/publications/beuc-x-2020-079_digital_services_act_and_new_competition_tool.pdf>.

¹⁴ Organisation for Economic Co-operation and Development (n 1).

¹⁵ See e.g. Daniel Mandrescu, 'Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)' (2018) 41 *World Competition* 453; Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38 *World Competition* 473; Lapo Filistrucchi and others, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10 *Journal of Competition Law & Economics* 293.

¹⁶ Organisation for Economic Co-operation and Development, 'Remedies and Sanctions in Abuse of Dominance 2006' (2006) Policy Roundtables DAF/COMP(2006)19.

11. In the following we consider first what is needed for an effective remedy and second, make some suggestions on how effective remedies might best be achieved in practice.

2.1. What should remedies for an abuse of dominance in digital markets look like?

12. **Article 102 remedies versus merger remedies.** As a preliminary observation, it is essential to distinguish between remedies under Article 102 TFEU and remedies provided for in the EU Merger Regulation.¹⁷ Merger remedies are different from remedies under Article 102 TFEU in the sense that the former aim to prevent the emergence of anticompetitive effects, while the latter attempt to solve those concerns once they are taking place or have already occurred. Nonetheless, as we note below, we can draw some inspiration for the design and implementation of remedies under Article 102 from the extensive decisional practice developed in the field of merger control.

13. **Remedies under Article 102 TFEU.** At its core, Article 102 TFEU is an *ex-post* instrument, it is only intended to apply after an infringement of competition law has occurred. Within the scope of Article 102, one could consider three possible objectives of remedies: (1) to compensate for the damages suffered by competitors and/or customers of the dominant undertaking, (2) to deter future anticompetitive practices, and (3) to stop the illegal behaviour, prevent its repetition, and restore effective competition.

14. **Objective of remedies.** First, under EU competition law, remedies do not primarily serve as an instrument to compensate for past damages linked to the illegal conduct.¹⁸ This objective should normally be achieved through actions for damages, a procedure that was reinforced with the adoption of the EU Damages Directive in 2014,¹⁹ although in practice it is very difficult for consumers to obtain redress for harms caused by competition infringements due to the lack of collective proceedings. Second, deterrence is mostly achieved through the imposition of fines that should be sufficiently high to make the offending entity and other markets actors reconsider engaging in similar conduct in the future.²⁰ Nonetheless, a well-designed remedy can also achieve that objective if it signals to rivals that conduct of this type is illegal and any competitive advantage they derive from it will be, not only brought to an end, but will also be reversed so as to restore the competitive dynamic that would have existed if the illegal behaviour had not occurred. Third, the central role of the remedy is to eliminate the illegal conduct together with its effects and to prevent the undertaking “from continuing to enjoy the fruits of [its] illegal behaviour”.²¹

¹⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 2004.

¹⁸ Cyril Ritter, ‘How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?’ (2016) 7 Journal of European Competition Law & Practice 587, 4.

¹⁹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (‘EU Damages Directive’)

²⁰ See European Court of Auditors, ‘The Commission’s EU Merger Control and Antitrust Proceedings: A Need to Scale up Market Oversight’ (2020) Special Report No 24/2020 paras 69–72 (the report noted that notwithstanding their amounts, the effectiveness of the fines vis-à-vis their deterrence effect was not assured and has not been properly analysed).

²¹ Philip Marsden, ‘Google Shopping for the Empress’s New Clothes –When a Remedy Isn’t a Remedy (and How to Fix It)’ [2020] Journal of European Competition Law & Practice 1, 3.

15. **Remedies under Regulation 1/2003.** At the EU level, remedies are provided for in Article 7 (and Article 9, in the form of commitments by the parties) of Regulation 1/2003.²² These can be both behavioural and structural. Notwithstanding the apparent priority accorded to behavioural remedies by Recital 12 and Article 7 of Regulation 1/2003, some experts consider that the decision between behavioural and structural remedies is solely determined by the principles of effectiveness and proportionality.²³ Structural remedies being generally more burdensome for the undertaking, they should only be imposed when equally effective behavioural remedies are not available or would be more burdensome than a structural remedy.

16. **Cease and desist.** As a preliminary observation, although it is inherent in competition law enforcement, merely requiring the undertaking to cease its illegal conduct is often insufficient to restore effective competition on the affected market. The competitive structure might have been affected to such an extent, through for example the elimination of rivals, that putting an end to the anticompetitive behaviour would not of itself restore effective competition. The competitive structure of the market has been damaged to such an extent that additional restorative remedies are required.

17. **Ufex and the meaning of “effectively”.** It is primordial to understand that Article 7 of Regulation 1/2003 does not simply require the illegal conduct to stop, but it also requires its effects to be terminated. Article 7 states that the Commission may impose remedies that are “... necessary to bring the infringement *effectively* to an end”.²⁴ The term ‘effectively’ means ‘that the “infringement must end in all its manifestations”,²⁵ which requires that not only the conduct should stop, but also the effects of such conduct.²⁶ Indeed, it would appear illogical and counterproductive to require the infringer to stop the conduct and refrain from it in the future while allowing the effects, that is the competitive advantages derived from the illegal behaviour, to continue to operate. This would signal to undertakings that any benefits gained through illegal behaviour will be theirs to keep. This would be akin to asking bank robbers to stop the robbery that is taking place while permitting them to keep the money that is already in their bags and the stolen getaway car for their next job. If remedies are to act as effective instruments to restore competition, then the offending undertaking should not be permitted to keep the illegal competitive advantage it has gained. Notwithstanding the importance of this objective, this not a simple exercise, neither in theory, nor in practice, as explained below.

18. **Status quo ante or counterfactual situation?** An important question is whether the remedy should strive to return to the market situation that existed before the unlawful conduct started, this is the “*status quo ante*”, or whether the remedy should work towards a hypothetical counterfactual situation that would have existed had the unlawful conduct never occurred.²⁷ Either option is complex and choosing one over the other might be impossible.

²² Council Regulation (EC) 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 [2003] OJ L1/1.

²³ Ritter (n 18) 10.

²⁴ Emphasis added

²⁵ Ritter (n 18) 2.

²⁶ Case C-119/97 *P Union Française de l'Express (UFEX)* ECLI:EU:C:1999:116 [94].

²⁷ If the *status quo ante*, i.e. the state of the market right before the start of the unlawful conduct, is expressed as t_0 , and the moment that the competition agency finds an infringement and imposes remedies as t_1 , then the question is:

19. **The *status quo ante*.** Under this first option, the competition agency aims to restore the situation as it was before the start of the illegal behaviour. In the *Akzo* case, the Court of Justice of the European Union chose this option when it stated that the contested remedy aimed to “re-establish the situation that existed before the dispute”.²⁸ The remedy in question did not in fact restore the *status quo ante*, it only encouraged the injured rival company to continue competing in order to “win back” customers it had lost to AKZO, the offending undertaking.²⁹ The remedy in *Akzo* did not restore the *status quo ante* since this would have involved forcing existing customers of AKZO that had switched providers because of (illegal) lower prices to switch back to their original provider.

20. **Theory and practice.** Although a return to the *status quo ante* is quite simple in theory, it is much more complex in practice. As shown in the *Akzo* case, it is impossible to force customers to switch back to their original vendor. This conclusion would also apply in the *Intel* case: how could a competition agency force former AMD clients to stop buying their chips from Intel? We see that in the case of illegal rebates, remedies can only serve to encourage customers to consider the different firms active on the market and buy from the one that makes the most economic sense. However, what would be the situation if the dominant undertaking had managed to eliminate all its competitors, or only marginal ones remained? In that scenario, a return to the *status quo ante* would not help to restore effective competition. Therefore, we believe that in certain exceptional situations, competition authorities should take less common options to ensure competition is restored. This could include structural remedies where a subsidiary or division of the dominant undertaking is severed from the parent company and transformed into a new rival.

21. **The counterfactual situation.** If a return to the *status quo ante* already appears difficult, achieving the second option is orders of magnitudes more complex. Under this scenario, “anything short of recreating the situation that would have existed ‘but for’ the infringement would be under-deterrent.”³⁰ This problem is exacerbated when the infringer has gained a substantial and long-standing advantage from the illegal conduct, and the market has “tipped” in its favour. A remedy that merely puts a stop to the conduct and places all the market players back on the same footing would not *prima facie* be sufficient to bring the effects of the infringement effectively to an end. The dominant undertaking would be forced to compete on the merits like all other market actors, but might still enjoy substantial advantages such as a large user base (acquired through anticompetitive practices), or enormous amounts of data collected from its users, or an efficient vertically integrated structure developed through tying practices, or a presence in and subsequent capture of other markets through abusive leveraging.

22. **Counterfactual as the perfect impossible solution?** If the infringer continues to reap the fruits of its (illegal) labour, what then is the solution? Under the counterfactual option, the competition agency could develop a hypothetical model of what the current market situation would look like if the unlawful conduct had never taken place. It would evaluate how the market in question would have normally evolved up to that point in time if competition on the merits had remained and the abuse of dominance had never occurred. We acknowledge the inherent complexities of such an exercise since it might well be difficult to estimate how a specific market would have hypothetically evolved over a period

should the agency place the offending undertaking back at t_0 , or should it be placed in a hypothetical alternative t_{1A} , that would have ‘likely’ occurred if the undertaking had never breached the rules.

²⁸ Case C-62/86, *AKZO Chemie BV v Commission* (1991) ECLI:EU:C:1991:286 [157].

²⁹ Ritter (n 18) 3.

³⁰ *ibid.*

of 5 or even 10 years (i.e. the duration of the abuse). In addition, we believe that designing a remedy that would tend to recreate that speculative situation would pose many challenges.

23. An alternative solution: make entry possible and likely. If neither option is achievable in practice, we suggest an alternative solution: ensure that new entry is possible. When competition has been damaged to the extent that other credible competitors have left the market (voluntarily or not), then the optimal solution is to ensure that new rivals enter the market and offer new and innovative products or services. When designing a remedy to such effect it is necessary to ensure that entry would be probable, fast, and sufficient. Effective competition cannot be restored if the dominant undertaking, although no longer abusing its position, does not face renewed competitive pressures.

24. A rival out of thin air. In certain cases where entry would not be likely, quick, or sufficient to restore effective competition, a more pro-active approach on the part of competition agencies might be necessary. In those exceptional cases, the agency might have to rely on structural remedies in order to create a new rival out of thin air; a specific branch or subsidiary of the infringing undertaking could be severed from the main business structure and would be transformed into a standalone and independent business entity that would now compete with the incumbent. We acknowledge the difficulty of designing and implementing such a remedy; however, we consider that in rare cases, it might be a possible method to restore effective competition in a market where more traditional remedies have been or would be ineffective. This remedy would be akin to the quite common divestiture required from the merging parties under the EU Merger Regulation.³¹

25. All the ideas set out above require careful thought and illustrate the difficulty of cure rather than prevention. Given that enforcement has shown that certain types of behaviour are used repeatedly in abuse of dominance cases, for example, certain forms of self-preferencing or tying and bundling, this would support the idea of *ex-ante* regulation of gatekeepers. Where remedies nevertheless need to be developed, the following sets out some ideas to optimise them.

2.2. How could effective remedies be best achieved in practice?

26. Effectiveness of remedies. Remedies are an integral part of effective competition law enforcement. Well-designed remedies have the potential to correct deeply uncompetitive market dynamics. Nonetheless, it appears that the effectiveness of antitrust remedies is rarely reviewed and assessed *ex-post*. The compliance by the undertaking with the imposed remedies is normally monitored; however, remedies' effectiveness in achieving the objectives they were designed for is generally not reviewed.³² At the EU level, the Commission has never undertaken a comprehensive review of the remedies imposed in Article 102 (or 101) TFEU cases, in contrast to merger control remedies.³³

27. Systematic *ex-post* evaluation. One way to improve the effectiveness of antitrust remedies could be to undertake a careful and systematic review of past remedies imposed under Article 102. The European Commission would be able to learn with the benefit of hindsight which remedies had a positive impact on competition and which actions failed to

³¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

³² Organisation for Economic Co-operation and Development (n 16) 8–9, 221.

³³ See European Commission, 'Merger Remedies Study' (2005) <https://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf>.

restore effective competition, or worse had detrimental effects on it.³⁴ If the ultimate objective is to promote consumer welfare through enhanced and dynamic competition, then it is judicious to ensure that the remedies developed and implemented are in fact effective in achieving those aims. Competition law enforcement would be greatly strengthened by more systematic *ex-post* review of remedies.

28. **Consider remedies early in the investigation.** As noted above, poorly designed remedies can have a harmful effect on competition and not solve the problems they were intending to. Therefore, BEUC suggests that competition authorities devote sufficient time and resources to the design and implementation of remedies. Ideally, the case officers should, already during the investigative phase, define the remedial objectives and draft a plan for achieving them should an abuse of dominance be proven. If remedies are not discussed from the start, it is possible that after months or years of investigation, the agency may not have the time, efforts, resources, or simply the will to devise and implement effective, appropriate and proportionate remedies. We consider this situation would be unfortunate since the case could potentially fail to correct the harmful behaviour it was supposed to solve.

29. **A review clause in the initial decision.** BEUC considers that competition agencies should ensure, possibly via review clauses inserted directly in the final decision, that remedies could be adjusted if necessary.³⁵ This would allow the competition agency to monitor the implementation of the remedy and verify whether the initial remedy design was appropriate to solve the identified competition issues, particularly in fast-paced digital industries. Where the need arises, ineffective remedies could then be adapted to improve them or, in exceptional cases, to remove inappropriate burdens on the undertaking. This possibility to amend the remedies could be especially useful for undertakings with a record of illegal behaviour, misconduct or a history of non-compliance and circumvention.

30. **Less reliance on the infringer in remedy design.** In general, it is logical to assume that the undertaking on which a remedy is imposed has superior knowledge of its internal structure and business, hence it is normal for competition agencies to solicit the undertaking's input in the design of remedies. Nevertheless, despite the possible benefits of this involvement, the infringing undertaking does not have strong incentives to make remedies effective. It would therefore be important to involve others with a detailed and practical knowledge of the industry and markets concerned.

31. **Enhanced consultation of third parties.** In contrast to the well-developed practice of consulting interested third parties in merger control, a formal consultation procedure for remedies adopted under Article 7 of Regulation 1/2003 does not exist (unlike for Article 9 commitments).³⁶ We therefore consider that a more systematic consultation phase that would take into account the views of market actors, but also of consumers, would be beneficial and would improve the effectiveness of remedies.³⁷

32. **Involvement of consumer organisations.** Consumer organisations at the European and national level can play an important role in effective competition enforcement and in the implementation of effective remedies. They can provide competition agencies with insight into problems faced by consumers in certain markets,

³⁴ Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' [2020] Journal of European Competition Law & Practice 4.

³⁵ *ibid* 5; Ritter (n 18) 7.

³⁶ A formal consultation procedure does exist for commitments adopted under Article 9, as provided by Article 27(4) of Regulation 1/2003.

³⁷ Turner (n 34) 6.

which could be related to a lack of competition or the presence of anticompetitive behaviours leading to increased prices or to a reduction in choice or the quality of products. In several countries, there are already good examples of co-operation between consumer groups and competition agencies through the creation of formal channels of communications as in the Netherlands and Greece. However, more is needed to stimulate co-operation between consumer organisations and agencies. This would contribute to creating a culture of compliance where the interests of agencies, consumers and companies are more closely aligned.

33. **Greater use of economics and behavioural economics.** In numerous digital markets, since the abuses often directly involve consumers, the remedies will also directly impact or rely on them. Therefore, BEUC considers that when remedies are consumer-facing, competition agencies should systematically integrate insights from behavioural economics.³⁸ The prevalence of consumer biases is substantial and can significantly impact the effectiveness and success of a specific remedy. We encourage competition agencies to properly test consumer-facing remedies on consumers themselves (in randomized controlled trials) to determine whether the remedial objectives are achieved.³⁹

34. **Dedicated remedies teams.** Competition agencies, including the European Commission, have less experience in antitrust remedies compared to merger remedies. Under the current system in the Commission, case officers are the ones responsible for designing, implementing, and monitoring the remedy rather than a specialist remedy team as is the case in the US FTC, DOJ, and the UK CMA for example. A consequence of this institutional design is that valuable practical experience gained during one case is not necessarily shared and passed to other case officers. In addition, a case officer may only be involved in a limited number of remedies cases. Therefore, institutional memory and valuable experience may be suboptimal.⁴⁰ In addition, as noted earlier, unless remedies are already considered early on in the investigation, case fatigue may set in and case officers may either lack sufficient resources or may want to dedicate less time and effort than necessary to the design, implementation and monitoring of effective remedies. A possible solution would be to have a dedicated team inside the European Commission in charge of remedies. Such a team would be able to develop extensive and detailed expertise and learn from best practice in other competition agencies. For this solution to work, the dedicated remedies team would need to be involved from the inception of the case and would work in parallel to the case officers to ensure that factual and legal developments in the case are reflected in the remedies under consideration.⁴¹

3. Conclusion

35. Dealing effectively with abuse of dominance in digital markets is essential for consumers. Given the ever-increasing scope and role of digital markets in consumers' lives, this importance is unlikely to diminish. We would therefore encourage competition agencies to continue to develop their enforcement activities at all stages of a case from evidence gathering, establishing dominance, through appropriate and agile theories of harm to effective remedies. We would also encourage agencies to be closely involved in the formulation of any *ex-ante* regulation of digital markets.

³⁸ Fletcher (n 3).

³⁹ Turner (n 34) 6.

⁴⁰ *ibid.*

⁴¹ *ibid* 7.