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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from BEUC

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Remedies and Commitments in Abuse Cases

- Contribution from BEUC -

1. Introduction

1. BEUC welcomes the opportunity to contribute to the Roundtable on "Remedies and Commitments in Abuse Cases". As a consumer organisation, we consider the question of remedies and commitments in competition law enforcement to be particularly important and relevant for consumers, and we appreciate the opportunity to advocate for a consumer-centric competition policy agenda.

2. In its call for contributions, the OECD raises important questions regarding how competition authorities decide between remedies and commitments, how to monitor compliance, and whether ex-post evaluations are systematically conducted. These are crucial questions to consider in enforcement proceedings.

3. This note focuses on selected abuse of dominance cases in the European Union (EU) that involved consumer-facing markets and where remedies or commitments were imposed, in particular where consumers directly interact with the commitments or remedies concerned. Through the review of these cases, this contribution outlines possible areas of improvement to try to ensure that remedies or commitments are effective and thereby benefit consumers.

2. Procedural context: remedies and commitments under Regulation 1/2003

4. Regulation 1/2003[1] enables the European Commission (the Commission) to take prohibition decisions and remedies in abuse cases under Article 7 and to adopt legally binding commitment decisions under Article 9 in the EU. The Commission can impose fines and periodic penalty payments if undertakings breach remedy and commitments decisions.[2]

5. Commitments imposed under Article 9 follow from the offer by the undertaking concerned to settle a case. Since the Commission does not make a finding of infringement of competition law, it is not necessarily constrained by a formal assessment of the allegedly anti-competitive conduct in question. Therefore, the Commission has the possibility to ask for concessions that would not necessarily be possible under a prohibition decision. The European Court of Justice explicitly acknowledged in *Alrosa* that the concessions voluntarily offered by the undertaking in commitment proceedings may go further than the remedies that the Commission could impose under Article 7 of Regulation 1/2003.[3]

6. Ultimately it is for the Commission to make the choice between commitments and remedies on a case-by-case basis in light of the facts and the circumstances of the case,

[1] 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 L 1/1 (hereinafter 'Regulation 1/2003').

[2] Articles 23(2) and 24(1) of Regulation 1/2003.

[3] Case C-441/07 P, *Commission v. Alrosa*, ECLI:EU:C:2010:377, para. 48.

including the input from complainants and third parties. But in either case, the design and implementation of the chosen option is of particular importance. To achieve enforcement of competition law that serves consumers, it is essential to design effective remedies and commitments. A remedy or commitment that is too lax, too strict, too late, too complex, too difficult to monitor, ill-designed or ill-implemented will not effectively bring the abuse to an end. In the worst case, a flawed remedy could damage competition (and consumers) instead of restoring it.[4]

3. Remedies and commitments in consumer-facing markets

7. This section considers a number of consumer-facing cases over the last 20 years where the Commission imposed remedies or commitments and highlights where they achieved their objectives, and why in other cases they failed to restore effective competition. We also briefly discuss the recent case against Apple brought by the Autoriteit Consument & Markt (ACM).

3.1. Microsoft Windows Media Player and Internet Explorer[5]

8. **Windows Media Player.** In the 2004 *Windows Media Player* case, the Commission found that Microsoft had abused its dominant position by tying the Windows Media Player (WMP) software with its Windows operating system. The case illustrates the potential psychological effects of a tying practice where consumers come to perceive the tied products as a single one.[6] The Commission concluded that the majority of consumers would not download an alternative media player software because they did not realise that media players were a standalone product since WPM was always pre-installed on computers running Windows.[7] The Commission's remedy in this case required Microsoft to offer an unbundled version of its Windows operating system where the WMP software was not pre-installed; however, Microsoft was allowed to continue to offer a bundled version for the same price. The remedy was considered ineffective since original equipment manufacturers simply continued to install on their computers the Windows operating system where WMP was included and consumers preferred to purchase a computer where WPM was pre-installed because the bundled and unbundled versions were sold at the same price. Here, simply ordering the undertaking to also offer an unbundled version alongside the bundled version proved to be ineffective because it did not consider how other market players and consumers would actually react to the remedy imposed. While behavioural insights appear to have been used to establish the existence of the abusive conduct, consumers' preferences and behaviour should have been more carefully considered. This case illustrates that behavioural insights should be adequately taken into account at all stages of competition law enforcement.

9. **Internet Explorer**. In contrast, while the 2009 *Internet Explorer* case also revolved around an alleged tying practice, the Commission applied behavioural insights in the design

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

[5] Commission decision of 24 March 2004, Case COMP/C-3/37.792, *Microsoft*; Commission decision of 16 December 2009, Case COMP/C-3/39.530, *Microsoft (tying)*.

[6] Agustín Reyna, 'The Psychology of Privacy—What Can Behavioural Economics Contribute to Competition in Digital Markets?' (2018) 8 International Data Privacy Law 240.

[7] Commission decision of 24 March 2004, Case COMP/C-3/37.792, *Microsoft*, para. 845.

of the commitments. Through consumer surveys, the Commission established that there was a significant attention deficit on the part of consumers with many not aware that alternatives to Internet Explorer existed or did not know how to download another web browser.[8] The Commission took account of consumer behaviour and cognitive biases such as the power of defaults and consumer inertia (*status quo* bias) and required Microsoft to display a choice screen that would let consumers select their preferred browser. The choice screen presented consumers with a clear interface where they could easily install their preferred web browser or learn more about each option.[9] The fact that the different options with recognisable brands were all presented in random order and in a clear and neutral manner was likely instrumental in ensuring the effectiveness of the commitment.

3.2. The *Google Android* case

10. The 2018 *Google Android* decision[10] also led to a choice screen remedy by Google. Users were presented with a choice screen where they could select their preferred search engine from among a list of rival search engines. While the fundamental idea was to restore competition harmed by Google's abusive practices exploiting consumers' *status quo* bias, the initial outcome was criticised by market participants.[11] Google created an auction model where rival search engines had to bid to be featured in the choice screen. As DuckDuckGo, a rival search engine, predicted in early 2020 around the time of the implementation of the choice screen,[12] popular rival search engines were quickly priced-out of the auction and became once again invisible to consumers.[13] Instead, the search engines that appeared

[8] Commission decision of 16 December 2009, Case COMP/C-3/39.530, *Microsoft (tying)*, paras. 51-52.

[9] For the choice screen interface, see Annex C of Commission decision of 16 December 2009, Case COMP/C-3/39.530, *Microsoft (tying)*.

[10] Commission decision of 18 July 2018, case AT. 40099, *Google Android.*

[11] For example, five of the main search engines in the European Union called on the Commission to review and improve the choice screen to ensure that it would more effective. *See*, DuckDuckGo and others, 'Open Letter to European Commission: Request for Trilateral Meeting among Google, the EC, and Alternative Search Engines to Improve Search Preference Menu' (*DuckDuckGo*, 27 October 2020) <https://spreadprivacy.com/trilateral-search-meeting/> accessed 5 May 2022.

[12] DuckDuckGo, 'Search Preference Menus: No Auctions Please' (*Search Preference Menus*, 10 March 2020) <https://spreadprivacy.com/search-preference-menu-auctions/> accessed 2 May 2022.

[13] Natasha Lomas, 'Google's "No Choice" Screen on Android Isn't Working, Says Ecosia — Querying the EU's Approach to Antitrust Enforcement' (*TechCrunch*, 30 July 2020) <https://social.techcrunch.com/2020/07/30/googles-no-choice-screen-on-android-isnt-working-says-ecosia-querying-the-eus-approach-to-antitrust-enforcement/> accessed 16 November 2020; Natasha Lomas, 'Google to Auction Slots on Android Default Search "Choice Screen" in Europe next Year, Rivals Cry "Pay-to-Play" Foul' (*TechCrunch*, 2 August 2019) <https://social.techcrunch.com/2019/08/02/google-to-auction-slots-on-android-default-search-choice-screen-in-europe-next-year-rivals-cry-pay-to-play-foul/> accessed 16 November 2020; Natasha Lomas, 'Google's EU Android Choice Screen Isn't Working Say Search Rivals, Calling for a Joint Process to Devise a Fair Remedy' (*TechCrunch*, 27 October 2020) <https://social.techcrunch.com/2020/10/27/googles-eu-android-choice-screen-isnt-working-say-search-rivals-calling-for-a-joint-process-to-devise-a-fair-remedy/> accessed 10 May 2022.

alongside Google on the choice screen were often small and unknown players.[14] This first iteration of the choice screen remedy thus did little to reintroduce effective competition in the market because it was likely that consumers would select Google from a list of other search engines they had never heard of.[15]

11. Following multiple criticisms by rival search engines, in June 2021, Google announced that it would change how the choice screen worked; the auction model was removed and up to five search engines—based on their popularity in the respective Member States—were featured in the choice screen.[16] These changes had a significant impact on which search engines were displayed and finally seemed to offer users the real possibility to quickly and easily switch to their preferred search engine.[17]

12. The failure of the initial choice screen illustrates how essential it is to consider how consumers will react to remedy design in practice. Therefore, when designing and implementing remedies and commitments in consumer–facing markets, competition authorities, should systematically integrate insights from behavioural economics,[18] and more generally test how consumers can be expected to behave in practice. Consumer–facing remedies should be rigorously tested on consumers themselves (in randomized controlled trials) to determine whether the remedial objectives are likely to be achieved.[19] This case also illustrates the importance of involving third parties who are affected by remedy design at an early stage in the process. The same applies to the *Google Shopping* case[20] where the effectiveness of the remedy is still being challenged five years on.[21]

[14] Natasha Lomas, 'Europe's Android "Choice" Screen Keeps Burying Better Options' (*TechCrunch*, 8 March 2021) <https://social.techcrunch.com/2021/03/08/europes-android-choice-screen-keeps-burying-better-options/> accessed 3 May 2022.

[15] For example, the choice screen in Greece from January until March 2021 featured Google, GMX, info.com, PrivacyWall, and Yandex. For a list of the winners of the auction in each Member States for that period, *see* Google, 'Choice Screen Auction Options – Period Q1 2021' (*Android*, 25 February 2021) <https://web.archive.org/web/20210225154351/https:/www.android.com/choicescreen-winners/> accessed 18 February 2022.

[16] Oliver Bethell, 'Changes to the Android Choice Screen in Europe' (*The Keyword*, 8 June 2021) <https://blog.google/around-the-globe/google-europe/changes-android-choice-screen-europe/> accessed 3 May 2022.

[17] For an overview of the top five options in each Member States during the period between September 2021 and August 2022, *see* 'Choice Screen Options – Period: September 2021 - August 2022' (*Android*) <https://web.archive.org/web/20220502125116/https://www.android.com/choicescreen-winners/> accessed 2 May 2022.

[18] Amelia Fletcher, 'The Role of Demand-Side Remedies in Driving Effective Competition A Review for Which?' (2016).

[19] Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' [2020] Journal of European Competition Law & Practice 6.

[20] Commission decision of 27 June 2017, case AT. 39740, *Google Search (Shopping).*

[21] https://www.theregister.com/2022/10/17/eu_companies_say_google_still/

3.3. The A*mazon Marketplace* and *Buy Box* cases[22]

13. In July 2022, the European Commission published commitments offered by Amazon to settle two ongoing investigations into the company's practices on its Marketplace.[23] The first case focuses on the company's alleged use of confidential third party seller data, whereas the second investigates the Amazon Prime label and the "Buy Box".[24]

14. In the commitments in relation to the Buy Box, Amazon has proposed to change the design of the product pages on its Marketplace website.[25] For any proposed changes to be effective, it will be essential to carefully consider the impact of these design changes on consumer behaviour. This is all the more important in light of the previously reported use by Amazon of dark patterns in the context of Amazon Prime subscription and cancellation,[26] Furthermore, if the commitments are accepted by the Commission, it would be advisable to include the possibility to amend them if necessary to ensure their effectiveness in practice.

[22] Amazon, 'Case COMP/AT.40462 and Case COMP/AT.40703: Commitment Proposal' <https://ec.europa.eu/competition/antitrust/cases1/202229/AT_40462_8414012_7971_3.pdf> accessed 14 July 20.

[23] European Commission, 'Antitrust: Commission Seeks Feedback on Commitments Offered by Amazon Concerning Marketplace Seller Data and Access to Buy Box and Prime' (2022) Press release IP/22/4522. For the full text of the commitments as well as mock-ups designed by Amazon to illustrate the changes the company was ready to make to the design of its website to alleviate the concerns of the Commission, *see* Amazon (n 22).

[24] For a brief overview of both investigations, *see* 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 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077>.

[25] Amazon (n 22).

[26] Forbrukerrådet, 'You Can Log Out, But You Can Never Leave: How Amazon Manipulates Consumers to Keep Them Subscribed to Amazon Prime' <https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf> accessed 16 January 2021; Anouch Seydtaghia, 'Comment Amazon & Co. Nous Manipulent Grâce Aux «dark Patterns»' *Le Temps* (14 January 2021) <https://www.letemps.ch/economie/amazon-co-manipulent-grace-aux-dark-patterns> accessed 12 May 2022; Eugene Kim, 'Internal Documents Show Amazon Has for Years Knowingly Tricked People into Signing up for Prime Subscriptions. "We Have Been Deliberately Confusing," Former Employee Says.' (*Business Insider*, 14 March 2022) <https://www.businessinsider.com/amazon-prime-ftc-probe-customer-complaints-sign-ups-internal-documents-2022-3> accessed 3 May 2022; Ben Brody, 'The FTC Is Going after Dark Patterns. That's Bad News for Amazon Prime.' (*Protocol*, 25 April 2022) <https://www.protocol.com/policy/dark-patterns-subscriptions-ftc-amazon> accessed 3 May 2022; European Commission, 'Consumer Protection: Amazon Prime Changes Its Cancellation Practices to Comply with EU Consumer Rules' (2022) Press release IP/22/4186 <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4186> accessed 25 October 2022.

3.4. The Dutch *Apple* case

15. In April 2019, the Dutch competition authority (ACM), launched an investigation into possible abuse of dominance by Apple in relation to its App Store.[27] The ACM was concerned about the mandatory use of Apple's proprietary in-app payment system and the accompanying 30 per cent commission fee imposed on app developers. In August 2021, the ACM concluded that Apple had abused its dominant position by imposing unreasonable conditions on providers of dating apps and ordered the company to adjust its conditions to allow providers to select the payment processor of their choice.[28]

16. Apple offered various remedy iterations subject to conditions which the ACM considered to be unreasonable and unnecessary both from the perspective of app developers and consumers.[29] This eventually led to the imposition of periodic penalty payments on Apple[30]. The ACM case shows that companies can attempt to delay the implementation of effective remedies. Apple's changes were insufficient and a created hurdles for both app developers and disincentives for consumers. Having a mechanism for competition authorities to achieve an effective remedy outcome in a reasonable timeframe is thus essential.

4. Recommendations to improve commitments and remedies in abuse cases

17. On the basis in particular of the experience gained from the cases discussed above, BEUC would make the following recommendations to improve commitments and remedies in abuse cases.

18. **Systematic consultation of third parties.** Competition authorities should systematically consult third parties on both proposed remedies and commitments. Taking into account the views of market actors, and also consumers through the involvement of consumer organisations in consumer-facing markets, would be beneficial and would improve the design and effectiveness of remedies.[31] Such formal consultation rights could be enshrined in law if Regulation 1/2003 is to be revised.[32] In addition, where a third party

[27] Autoriteit Consument & Markt, 'ACM Launches Investigation into Abuse of Dominance by Apple in Its App Store' (11 April 2019) <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store> accessed 21 October 2022.

[28] Autoriteit Consument & Markt, 'Summary of Decision: Abuse of Dominant Position Apple' (24 December 2021) <https://www.acm.nl/en/publications/summary-decision-abuse-dominant-position-apple> accessed 21 October 2022.

[29] Autoriteit Consument & Markt, 'ACM: Developing a New App Is an Unnecessary and Unreasonable Condition That Apple Imposes on Dating-App Providers | ACM.Nl' (14 February 2022) <https://www.acm.nl/en/publications/acm-developing-new-app-unnecessary-and-unreasonable-condition-apple-imposes-dating-app-providers> accessed 21 October 2022.

[30] Autoriteit Consument & Markt, 'ACM to Assess Adjusted Proposal of Apple Regarding Its Conditions for Dating Apps' (28 March 2022) <https://www.acm.nl/en/publications/acm-assess-adjusted-proposal-apple-regarding-its-conditions-dating-apps> accessed 21 October 2022.

[31] Turner (n 19) 6.

[32] BEUC, 'Evaluation of the Framework for Antitrust Enforcement of Articles 101 and 102 TFEU – BEUC's Response to the Public Consultation in Relation to the Evaluation of Regulation 1/2003' (2022) BEUC-X-2022-102 – 06/10/2022 <https://www.beuc.eu/position-papers/evaluation-framework-antitrust-enforcement-articles-101-and-102-tfeu-response>.

has been formally admitted to a case during the investigative phase, this formal admission should continue beyond the prohibition or commitments decision where it subsequently becomes necessary to review the remedies taken. Third parties should not lose their rights to be heard at this stage, which can be equally important for effective termination of competition law infringements.

19. **Application of behavioural insights to remedy design.** Systematically integrating insights from behavioural economics should be considered to ensure that remedies and commitments are effective in consumer-facing markets. Testing in advance how a specific consumer-facing remedy works in practice is essential for competition authorities to know whether its objectives are likely to be met. Given the fact that companies can and very often do take advantage of the way consumers behave to sell their products and steer consumer choice, consumer behaviour can have a considerable impact on the effectiveness and success of a remedy.

20. **A remedy review clause in the initial decision.** Competition authorities should ensure, possibly via review clauses inserted directly in decisions, that remedies or commitments could be adjusted if necessary.[33] This would allow competition authorities to monitor the implementation of the remedies and commitments and verify whether the initial design was appropriate to solve the identified competition issues. Ineffective remedies or commitments could then be adapted to improve them or, in exceptional cases, to remove inappropriate burdens on the undertaking.

21. **Restorative remedies.** In some cases, in addition to requiring the conduct to be terminated, competition authorities may need to require restorative steps to be taken to re-introduce or restore effective competition in a market in light of the gravity and/or duration of an infringement. Such remedies may sometimes be the only possibility to counter the competitive harm that may otherwise be preserved. For example, when the assessment shows the ability of an infringement to “wall off” (almost incontestable) markets, the remedies used must be capable of breaking down these walls. A revision of Regulation 1/2003 would provide an opportunity to clarify the use of restorative remedies in some cases as recognised in EU case law.

22. **Restitution for consumers under commitments decisions and settlements.** Compensation for consumers harmed by competition law infringements through private follow-on damages actions is not working as it should in Europe. Regulation 1/2003 could be amended to include that companies who wish to close antitrust cases, including abuse cases, by commitments or through settlements are required to include a mechanism offering some form of compensation to consumers who have suffered harm caused by the conduct concerned. There are several precedents for this type of mechanism in the EU. For example in the recent *Aspen Pharma* case, concerning excessive pricing for critical off patent cancer drugs sold across Europe, the Commission accepted commitments offered by Aspen[34] involving also a retrospective element: Aspen committed to retroactively apply reduced net medicine prices to public and private entities (that ultimately pay or reimburse medicine prices) from the moment Aspen first proposed its commitments until the time that Aspen effectively implemented the price reductions. The Aspen decision also included a fall-back mechanism for when it was not possible to pay all or part of a transitory rebate to the ‘appropriate beneficiary’ identified in the decision. If no appropriate beneficiary could be

[33] Turner (n 19) 5; Cyril Ritter, ‘How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?’ (2016) 7 Journal of European Competition Law & Practice 587, 7.

[34] Press release IP/21/524 of 10 February 2021 access here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_524

identified, any non-paid parts of the transitory rebate were to be transferred to 'fall-back recipients'. Some form of restitution should be considered systematically in commitment and settlement cases.

23. **Review and ex-post evaluation of effectiveness.** Compliance by undertakings with the imposed remedies is normally monitored; however, remedies' effectiveness in achieving the objectives they were designed for is not systematically reviewed.[35] The Commission published in August 2022 a public tender for a study that would evaluate the effectiveness of antitrust remedies, in particular looking at remedies in digital markets cases.[36] While this study should provide valuable insights into the effectiveness of past remedies, more systematic *ex-post* analysis of the remedies (and commitments) would be useful.

[35] Organisation for Economic Co-operation and Development (n 7) 8–9, 221.

[36] European Commission, Ex post evaluation of the implementation and effectiveness of antitrust remedies COMP/2022/OP/0009 (2022) <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=11835>.