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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from the European Union

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Remedies and Commitments in Abuse Cases

- Contribution from the European Union -

1. Legal Framework under EU competition law

1. Under EU competition law, remedies and commitments relating to abuse cases can be envisaged in two main types of decisions: (i) decisions finding an infringement, pursuant to Article 7(1) of Regulation 1/2003[1], and (ii) decisions making commitments binding on undertakings, pursuant to Article 9(1) of Regulation 1/2003.

2. Pursuant to Article 7(1) of Regulation 1/2003, the European Commission ("Commission") is entitled, where it finds an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU"), to require the undertakings concerned *"[…] to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. […]"*.

3. Pursuant to Article 9(1) of Regulation 1/2003, where the undertakings concerned by an investigation offer commitments to meet the Commission's preliminary concerns, *"[…] the Commission may by decision make those commitments binding on the undertakings. Such a decision […] shall conclude that there are no longer grounds for action by the Commission."*

4. Under the first scenario, there is a decision finding an infringement and the Commission imposes the remedies, which may include an order for the infringement to be brought to an end (cease-and-desist order) if the infringement is still ongoing, as well as other types of remedies. The decision may also impose a fine. Under the second scenario, the Commission does not conclude on whether or not there has been or still is an infringement and therefore also does not impose a fine. Moreover, commitments are offered by the undertakings. The Commission has discretion whether to accept the commitments offered and it may decide that a case is not suitable to be resolved with a commitments decision[2]. In both types of decisions, the Commission may impose essentially the same kinds of structural or behavioural obligations on undertakings.

5. In terms of procedure[3], remedies pursuant to Article 7(1) of Regulation 1/2003 are not subject to a market test. If the Commission intends to impose remedies, it sets out this

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[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, OJ L 1, 04.01.2003, pp. 1-25 ("Regulation 1/2003").

[2] See Recital 13 of Council Regulation (EC) No 1/2003: *"Commitment decisions are not appropriate in cases where the Commission intends to impose a fine."*

[3] The procedural rules for remedies and commitments are generally contained in Regulation 1/2003 and Regulation 773/2004 (Commission 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, OJ L 123, 27.4.2004,

intention in the Statement of Objections indicating the remedies that may be envisaged in a sufficiently detailed manner to allow the parties to defend themselves as to the necessity and proportionality of the remedies envisaged[4]. On the other hand, commitments offered under Article 9(1) of Regulation 1/2003 are subject to a market test and therefore, it is possible for third parties to provide their views on the proposed commitments[5]. There is no formal deadline for undertakings to offer commitments (for example, commitments may still be accepted even after the Commission has issued a Statement of Objections), but the Commission encourages undertakings to signal at the earliest possible stage their interest in discussing commitments. Both prohibition and commitment decisions can be appealed to the Union courts by those directly and individually concerned by the decision.

6. Several distinctions can be made when the Commission considers the way forward in a specific case.

2. Remedies vs Commitments

7. The Commission retains some margin of discretion in the choice between a prohibition decision pursuant to Article 7(1) of Regulation 1/2003 (with or without remedies) and a commitments decision pursuant to Article 9(1) of Regulation 1/2003[6]. The choice depends on the specific features of each case and the objectives pursued by the Commission.

8. In practice, commitment decisions are only possible when companies are willing to offer appropriate commitments. The Commission will not accept commitments that fall short of addressing its concerns. Commitment decisions can have several advantages. They may allow for a quicker impact on the market and quicker resolution of the competition concerns, especially where undertakings offer commitments early in the procedure. This can be especially important for abuse cases in fast-moving markets (such as digital markets) where achieving a fast solution may prevent the exclusion of competitors. Commitment decisions may also allow for more effective remedies as these can focus on adjusting future behaviour and go beyond what the Commission could have imposed in a prohibition decision. Moreover, the fact that the undertakings under investigation design the commitments themselves may allow for a swifter implementation. Finally, the intervention of third parties in the market test of the commitments allows the Commission to receive useful feedback on the appropriateness of the commitments, which can be used to improve them.

9. Prohibition decisions, on the other hand, create a more solid legal precedent, as there is a finding of an infringement and the decisions are usually reasoned in more detail. They may therefore have a stronger deterrent effect, especially if a fine is also imposed.

p. 18–24). They are also further developed in DG Competition's *"Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU"*.

[4] See Case T-395/94, *Atlantic Container Line and Others v Commission*, EU:T:2002:49, para.418.

[5] For more details on the market test procedure see Article 27(4) of Council Regulation (EC) No 1/2003 and DG Competition's *"Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU"*. In practice, the Commission must publish a market test notice containing a concise summary of the case and the main content of the commitments. It will also publish on the website of DG Competition the full text of the commitments. Interested third parties are invited to submit their observations within a fixed time limit, which shall not be less than one month.

[6] For more information on this topic, see: https://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf

Prohibition decisions are better suited for cases that focus on past behaviour and where a change in future behaviour is less relevant. They are therefore more adequate where the main objective pursued in a case is deterrence, punishment and precedent value. The choice of whether to adopt a prohibition decision with or without remedies is subject to somewhat different considerations, which will be addressed below. Finally, it should also be kept in mind that prohibition decisions are more helpful than commitment decisions to victims of antitrust violations seeking to obtain damages, as only the former make a finding of an infringement.

10. The above considerations apply equally to cases under Article 101 and 102 TFEU. In practice, when looking at the figures of antitrust decisions adopted by the Commission since 2012, it is noticeable that cases under Article 101 TFEU are more often the subject of prohibition decisions than commitment decisions. In part, this is related to the fact that commitment decisions are generally not considered adequate for cartel cases, due to the seriousness of those infringements and the need for a strong deterrent effect that is best achieved with the imposition of a fine. When excluding cartel cases, there are still more prohibition decisions than commitment decisions where cases under Article 101 TFEU are concerned. Since 2012, the Commission has adopted 37 decisions related to infringements of Article 101 TFEU[7]. Of these, 22 were prohibition decisions and 15 were commitment decisions.

11. As regards decisions related to infringements of Article 102 TFEU, the figures are more balanced. Since 2012, the Commission has adopted 25 decisions related to infringements of Article 102 TFEU[8]. Of these, 13 were prohibition decisions and 12 were commitment decisions. This distribution stays essentially the same if looking only at the last five years. Since 2018, the Commission adopted six prohibition decisions and five commitment decisions. This suggests that there is no discernible trend towards adopting more decisions of one type versus another for abuse cases. However, the prohibition decisions mentioned here did not all impose remedies beyond a cease-and-desist order[9], whereas all commitment decisions naturally included commitments.

3. Types of remedies/commitments

12. Another distinction that can be made when the Commission considers the way forward in a specific case is between the different types of obligations the Commission may impose or make binding on the undertakings.

13. The most common type of remedy the Commission imposes in prohibition decisions related to both Article 101 and 102 TFEU are cease-and-desist orders. Cease-and-desist orders are simple orders for the undertakings to stop the infringing conduct and to refrain from engaging in the same conduct again (or any conduct having the same or equivalent object or effect as the infringing conduct). They do not prescribe a specific conduct to be adopted by the infringing undertakings. As such, they leave it to the infringing undertakings to determine what action needs to be taken to remedy the situation. This is often a flexible approach, but it may also present shortcomings and prevent an effective enforcement by the Commission.

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7 Two of these decisions concerned both Article 101 and 102 TFEU.

8 Two of these decisions concerned both Article 101 and 102 TFEU.

9 The specific practice of the Commission in imposing remedies beyond a cease-and-desist order in prohibition decisions in discussed in more detail below.

14. Beyond cease-and-desist orders, the main distinction that can be made is between structural and behavioural remedies[10], which can be included in both prohibition and commitment decisions. Structural remedies involve changes to the structure of an undertaking and thus effectively change the structure of the market. As such, they modify the incentives for the undertakings concerned to adopt a particular conduct. They most often concern the divestiture of assets. Behavioural remedies require an undertaking to act or not to act in a particular manner on the market, for example with regard to prices, contractual obligations, etc. They essentially limit the freedom to conduct business. They can include conduct obligations and performance obligations, the latter being focused on the outcome of the conduct rather than the conduct itself.

15. The distinction between behavioural and structural remedies is not always a simple one, as EU competition law does not provide precise definitions for those concepts. However, it is an important distinction, since Article 7(1) of Regulation 1/2003 states a preference for the imposition of behavioural remedies[11]. It states that structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. There is no similar requirement for commitments pursuant to Article 9(1) of Regulation 1/2003.

16. The choice of a specific type of remedy is also subject to the requirements set out in Article 7(1) of Regulation 1/2003 that the remedies (either structural or behavioural) be necessary and proportionate[12]. The question of whether a remedy is necessary has to do with its effectiveness, i.e. whether the remedy is capable of bringing the infringement to an end. This raises the linked question of what should be the objective of a remedy, which can have three different answers: (i) the remedy should re-establish the situation as it was before the infringement; (ii) the remedy should re-establish the situation as it would be absent the infringement; or (iii) the remedy should re-establish the competitive process, i.e. restore the conditions for a competitive and contestable market.

17. The Union courts have confirmed in the *AKZO* case that the Commission's powers extend to the elimination of the anticompetitive effects of an infringement, where ending the anticompetitive practices is not enough[13]. In this case, the Commission had imposed an obligation aimed at eliminating the consequences of the infringement. In the *Commercial Solvents* case, the Court of Justice upheld a remedy obliging an undertaking to supply specified quantities of the relevant raw material to another undertaking, stating that this was necessary to ensure the undertaking *"was protected from the consequences"* of the

[10] "Remedies" is used here as a term that encompasses both remedies pursuant to Article 7(1) of Regulation 1/2003 and commitments pursuant to Article 9(1) of Regulation 1/2003.

[11] It can be argued however that this apparent preference is merely a reflection of the principle of proportionality, which requires that the least onerous remedy be chosen whenever there are several equally effective remedies. Therefore, this would not be an additional requirement to the principle of proportionality. See E. De Smijter and L. Kjolbye, *'The Enforcement System Under Regulation 1/2003'* in J. Faull and A. Nikpay (eds), *The EU Law of Competition* (3rd edn Oxford University Press, Oxford 2014), p.125. See also C. Ritter, *'How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?',* Journal of European Competition Law & Practice, Volume 7, Issue 9, 1 December 2016, p. 587–598.

[12] Commitments under Article 9 must equally be necessary, in that they must effectively address the concerns expressed by the Commission, and proportionate.

[13] See C-62/86, *AKZO v Commission*, EU:C:1991:286, para 155 and 157.

infringement[14]. However, the Commission rarely imposes or accepts such remedies. This is in part due to the difficulties in designing such remedies, as they require the identification of a counterfactual that can serve as a proxy for the competition situation to be restored, as well as a more sophisticated assessment of effects (since the Commission would need to demonstrate that there are persisting anti-competitive effects stemming from the infringement). This can often be challenging, especially in more complex cases.

18. More recently, the Union courts have put emphasis on the fact that the role of competition law is to protect competition as a process, not the position of individual competitors. This would be more in line with an interpretation that effective remedies should aim at re-establishing the competitive process as such. Whatever the interpretation adopted, an effective remedy should create new realistic commercial opportunities, but it is for the market participants to take them up. In other words, the Commission cannot guarantee a specific market outcome. Nor is it the task of the remedies policy to provide compensation for the damages suffered by individual competitors (for that, there are the damages actions).

19. Remedies should also be proportionate. This requirement is to be interpreted somewhat differently under Article 7(1) and Article 9(1) of Regulation 1/2003. Unlike Article 7(1) of Regulation 1/2003, Article 9(1) does not expressly refer to proportionality. The Union courts have nevertheless made clear that the principle of proportionality, as a general principle of European Union law, is a criterion for the lawfulness of any act of the institutions of the Union, including decisions pursuant to Article 9(1) of Regulation 1/2003[15]. However, the Union courts have also accepted that the extent and content of the proportionality principle is different under these two provisions. In particular, under Article 9(1), the Commission need only verify that the commitments address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately[16]. By contrast, under Article 7(1), the requirements are stricter, as the Commission must seek the least onerous remedy that will effectively bring the infringement to an end[17]. In practice, this means that under Article 9(1), measures going beyond what the Commission could have imposed in the context of Article 7(1) should not automatically be regarded as disproportionate.

20. Beyond the legal requirements discussed above, the choice of a specific type of remedy is always based on the facts and circumstances of each individual case. The remedy needs to be capable of bringing the infringement to an end or capable of addressing the concerns expressed by the Commission. There is therefore an inherent link between the nature of the infringement and the remedies available to the Commission. Structural remedies

[14] See Cases 6/73 and 7/73, *ICI and Commercial Solvents v Commission*, EU:C:1974:18, para 46.

[15] Case C-441/07 P, *Commission v Alrosa*, EU:C:2010:377, para 36.

[16] *Idem*, paras 38-41.

[17] If there is only one possible remedy bringing the infringement to an end, that remedy is considered to fulfil the proportionality condition. See Joined cases C-241/91 P and C-242/91 P, *Magill*, EU:C:1995:98, paras 91-92. The so-called *Automec* case law further suggests that it is not for the Commission to impose its own choice from among all the various potential remedies. This could mean that where several effective remedies are available it is in principle for the infringing undertaking to select the appropriate remedy (see Case T-24/90, *Automec v Commission*, EU:T:1992:97, paras 51-52). However, it can be argued that a restrictive reading of this case law would unduly restrict the Commission's powers to *"impose […] any behavioural or structural remedies which are […] necessary to bring the infringement effectively to an end"*, as set out in Article 7(1) of Regulation 1/2003. The Commission should thus be able to balance proportionality and effectiveness in order to impose a specific type of remedy.

will often be appropriate where there is a direct link between the infringement and the holding of certain assets or the structure of the undertaking concerned. Other elements to take into account are the fact that structural remedies are difficult to circumvent and will often need to be monitored for a shorter time. On the other hand, behavioural remedies can be more varied but this also means that they are often more complex (sometimes involving a number of complementary different elements). In practice, this may make it more difficult to get their design right and to ensure effective implementation. Moreover, behavioural remedies offer more opportunities for circumvention and often need to be monitored over a longer period of time. Where both behavioural and structural remedies are effective, it will also depend on the individual circumstances of the case and the envisaged remedies whether a structural measure is more burdensome than a behavioural obligation. The latter require close monitoring, which may interfere with the business conduct of the undertaking. For instance, a behavioural remedy in the form of price control, with accompanying accounting requirements and monitoring for an extended duration, may be significantly more burdensome than a structural remedy in the form of an obligation to sell a shareholding.

21. In its practice, the Commission tends to choose behavioural remedies more often than structural remedies, regardless of whether the case concerns Article 101 or 102 TFEU. Prohibition decisions almost always include a cease-and-desist order, but since the adoption of Regulation 1/2003, the Commission has only imposed remedies going beyond a cease-and-desist order in five cases[18]. In four of these cases, the remedy imposed was behavioural. The Commission imposed a structural remedy in the *ARA* decision[19]. As regards commitment decisions, there is a clear predominance of behavioural commitments over structural commitments, and in some cases, behavioural and structural commitments have been combined. The few cases in which the Commission accepted structural commitments mainly concerned the energy and transport sectors, where the Commission accepted the divestiture of assets such as generation capacity[20], transmission facilities[21] or airport slots[22]. Structural commitments have been accepted in both Article 101 and 102 cases and there is no discernible trend that would allow concluding that structural remedies are more often used or more suitable in abuse cases.

22. Behavioural remedies imposed or accepted by the Commission have varied in their content and design. In abuse cases, the Commission has for example imposed positive remedies[23] such as access remedies, an order to supply, an obligation to amend business

[18] See Commission Decision of 24 March 2004 in case COMP/37.792 – Microsoft; Commission Decision of 19 December 2007 in case COMP/34.579 – MasterCard; Commission Decision of 16 July 2008 in case COMP/38.698 – CISAC; Commission Decision of 20 September 2016 in case AT.39759 – ARA foreclosure and Commission Decision of 13 May 2019 in case AT.40134 AB InBev.

[19] In this case, that was subject to the cooperation procedure, the Commission required ARA "to divest the part of the household collection infrastructure" which ARA owned to one or several independent purchasers (see Article 4 of the Commission Decision of 20 September 2016 in case AT.39759 – ARA foreclosure).

[20] For example, in cases AT.39388 and AT.39389 concerning the German electricity market, the Commission accepted E.ON's commitments to divest part of its generation capacity and its extra-high voltage network.

[21] For example, in case AT.39402 - RWE gas foreclosure, the Commission accepted RWE's commitment to divest its entire Western German high-pressure gas transmission network.

[22] For example, in case AT.39595 - Continental/United/Lufthansa/Air Canada, the Commission accepted the airlines' commitment to make slots available at Frankfurt and New York airports.

[23] For example, in case AT. 39678 – Deutsche Bahn, the Commission accepted Deutsche Bahn's commitment to introduce a new pricing system for traction current, thereby granting electricity providers

terms, an obligation to change business practices to make competition possible or obligations on prices. The Commission has in some abuse cases also imposed negative remedies[24] such as the prohibition to enter into certain types of agreements or to engage in certain conduct (e.g. seeking injunctions).

23. The design of remedies/commitments being inherently linked to the type of infringement, it naturally follows that cases targeting novel theories of harm may require imposing or accepting new forms of remedies/commitments. One recent example of this were the remedies imposed in the context of the Google Android decision[25]. The prohibition decision adopted in 2018 imposed a cease-and-desist obligation, which, *inter alia*, entailed the untying of the supply of Google Play Store, Google Search and Google Chrome. The Commission did not impose particular measures but set out a deadline for the parties to notify to it the measures by means of which they intended to bring the infringement effectively to an end. One of the measures chosen by the parties and endorsed by the Commission was the implementation of a choice screen remedy, allowing consumers to choose which search provider they want on their Android device and thus replace Google Search. The Commission closely monitored the implementation of this and other commitments to ensure that they would be as effective as possible.

4. Enforcement of remedies/commitments

24. In addition to the structural/behavioural remedies/commitments, the Commission will usually also impose obligations on the undertakings that are meant to facilitate the monitoring of the remedies/commitments and ensure compliance. These may include an obligation for the undertaking to report to the Commission periodically on how it is implementing the remedies/commitments or the appointment of a monitoring trustee. A monitoring trustee is an independent person or company that is specifically appointed to monitor the correct implementation of the remedies and report back to the Commission. This can be especially useful when the implementation of the remedy entails difficult technical aspects for which the Commission is not well equipped. The appointment of a monitoring trustee is a rather standard practice for the Commission.

25. In case of non-compliance, the Commission can impose a fine on the infringing undertakings. Article 9(2) of Regulation 1/2003 foresees that the Commission can reopen the proceedings if the undertaking does not comply with the commitments, with the possibility of imposing a fine. There is no need to show an underlying infringement of Articles 101 or 102 TFEU, but simply that the commitments themselves have not been complied with. Article 23(2) of Regulation 1/2003 sets out that the Commission may impose fines if undertakings fail to comply with a commitment made binding by a decision pursuant to Article 9. In addition, Article 24 of Regulation 1/2003 sets out that the

access to its network for supplying traction current. In case AT.39692 – IBM, the Commission accepted IBM's commitment to make spare parts and technical information available, under commercially reasonable and non-discriminatory terms, to independent mainframe maintainers. In case AT.39592 – Standard and Poor's, the Commission accepted a commitment to abolish a licensing fee and to offer a particular product for a cost-based price or for free.

[24] For example, in case AT.39116 – Coca-Cola, the Commission accepted Coca-Cola's commitment to refrain from entering into exclusive agreements with certain customers or from offering them certain types of rebates. In case AT.39939 – Samsung, the Commission accepted Samsung's commitment not to seek injunctions in Europe on the basis of its standard essential patents for smartphones and tablets against licensees who sign up to a specified licensing framework.

[25] See Commission Decision of 18 July 2018 in case AT.40099 – Google Android.

Commission may impose periodic penalty payments in order to compel the undertaking (i) to put an end to an infringement, in accordance with a decision taken pursuant to Article 7, or (ii) to comply with a commitment made binding by a decision pursuant to Article 9.

26. The imposition of a fine under Article 23(2) of Regulation 1/2003 is subject to a cap of 10% of the undertaking's total turnover in the preceding business year. The imposition of periodic penalty payments pursuant to Article 24 of Regulation 1/2003 is a two-step process, which first involves a warning based on Article 24(1). This sets out the amount of the periodic penalty payment, which cannot exceed 5 % of the average daily turnover of the relevant undertaking in the preceding business year per day and calculated from the date appointed by the decision. This warning can be a standalone decision but is most often already part of the prohibition or commitment decision. As a second step, if the undertaking does not comply, the Commission will adopt a decision imposing the total amount to be paid, pursuant to Article 24(2) of Regulation 1/2003.

27. In its practice, while the Commission will often set out the possibility of fines or periodic penalty payments in its decisions, it only imposed a fine for non-compliance in one instance. In 2013, the Commission found that Microsoft had not fully complied with the commitment to make available to users a browser choice screen which had been made binding on Microsoft in the browser tying case and thus imposed a fine under Article 23(2) of Regulation 1/2003[26].

5. Remedies and commitments in regulated sectors

28. Usually, the enforcement actions taken by competition authorities and the activities of the sector regulators complement each other, but there is also the risk that they could lead to uncoordinated results. In this context, cooperation between competition authorities and regulators can be an effective tool to defuse contradicting outcomes and provide coordinated responses[27]. Furthermore, case-specific coordination with sector regulators also helps a competition authority better understand the regulatory framework in which undertakings operate – which is useful for the competitive assessment and for the design of effective remedies.

29. In practice, the Commission does not shy away from intervening in regulated sectors where this is warranted[28]. The Commission has adopted a series of competition decisions under Article 102 TFEU in cases where the conducts under scrutiny occurred in regulated sectors, in particular in the telecommunications and the energy sectors. In some cases, a certain conduct may already be subject to regulation. This however does not necessarily prevent a competition infringement to arise. In other cases, competition enforcement may intervene to address a conduct that is not caught by regulation, i.e. a regulatory gap, or when regulation did not go as far as necessary to prevent problems on the market. For example, in the telecommunication sector, in 2007 the Commission fined Telefonica for an abuse of dominant position in the form of a margin squeeze[29]. On appeal,

[26] See Commission Decision of 6 March 2013 in Case AT.39530 – Microsoft (Tying).

[27] For a more detailed assessment of this topic, see the Commission's contribution to the OECD Global Forum on Competition (December 2022) on *Interactions between competition authorities and sector regulators*.

[28] For more detailed information on this, see the Commission's contribution to the Working Party No. 2 on Competition and Regulation of 7 June 2021 on *Competition Enforcement and Regulatory Alternatives* (DAF/COMP/WP2/WD(2021)13).

[29] Commission Decision of 4 July 2007 in Case AT.38784 - Telefonica.

Telefonica argued that the Commission had encroached upon the powers of the national regulatory authority and referred to concepts of a regulatory nature. Both the General Court and the Court of Justice dismissed this argument. In this and other cases, the Union courts further clarified that the fact that an undertaking's conduct complies with a regulatory framework does not mean that such conduct complies with Article 102 TFEU and EU competition law is applicable to conducts put in place within the boundaries and the limits of regulatory provisions. In this respect, the Commission is exclusively bound by the provisions of the TFEU, and ex ante remedies (such as price interventions) imposed at a regulatory level are not relevant in cases where the undertakings concerned behave autonomously on the market. They therefore do not preclude the Commission from finding an infringement and imposing (ex-post) remedies.

6. Ex-post evaluation of adopted measures

30. The ex-post evaluation of adopted remedies/commitments is essential to better understand their impact on market functioning and consumer welfare. It can also provide important lessons that the Commission can use to improve the design and implementation of future remedies/commitments.

31. The Commission is increasingly invested in this type of evaluation and in this context, has recently launched a call for tenders for a study of remedies imposed in non-cartel antitrust cases[30]. The study will include a descriptive part, covering all decisions in which antitrust remedies have been imposed since the entry into force of Regulation 1/2003 (both under Article 101 and 102 TFEU) and an ex-post evaluation part, covering a sample of remedies decisions (under both Article 7(1) and Article 9(1) of Regulation 1/2003). The ex-post evaluation part of the study will assess whether the remedies in the selected cases have been correctly implemented by the addressees of the decision and had the effects on competition intended by the decision, with a view to drawing broader policy conclusions and making recommendations for improving enforcement practice.

7. Final remarks

32. The Commission believes that remedies and commitments are a very important tool in antitrust cases in general, including abuse cases. Remedies and commitments are one of the main parameters to assess the effectiveness of competition enforcement and the Commission is therefore committed to make full use of its powers in this area.

33. The identification and design of effective remedies/commitments is a complex case-by-case exercise. It requires striking the right balance between the need to find the most effective solution while at the same time not unduly interfering with business decisions and risk chilling innovation. It must also balance the interests of all the parties affected: the infringer and its competitors, but also business partners, customers, and consumers. Furthermore, to ensure that remedies and commitments deliver on their objectives, it is important to have adequate technical expertise and to involve all relevant parties both when discussing the design of the remedies/commitments and when monitoring their implementation. Nevertheless, the Commission has rather broad powers when it comes to imposing remedies or accepting commitments and the complexity in identifying a remedy/commitment should not deter it from adopting such decisions.

[30] https://etendering.ted.europa.eu/cft/cft-display.html?cftId=11835