European Commission

Clean, Just and Competitive Transition

Ex post evaluation of the implementation and effectiveness of EU antitrust remedies

Final Report

Prepared by GRIMALDI ALLIANCE NERA

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Abstract (EN)

In this report we study the implementation and effectiveness of the antitrust remedies that the European Commission imposed over the last 20 years pursuant to Article 7 (*prohibition decisions*) and Article 9 (*commitments decisions*) of Regulation 1/2003. To this end, we collect evidence from a variety of sources, including: (i) the legal and economic literature; (ii) interviews with enforcers, scholars and practitioners on challenges and best practices; (iii) a novel dataset we constructed of all non-cartel antitrust decisions that the Commission took between the entry into force of Regulation 1/2003 on 24 January 2003 and 31 December 2022; and (iv) most notably, the retrospective evaluation of a carefully constructed sample of twelve significant remedy cases, based on oral interviews and written questionnaires with case teams, decision addressees and market participants, as well as Open Source Intelligence (OSINT) research. From the twelve case studies we learn that: (i) while the majority of remedies assessed were fully implemented, less than half of the remedies were fully effective in attaining their intended objective; (ii) purely behavioural remedies were the least likely to be fully implemented and fully effective; and (iii) implementation and effectiveness seem to have improved over time. Based on the twelve case studies and our other sources of evidence we provide several recommendations *de lege lata* and *de lege ferenda* for future enforcement practice and policy, especially in relation to remedies under Article 7. In particular, we recommend the removal of the statutory subordination of structural to behavioural remedies under Article 7, the flexible use of market testing, and the more frequent recourse to reporting obligations and monitoring trustees.

Abstract (DE)

In diesem Bericht untersuchen wir die Umsetzung und Wirksamkeit der Abhilfemaßnahmen, die die Europäische Kommission in den letzten 20 Jahren gemäß Artikel 7 (*Verbotsentscheidungen*) und Artikel 9 (*Verpflichtungsentscheidungen*) der Verordnung 1/2003 auferlegt hat. Zu diesem Zweck wurden aussagekräftige Informationen aus einer Vielzahl von Quellen gesammelt, darunter: (i) relevante juristische und ökonomische Literatur; (ii) Interviews mit Mitarbeitern von Wettbewerbsbehörden, Wissenschaftlern, Wettbewerbsrechtsanwälten und -ökonomen zu Herausforderungen und Best Practices; (iii) ein von uns erstellter Datensatz aller nicht kartellbezogenen Entscheidungen, die die Kommission zwischen dem Inkrafttreten der Verordnung 1/2003 am 24. Januar 2003 und dem 31. Dezember 2022 getroffen hat; und (iv) vor allem die Ex-post-Evaluierung einer sorgfältig zusammengestellten Auswahl von zwölf bedeutenden Entscheidungen mit Abhilfemaßnahmen, die auf mündlichen Interviews und schriftlichen Befragungen von Fallteams, Entscheidungsadressaten und Marktteilnehmern sowie auf Open Source Intelligence (OSINT) beruht. Aus diesen zwölf Fallstudien lernen wir, dass (i) Abhilfemaßnahmen in den meisten bewerteten Fällen zwar vollständig implementiert, jedoch weniger als die Hälfte der Abhilfemaßnahmen voll wirksam bei der Erreichung des angestrebten Ziels waren; (ii) verhaltensorientierte Abhilfemaßnahmen am unwahrscheinlichsten vollständig implementiert und voll wirksam waren; und (iii) sich die Umsetzung und Wirksamkeit im Laufe der Zeit erheblich verbessert zu haben scheinen. Auf der Grundlage der zwölf Fallstudien und anderen Quellen entwickeln wir verschiedene Empfehlungen *de lege lata* und *de lege ferenda* für die künftige Anwendungspraxis und -politik ab, insbesondere in Bezug auf Artikel 7. So empfehlen wir die Aufhebung der gesetzlichen Unterordnung gemäß Artikel 7 von strukturellen Abhilfemaßnahmen gegenüber verhaltensbezogenen Abhilfemaßnahmen, den flexiblen Einsatz von Markttests und den häufigeren Einsatz von Berichtspflichten und Überwachungstreuhändern.

Abstract (FR)

Dans ce rapport, nous analysons la mise en œuvre et l'efficacité des mesures correctives imposées par la Commission européenne, au cours des 20 derniers années, sur le fondement de l'article 7 (*décisions d'interdiction*) et de l'article 9 (*décisions d'acceptation d'engagements*) du règlement 1/2003. À ces fins, nous recueillons des éléments pertinents à partir de plusieurs sources, notamment : (i) la doctrine juridique et économique; (ii) des entretiens avec des universitaires et des praticiens sur les défis et les meilleures pratiques dans la conception et la mise en œuvre des mesures correctives; (iii) un ensemble de données réunissant toutes les décisions antitrust, hors cartels, que la Commission a adoptées entre l'entrée en vigueur du règlement 1/2003 le 24 janvier 2003 et le 31 décembre 2022 ; et (iv) en particulier l'analyse a posteriori d'un échantillon soigneusement construit de douze cas importants de mesures correctives, par le biais d'entretiens oraux et de questionnaires écrits avec des gestionnaires de cas, des destinataires des décisions et des acteurs du marché, ainsi que des recherches via Open Source Intelligence (OSINT). Nous tirons de l'étude de ces douze cas plusieurs enseignements importants : (i) si la majorité des mesures évaluées ont été pleinement mises en œuvre, moins de la moitié des mesures ont été pleinement efficaces pour atteindre l'objectif visé ; (ii) les mesures purement comportementales ont été les moins susceptibles d'être pleinement mises en œuvre et pleinement efficaces ; et (iii) la mise en œuvre et l'efficacité semblent s'être améliorées au fil du temps. Sur la base de ces douze études de cas et nos autres sources de données, nous formulons de nombreuses recommandations *de lege lata* et *de lege ferenda* pour les futures pratiques et politiques, spécifiquement en relation avec les mesures prévue à l'article 7. En particulier, nous recommandons la suppression du rapport de subordination des mesures correctives structurelles aux mesures correctives comportementales prévu dans le texte de l'article 7, l'utilisation flexible des tests de marché, le recours plus fréquent à l'obligation de déclaration ainsi qu'à la nomination du mandataire chargé du contrôle.

Table of Contents

Executive summary (EN)

Study background and aims. On the occasion of the twentieth anniversary of Regulation 1/2003, which governs the enforcement of the antitrust rules in the European Union, the Directorate-General for Competition of the European Commission tendered in October 2022 (call for tenders COMP/2022/OP/0009) a contract for a study on the ex post evaluation of the implementation and effectiveness of antitrust remedies by the Commission. A multi-disciplinary consortium composed of law firm Grimaldi Alliance, economic consulting firm NERA, Prof. Peter Whelan of the School of Law of the University of Leeds and Thomas Hoehn, monitoring trustee and remedies expert, were awarded the contract in May 2023. The present report contains the results of the research that we have carried out over the last 16 months.

The objective of the Study is to assess the effectiveness of the Commission's antitrust policy and practice in cases that involved remedies, as well as outlining possible areas for improvement. To this end the Study gathers evidence from a variety of sources, including: (i) the legal and economic literature on antitrust remedies; (ii) interviews with antitrust and merger case managers from DG COMP, officials from other competition authorities (France's *Autorité de la concurrence*, Germany's *Bundeskartellamt*, and the United States' Antitrust Division of the Department of Justice and Federal Trade Commission), legal and economic scholars, and monitoring trustees; (iii) a novel dataset we constructed of all (non-cartel) antitrust decisions that the Commission took between the entry into force of Regulation 1/2003 on 24 January 2003 and 31 December 2022; and (iv) most notably, oral interviews and written questionnaires with case teams, decision addressees and market participants, as well as Open Source Intelligence (OSINT) research, in twelve significant EU antitrust remedy cases that we carefully selected using a range of quantitative criteria from the dataset, excluding cases where the decision was annulled by the Court of Justice of the European Union or was under judicial review at the time of the selection. To all of our interview partners we have granted anonymity and have ensured the protection of the business secrets of their employers or clients.

Key features of the EU legal framework governing remedies. Regulation 1/2003 has governed the enforcement of the antitrust rules in the EU for the last 20 years and has brought about a radical change from the previous Regulation 17/1962, by decentralising enforcement to the Member States' competition authorities and courts, and by giving the Commission greater flexibility to set enforcement priorities. The EU antitrust rules are found in Article 101 of the Treaty on the Functioning of the European Union, which prohibits agreements among firms that restrict competition, and Article 102 TFEU, which prohibits abuses of a dominant position. Remedies for the enforcement of these rules are found in Article 7 and Article 9 of Regulation 1/2003. In Article 7 decisions (also known as prohibition, or infringement, decisions) the Commission may, in addition to ordering the undertakings in question to bring the infringement to an end, impose on the same undertakings *"any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end"*. According to Article 7, *"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"*. In Article 9 decisions (also known as commitments decisions), the undertakings in question may offer commitments to the Commission and *"the Commission may by decision make those commitments binding"* on them if the commitments *"meet the concerns expressed to them by the Commission in its preliminary assessment"*. In addition to Article 7 and Article 9 remedies, the Commission can also adopt, *"in cases of urgency due to the risk of serious and irreparable damage to competition"*, Article 8 interim measures. Procedural guidance on the design of EU antitrust remedies is offered by the Commission notice (2011) on best practices for the conduct of proceedings concerning Article 101 and 102 TFEU, as well as by DG COMP's Antitrust manual of procedures (2019).

At a minimum, a prohibition decision will order the concerned undertakings to bring the infringement to an end. Such a "cease-and-desist" order is formulated in two alternative ways across decisions: as a "basic" order to *"bring to an end the infringement"* or, increasingly over time, as a "like-object-or-effect" order that in addition orders the concerned undertakings to *"refrain from repeating"* the infringement and to refrain from *"any act or conduct having the same or equivalent object or effect"*. While cease-and-desist orders can themselves be considered a particular form of (behavioural) remedies, a prohibition decision may in addition include (positive) remedies that expand the detail and scope of the cease-and-desist order, with a view to not only halting the anticompetitive behaviour but also preventing the behaviour from being repeated/the order from being circumvented and removing its adverse consequences, in effect restoring the conditions for and outcomes of undistorted competition. Such remedies are usually specified in the preamble or the operative part of a decision, but it can also be that the prohibition decision just orders the concerned undertakings to propose a remedy which, if accepted, the Commission will impose in a subsequent decision. Over time, based on the settlement procedure for cartel investigations, a cooperation procedure for non-cartel antitrust investigations has emerged that rewards the addressee of a prohibition decision for its contribution to the finding of the infringement or its solution, the latter in the form of proposing remedies.

Commitments decisions tend to be much shorter than prohibition decisions, concentrating on the commitments that have been offered by the concerned undertakings and made binding on them by the Commission, rather than providing an in-depth assessment of the relevant markets, the position of the undertaking on them and its problematic behaviour. With a commitments decision, foregoing the finding of an infringement and potential fines is traded against a swifter investigation and greater flexibility in remedy design.

Unlike Article 7 remedies, Article 9 remedies require formal market testing, allowing the proposed remedies not only to be tested for their verifiability and effectiveness but also to be made transparent in the first place. A significant role in the monitoring of compliance and verification of implementation of any remedy can be played not only by the reporting obligations that the concerned undertaking may have towards the Commission but also by an independent monitoring trustee appointed by the undertaking subject to approval by the Commission. Because, however, the General Court's judgment in Case T-201/04, *Microsoft Corp.* v *Commission* has restricted the ability of the Commission to order an undertaking to appoint a monitoring trustee with extensive investigative powers and pay for its costs, monitoring trustees have since then only been appointed in Article 9 cases, creating a latent constraint on the imposition of complex remedies under Article 7.

Perhaps because of the overall smaller number of cases and their greater heterogeneity, the practice of antitrust remedies does not appear to be as well developed as the practice of merger remedies. To date, for example, no substantive guidance on EU antitrust remedies exists that is comparable to the guidance offered in EU merger control by the Commission's merger remedies notice (2008). Unsurprisingly, this pattern extends to retrospective evaluation. Indeed, this Study aims to follow the Merger Remedies Study that the Commission itself undertook in 2005. In this respect it is important to note that EU merger remedies share features of, in particular, Article 9 antitrust remedies, in that merger remedies are offered – to avoid the possible prohibition of a proposed merger – by the merging parties, and usually include the appointment of a monitoring trustee. At the same time, there are important differences between antitrust and merger remedies, as for example according to the Commission's merger remedies notice *"commitments which are structural in nature are preferable"*. While at first sight this preference may appear to be at odds with the statutory preference for behavioural remedies expressed in Article 7 of Regulation 1/2003, the discrepancy can be explained at least partly by considering that a merger intrinsically gives rise to a structural change (which, if considered likely to have anticompetitive effects, is then preferably eliminated by a structural remedy). In antitrust enforcement, however, it is the

anticompetitive behaviour, which may or may not be intrinsically incentivised by a certain structure of the firm, that is the key issue.

Statistical analysis. As part of this project, we constructed a novel, detailed and comprehensive dataset on all (non-cartel) antitrust decisions that the Commission adopted between the entry into force of Regulation 1/2003 on 24 January 2003 and 31 December 2022. We count 51 Article 9 decisions as well as a total of 57 non-cartel Article 7 decisions, twelve of which include a remedy. The 57 Article 7 decisions also account for seven equivalent decisions (including two remedy decisions) that were still adopted under the preceding Regulation 17/1962, before the new Regulation started to apply on 1 May 2004.

Based primarily on the public version of the decision, the associated press release and the judgments of the Court of Justice of the European Union, our dataset contains information about characteristics of the decision (such as its date and length), the type of competition concern, the type of remedy, the remedy's modalities and flanking measures, as well as the status of judicial review.

Among other patterns, we find that the decisions have addressed in similar numbers Article 101 TFEU and Article 102 TFEU competition concerns, with prohibition decisions being the most frequent legal instrument to address restrictive agreements and commitments decisions being the most frequent instrument to address abuses. Among the agreements, horizontal agreements outweigh the vertical agreements. Among the abuses, about two thirds of the cases are exclusionary abuses, followed by abuses related to the internal market and a handful of exploitative abuses. The number of commitments decisions, both in absolute terms and relative to the number of prohibition decisions, peaked during the terms of Competition Commissioners Neelie Kroes first and Joaquín Almunia next. About two thirds of Article 7 decisions have undergone or were (at the time of writing) undergoing judicial review, whereas this is the case for less than 10% of Article 9 decisions.

Turning to remedies, we find that while they are necessarily included in all Article 9 decisions, specific, positive remedies going beyond a cease-and-desist order were only included in 20% of the Article 7 decisions. Distinguishing among structural remedies (such as the divestiture of assets), purely behavioural remedies (these are remedies that provide specific obligations on the behaviour of the concerned undertaking going forward) and behavioural remedies with structural elements (these are behavioural remedies with the potential for a lasting effect on market participants' incentive and ability to compete, and in addition, are beyond the ongoing manipulatory reach of the concerned firm), we find in addition that purely behavioural remedies are the most frequently used remedy type. Only one structural remedy (AT.39759 – *ARA foreclosure*) and no behavioural remedy with structural elements were ever imposed under Article 7, whereas six remedies accepted under Article 9 were structural remedies and seven were behavioural remedies with structural elements. Purely behavioural remedies (of which we have 49 cases) take various forms, including the obligation to engage/not engage in certain behaviour (twelve cases), terminate or change existing contracts/exclusivity clauses (nine cases), provide access to technical information (six cases), and the obligation to respect certain price caps/conditions (six cases).

Among remedies' modalities and flanking measures, we find that a monitoring trustee was appointed under Article 9 in all six structural remedies, six out of the seven behavioural remedies with structural elements, and half of the purely behavioural remedies. The most common durations for behavioural remedies are 5 and 10 years.

Case studies. From these 108 cases we were tasked with selecting five significant Article 7 cases and seven significant Article 9 cases for which to conducted an ex post evaluation of their remedies' implementation and effectiveness, after excluding the 45 cases that were resolved with a simple cease-and-desist order, the cases that were entirely or broadly annulled by the Court of Justice of the European Union (AT.38698 – *CISAC Agreement* and AT.40023 – *Cross-border access to pay-TV*), and the cases that were under judicial

review at the time of the case selection (AT.39740 – *Google Search (Shopping)*, AT.40099 – *Google Android*, AT.40411 – *Google Search (AdSense)*, AT.40208 – *International Skating Union's Eligibility Rules* and AT.39816 – *Upstream gas supplies in Central and Eastern Europe*). The selection of Article 7 cases was straightforward in light of the small number of eligible cases. For the selection of Article 9 cases we constructed a quantitative index of the significance of the case and the significance of its remedy combining a range of factors, including the length of the decision and the number of downloads of the decision from the Commission's COMP Case Search website, ranked cases on this basis, and selected the highest ranking cases, while ensuring coverage over time and between Article 101 and Article 102 TFEU cases, type of competition concern and type of remedy.

The resulting case selection is presented in Table 1. As indicated in the table, in some of these cases remedy obligations are still ongoing.

Table 1 Case selection

Case	Decision type	Year	Legal basis	Competition concern	Remedy type	Implementation	Effectiveness
AT.37792 *Microsoft I*	Art. 7	2004	Art. 102	Exclusion a) tying;	Purely behavioural (untie/unbundle)	Full;	No;
AT.37792 *Microsoft I*	Art. 7	2004	Art. 102	b) restricting interoperability	Purely behavioural (access to technical information)	Partial	Partial
AT.34579 *MasterCard I*	Art. 7	2007	Art. 101	Horizontal agreement	Purely behavioural (price caps)	No	No
AT.39985 *Motorola*	Art. 7	2014	Art. 102	Exclusion (SEP injunctions)	Purely behavioural (remove contractual clauses)	Full	Full
AT.39759 *ARA foreclosure*	Art. 7	2016	Art. 102	Exclusion (refusal of access)	Structural	Full	Full
AT.40134 *AB InBev*	Art. 7	2019	Art. 102	Internal market	Purely behavioural (multi-language labels)	Full	Full
AT.38636 *Rambus*	Art. 9	2009	Art. 102	Exploitation (patent ambush and excessive prices)	Purely behavioural (price caps)	Full	Partial
AT.39596 *BA/AA/IB**	Art. 9	2010	Art. 101	Horizontal agreement (airline alliance)	Behavioural with structural elements (airport slots)	Partial	Partial

AT.39315 *ENI*	Art. 9	2010	Art. 102	Exclusion (strategic underinvestment)	Structural	Full	Partial
AT.39847 *E-books*	Art. 9	2012	Art. 101	Horizontal and vertical agreements	Purely behavioural (change contracts)	Full	Partial
AT.39678/AT.39731 *Deutsche Bahn I/II*	Art. 9	2013	Art. 102	Exclusion (margin squeeze)	Behavioural with structural elements	Full	Full
AT.40608 *Broadcom**	Art. 9	2020	Art. 102	Exclusion (exclusive dealing and tying/bundling)	Purely behavioural (remove clauses)	Inconclusive (lack of relevant evidence)	Inconclusive (lack of relevant evidence)
AT.40394 *Aspen**	Art. 9	2021	Art. 102	Excessive prices	Purely behavioural (price caps)	Full	Full

Note: The asterisk denotes cases in which the remedy obligations are still ongoing.

We note that in case AT.37792 – *Microsoft I* two different competition concerns were addressed with two distinct remedies, resulting in a total of 13 remedies that were evaluated.

Overall methodological approach. The methodology that we apply in this Study combines different sources of evidence, whereby in addition to retrospectively looking at a considerable number of significant individual cases we reviewed the literature, conducted expert interviews and performed a statistical analysis of all EU antitrust remedy cases of the last twenty years. The main strengths of this methodology are that: (i) significant/borderline cases are likely to shed valuable light on the Commission's policy objectives and orientation above and beyond the individual case; (ii) considering their size and complexity, such cases are likely to have given rise to a number of implementation issues from which we can learn; (iii) the sample of cases is reasonably large – covering most Article 7 remedy cases and one in seven Article 9 cases – and thus offers us a broad perspective; and (iv) this perspective is further broadened by the inclusion of the statistical analysis of all remedies cases, the interviews with experts and the literature review.

As the same time, the Study's methodology suffers from a number of limitations, the main of which are that: (i) we could not include a number of significant recent cases, because they are pending before the CJEU; and (ii) the ex post evaluation was necessarily only qualitative, since a more rigorous quantitative analysis would have forced us to limit ourselves to a much smaller number of cases, thereby missing the Study's deliberately broad scope.

Results from the case studies. Based on oral interviews and written questionnaires with case teams, decision addressees and market participants, as well as OSINT research, we conclude that nine out of 13 remedies were implemented fully, while two remedies were only partially implemented, and one was not implemented. The assessment of implementation of one remedy was inconclusive due to it being ongoing and lack of relevant evidence. Turning from implementation to effectiveness, we conclude that only five remedies were fully effective in achieving their intended objectives, whereas in five cases, the remedies were only partially effective. In the evaluation we found two remedies that were ineffective while we could

not conclude the level of effectiveness of one remedy, again due to it being ongoing and a lack of relevant evidence.

The ex post evaluation also revealed that the implementation and effectiveness of remedies varied with the decision type, the remedy type and over time. In general, Article 7 remedies show more issues of implementation and effectiveness compared to Article 9 remedies When it comes to remedy type, the ex post evaluation indicates that purely behavioural remedies were the least likely to be fully implemented and fully effective, pointing to remedy design issues, the inability of purely behavioural remedies to alter the concerned undertaking's incentives to misbehave, as well as difficulties in monitoring implementation. Lastly, the retrospective assessment suggests that the remedy practice of the Commission has improved over time, considering that issues of implementation and effectiveness were found rather in older cases (starting with AT.37792 – *Microsoft I* and AT.34579 – *MasterCard I*) than in more recent cases.

The record on effectiveness of a set of remedies with respect to their intended objective may, however, understate the wider impact that these remedies have had. Indeed, it is one of the lessons learned from this project that some of the remedies that we assessed (and the decisions in which they are included) have also had a broader impact that comprises influencing future hard and soft antitrust law, antitrust judgments and sector regulation, such as the Commission's Horizontal guidelines, the Court of Justice of the European Union judgment in *Huawei* v *ZTE*, the EU's Multilateral Interchange Fees regulation, the proposed SEP regulation, as well as the Digital Markets Act.

Challenges identified and lessons learned. In addition to conducting OSINT research and interviewing DG COMP's case teams, decision addresses, market participants and their advisers in the context of our twelve case studies, we have reviewed the literature and talked to officials at DG COMP and four other competition authorities, legal and economic scholars, and monitoring trustees with a view to identifying the main challenges and best practices in the design and implementation of antitrust remedies.

Our research suggests that Regulation 1/2003 has provided a valuable legal framework for the imposition of antitrust remedies in the EU over the last 20 years. This has allowed the Commission to intervene on key competition issues, not rarely at the intersection with sector regulation and intellectual property law. We also find that the requirements of the seminal judgments by the CJEU on antitrust remedies, which are enshrined in Regulation 1/2003, remain a sound guiding principle for antitrust remedy design, namely *"removing the infringement and bringing it effectively to an end"*.

While the legal framework of Regulation 1/2003 remains valuable today, 20 years after its adoption, our research has brought to light a number of challenges in its application. The four main challenges surrounding remedy design relate to, respectively, the tailoring of the remedy objective to the competition concern, the choice of remedy type (whether structural or behavioural remedies), the choice of legal instrument (whether a prohibition or a commitments decision), and monitoring of compliance.

Regarding the first challenge, our Study finds that stopping the anticompetitive conduct is the most immediate objective of antitrust remedies, which can, on many occasions, be achieved by a simple cease-and-desist order. In certain cases, however, a pure cease-and-desist order may not be sufficient to effectively halt the problematic behaviour, in which case positive remedies may be required that specify in more detail the behaviour the concerned undertaking will have to adopt going forward. The objective of antitrust remedies may go beyond stopping the anticompetitive behaviour, to also encompass preventing the behaviour's repetition and the prohibition's circumvention. Depending on market conditions, the problematic behaviour and the timeliness of antitrust intervention, remedies may also be designed in such a way as to remove or undo the adverse consequences of the behaviour on the affected markets, that is restoring undistorted competition. In exclusionary cases, the latter objective confronts the Commission with the complex problem of identifying the relevant counterfactual scenario and shaping the

remedy to bring the market to that scenario. The pursuit of restorative aims should nonetheless be taken seriously, as long as the potential for remedies to reignite the competitive process outweigh the burden on the concerned undertaking to implement the remedies and the risk that they would chill the incentives to compete and innovate.

Regarding the second challenge, the relevant remedy objective can be pursued with different remedy types and our research confirms that, while not always clear-cut, the traditional distinction between structural and behavioural remedies remains pervasive. Depending on the facts of a case, as was argued in several interviews conducted for our Study, behavioural remedies – the most often used remedy type in antitrust cases – can be difficult to implement effectively and can be as intrusive and burdensome as structural remedies. In effect this means that, consistent with Article 10 of Directive 2019/01 (the ECN+ Directive), the ultimate remedy choice should be guided by the effectiveness and proportionality principles alone, irrespective of remedy type.

Regarding the third challenge, our Study notes that remedies can be applied through both prohibition and commitments decisions, each coming with their own advantages and disadvantages that have to be carefully balanced. In the former (prohibition) case, remedies increase the detail or scope of a cease-and-desist order, but their effectiveness is in practice constrained by a variety of factors, including the focus of the case team on establishing the infringement, the statutory subordination of structural to behavioural remedy type and the requirement for the Commission to carry the cost of appointing a monitoring trustee or technical experts. In the latter (commitments) case, the Commission has a wider discretion in the remedy choice, but the cooperation of the concerned undertakings is a precondition for their adoption. Finally, the Study has suggested that the use of interim measures can be useful and enhance the effectiveness of remedies. For example, negotiating remedies on the back of interim measures may accelerate the finding of an adequate solution to the competition issue, since the concerned undertaking will have already halted its problematic behaviour and may be keener than otherwise to end the investigation.

Finally, with regard to the fourth challenge, monitoring the implementation of remedies is crucial, since the concerned undertaking will have an incentive to minimise the impact of the remedy on its business. In the case of structural measures, if effectively implemented, the remedy will bring about a reallocation of resources in the market that eliminates the incentive for the concerned undertaking to behave anticompetitively. In the case of a behavioural remedy, the ability to behave anticompetitively will, if the remedy is effectively implemented, be eliminated, even though the anticompetitive incentive may persist as long as market conditions do not change, either by themselves or as a result of the behavioural remedies' own possible structural effects. Given this incentive problem, ongoing monitoring efforts will be particularly high for complex behavioural remedies and will be facilitated by the inclusion of reporting obligations (which are currently not foreseen in simple cease-and-desist orders, possibly on account of a prohibition decision's deterrent effect) and the appointment of monitoring trustees, who in turn may require the support of technical experts.

In our ex post evaluation of the twelve case studies we found that while the majority of remedies in our sample were fully implemented, less than half of the remedies evaluated were fully effective in attaining their intended objective. The less satisfactory results for effectiveness than for implementation are due to the fact that at times remedies were not fully implemented (AT.37792 – *Microsoft I (interoperability)*, AT.34579 – *MasterCard I,* AT.39596 – *BA/AA/IB*) but at other times remedies were ineffective or only partially effective despite being fully implemented (AT.37792 – *Microsoft I (tying)*, AT.38636 – *Rambus*, AT.39315 – *ENI,* AT.39847 – *E-books*). This suggests that the latter remedies were designed in a way that was not well-suited to attain their intended objective in the first place. In one case (AT.40608 – *Broadcom*) we could not come to a conclusive assessment based on the evidence we collected and considering that the remedy obligations are still ongoing.

Our ex post evaluation also reveals that the implementation and effectiveness of remedies varies with the decision type, remedy type, and over time. Overall, remedies that were imposed with prohibition decisions show more issues of implementation and effectiveness compared to those that were made binding through commitments decisions. With respect to the remedy type, the ex post evaluation suggests that purely behavioural remedies were the least likely to be fully implemented and fully effective. Lastly, the assessment through our twelve case studies shows that the remedy practice of the Commission appears to have improved over time, as issues of implementation and effectiveness were found in older (most notably, AT.37792 – *Microsoft I* and AT.34579 – *MasterCard I*) cases rather than more recent cases.

Recommendations. In light of these observations, we make the following recommendations:

1. The aspiration of antitrust remedies should always be not only to stop the anticompetitive behaviour of the concerned undertakings but also to prevent its repetition (or circumvention) and to remove the detrimental effects on the market that it caused, whenever feasible.

2. Consistent with the existing legal framework, the principle of effectiveness should be the fundamental principle in the design of antitrust remedies.

3. Timely antitrust decision is important for remedies to be effective. The Commission should consider introducing measures to streamline antitrust proceedings.

4. In line with Article 10 of the ECN+ Directive, the subordination of structural remedies to behavioural remedies should be removed from the text of Article 7 of Regulation 1/2003, leaving it to the principles of effectiveness and proportionality to inform the choice of the best remedy type, depending on the facts of a case.

5. Overcoming the lack of legal basis in Regulation 1/2003, as the *Microsoft* judgment has held, the Commission should be enabled to require an addressee of an infringement decision to bear the costs of monitoring the implementation of remedies, making the appointment of a monitoring trustee practically easier also in Article 7 cases.

6. In complex Article 7 cases, the Commission should consider separating the infringement decision from the remedy decision, allowing for dedicated efforts to design remedies, market test the remedies under consideration and achieve more transparency on the remedies ultimately imposed.

7. The benefits of market testing remedies, which is required in the framework of Article 9, also apply to Article 7 remedies. Accordingly, this practice should be encouraged to the extent possible also in the latter case.

8. Consider formalising a cooperation procedure in the framework of non-cartel Article 7 cases, ensuring more certainty for the undertakings regarding conditions and benefits related to this procedure.

9. In suitable cases, the Commission should encourage the use of the Article 9 procedure, which provides for shorter proceedings, more flexibility in the design of remedies, better monitoring of implementation and lower risk of judicial challenges, albeit at the cost of a smaller contribution to case precedent and deterrence.

10. The formalities around market testing, such as the publication of the proposed remedies in the EU Official Journal and related translation requirements, could be simplified in the interest of agility.

11. In cases of urgency, more systematically explore the adoption of Article 8 interim measures, in particular in cases where there may be strong substantive and procedural synergies between the interim measures and the possible subsequent remedies.

12. The implementation of remedies needs to be verified. Reporting obligations should be included in Commission decisions as standard practice, including in simple cease-and-desist orders.

13. The appointment of a monitoring trustee should be the default practice in antitrust remedy decisions, unless there are compelling reasons against it. In the process, the role of the Commission in the appointment of the monitoring trustee could be strengthened in that the Commission could for example: (i) have the option to ask that more than one monitoring trustee be proposed; (ii) have the final word on the selected monitoring trustee; (iii) have the ability to quickly replace the monitoring trustee during their mandate in case of any issues, including suspected conflicts; (iv) define appropriate limits to the powers of the monitoring trustee; (v) allow for the appointment of technical experts; and (vi) establish suitable governance system in complex cases which require resource intensive monitoring efforts.

14. The appointment of an independent advisor to the Commission in the remedy design phase should be considered in appropriate cases, for example where the design of remedies may require technical expertise or their implementation may be particularly complex.

15. Consider the publication of guidance on antitrust remedies, similar to the Merger Remedies Notice (2008) and the Commission´s model text for the trustee mandate under EU merger control (2013), which may provide significant benefits to all parties, enhance remedy implementation and effectiveness, and speed up the remedy design process.

16. Consider reinforcing the ex post evaluation of remedies as a standard practice, by collecting relevant market information (such as market shares) from the concerned undertakings and market participants at the conclusion of each antitrust case.

17. The Commission should continue to exploit synergies between antitrust remedies adopted in different decisions, and use the experience and market knowledge gained from antitrust remedies to inform and pro-competitively enhance sector regulation, whilst respecting the legal limits of Regulation 1/2003.

18. The Commission should consider setting up a dedicated unit to support the case teams on remedy design, implementation and effectiveness across all relevant EU competition policy areas (antitrust, merger control, State aid, DMA and Foreign Subsidies Regulation). At the very least, a knowledge repository on remedies should be put in place.

Kurzfassung (DE)

Studienhintergrund und -ziele. Anlässlich des zwanzigsten Jubiläum der Verordnung 1/2003, welche die Anwendung der Wettbewerbsvorschriften in der Europäischen Union regelt, hat die Generaldirektion Wettbewerb der Europäischen Kommission im Oktober 2022 (Ausschreibung COMP/2022/OP/0009) einen Auftrag für eine Studie zur rückblickenden Bewertung der Umsetzung und Wirksamkeit wettbewerbsrechtlicher Abhilfemaßnahmen, die durch die Kommission im Rahmen von nicht-Kartellentscheiden gemäß Verordnung 1/2003 auferlegt wurden, ausgeschrieben (Ausschreibung COMP/2022/OP/0009). Ein multidisziplinäres Konsortium, bestehend aus der Rechtsanwaltskanzlei Grimaldi Alliance, dem Wirtschaftsberatungsunternehmen NERA, Prof. Peter Whelan von der juristischen Fakultät der Universität Leeds und Thomas Hoehn, Überwachungstreuhänder und Experte für Abhilfemaßnahmen, erhielt im Mai 2023 den Zuschlag. Der vorliegende Bericht enthält die Ergebnisse der Studie, die in den letzten sechzehn Monaten durchgeführt wurde.

Ziel dieser Studie ist es, die Wirksamkeit der Wettbewerbspolitik und -praxis der Kommission in Fällen, in denen Abhilfemaßnahmen ergriffen wurden, zu bewerten und eventuelle Verbesserungsmöglichkeiten aufzuzeigen. Dazu wurden in der Studie Informationen aus verschiedenen Quellen zusammengetragen, u. a: (i) die juristische und ökonomische Literatur zu wettbewerbsrechtlichen Abhilfemaßnahmen; (ii) Interviews mit Mitarbeitern der GD Wettbewerb, Angehörigen anderer Wettbewerbsbehörden (z.B. der französischen Autorité de la concurrence, des deutschen Bundeskartellamts, der Antitrust Division des US-Justizministeriums und der Federal Trade Commission), Rechts- und Wirtschaftswissenschaftlern und Überwachungstreuhändern; (iii) einen von uns erstellten neuen, detaillierten und umfassenden Datensatz aller nicht kartellbezogenen Wettbewerbsentscheidungen, die die Kommission zwischen dem Inkrafttreten der Verordnung 1/2003 am 24. Januar 2003 und dem 31. Dezember 2022 getroffen hat; und (iv) mündliche Interviews und schriftliche Befragungen von Fallmanagern, Entscheidungsadressaten und Marktteilnehmern sowie Open Source Intelligence (OSINT) in zwölf bedeutenden Fällen mit Abhilfemaßnahmen, die wir sorgfältig anhand einer Reihe quantitativer Kriterien aus dem Datensatz ausgewählt haben, mit Ausnahme von Fällen, in denen die Entscheidung vom Gerichtshof der Europäischen Union für nichtig erklärt oder zur Zeit der Fallauswahl gerichtlich noch überprüft wurde.

Wichtige Merkmale des rechtlichen Rahmens für Abhilfemaßnahmen. Die Verordnung 1/2003 regelt seit zwanzig Jahren die Anwendung des Wettbewerbsrechts in der EU und stellt eine radikale Änderung gegenüber der vorherigen Verordnung 17/1962 dar, indem sie die Durchsetzung des EU-Wettbewerbsrechts dezentralisierend den Wettbewerbsbehörden und Gerichten der Mitgliedstaaten überträgt und der Kommission mehr Flexibilität bei der Festlegung von Prioritäten einräumt. Die relevanten EU-Wettbewerbsvorschriften finden sich in Artikel 101 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV), der wettbewerbsbeschränkende Vereinbarungen zwischen Unternehmen verbietet, und in Artikel 102 AEUV, der die missbräuchliche Ausnutzung einer beherrschenden Stellung untersagt. Rechtsmittel zur Durchsetzung dieser Vorschriften finden sich in Artikel 7 und Artikel 9 der Verordnung 1/2003. In Entscheidungen nach Artikel 7 (auch als Verbots- oder Zuwiderhandlungsentscheidungen bekannt) kann die Kommission den betreffenden Unternehmen nicht nur auferlegen, die Zuwiderhandlung abzustellen, sondern auch „alle erforderlichen Abhilfemaßnahmen verhaltensorientierter oder struktureller Art vorschreiben, die gegenüber der festgestellten Zuwiderhandlung verhältnismäßig und für eine wirksame Abstellung der Zuwiderhandlung erforderlich sind“. Nach Artikel 7 können „Abhilfemaßnahmen struktureller Art […] nur in Ermangelung einer verhaltensorientierten Abhilfemaßnahme von gleicher Wirksamkeit auferlegt werden, oder wenn letztere im Vergleich zu Abhilfemaßnahmen struktureller Art mit einer größeren Belastung für die beteiligten Unternehmen verbunden wäre“. In Entscheidungen nach Artikel 9 (auch bekannt als Verpflichtungsentscheidungen) können die beteiligten Unternehmen der Kommission

Verpflichtungszusagen anbieten, und „die Kommission [kann] diese Verpflichtungszusagen im Wege einer Entscheidung für bindend für die Unternehmen erklären“, wenn die Verpflichtungen „die ihnen von der Kommission nach ihrer vorläufigen Beurteilung mitgeteilten Bedenken [ausräumen]“. Zusätzlich zu den Abhilfemaßnahmen nach Artikel 7 und Artikel 9 kann die Kommission „in dringenden Fällen, wenn die Gefahr eines ernsten und nicht wieder gutzumachenden Schadens für den Wettbewerb besteht“, auch einstweilige Maßnahmen nach Artikel 8 anordnen. Die Bekanntmachung der Kommission (2011) über Best Practice Vorgehensweisen in Verfahren nach Artikel 101 und 102 AEUV sowie das Verfahrenshandbuch (2019) der Generaldirektion Wettbewerb (DG COMP) bieten verfahrenstechnische Orientierungshilfen für die Gestaltung von Abhilfemaßnahmen im EU-Wettbewerbsrecht.

In einer Verbotsentscheidung werden den beteiligten Unternehmen zumindest angewiesen, die Zuwiderhandlung abzustellen. Eine solche Unterlassungsanordnung wird in den relevanten Entscheidungen auf zwei alternative Arten formuliert: als einfache Anordnung, „die Zuwiderhandlung zu beenden“, oder, in zunehmendem Maße über die Zeit, als Anordnung mit „gleichem Zweck oder gleicher Wirkung“, die die beteiligten Unternehmen anordnet, „eine Wiederholung der fraglichen Maßnahmen sowie die Verfolgung anderer Maßnahmen gleichen Zwecks und gleicher Wirkung zu unterlassen“. Während eine solche einfache Unterlassungsanordnung an sich als eine besondere Form von (verhaltensbezogenen) Abhilfemaßnahmen angesehen werden kann, kann eine Verbotsentscheidung zusätzlich (positive) Abhilfemaßnahmen enthalten, die die Einzelheiten und den weiteren Anwendungsbereich der Unterlassungsanordnung bestimmt. Solche Abhilfemaßnahmen können darauf abzielen, nicht nur das wettbewerbswidrige Verhalten zu unterbinden, sondern auch deren Wiederholung/eine Umgehung der Entscheidung zu verhindern und mögliche nachteilige Folgen zu beseitigen, um damit die Bedingungen für einen unverfälschten Wettbewerb wiederhergestellt werden. Diese Abhilfemaßnahmen werden in der Regel in der Präambel oder im verfügenden Teil einer Entscheidung genannt, es kann aber auch sein, dass die Verbotsentscheidung die betroffenen Unternehmen lediglich auffordert, eine Abhilfemaßnahme vorzuschlagen, die die Kommission im Falle ihrer Annahme in einer späteren Entscheidung auferlegt. Im Laufe der Zeit hat sich auf der Grundlage des Vergleichsverfahrens für Kartelluntersuchungen auch ein Kooperationsverfahren für nicht kartellbezogene Untersuchungen entwickelt, bei dem das beteiligte Unternehmen bei einer Verbotsentscheidung für seinen Beitrag zur Feststellung der Zuwiderhandlung oder zu deren Behebung belohnt wird, letzteres in Form eines Vorschlags für Abhilfemaßnahmen.

Verpflichtungsentscheidungen gemäß Artikel 9 sind in der Regel wesentlich kürzer als Verbotsentscheidungen gemäß Artikel 7 und konzentrieren sich auf die von dem betreffenden Unternehmen angebotenen und von der Kommission für verbindlich erklärten Verpflichtungen, anstatt eine eingehende Bewertung der relevanten Märkte, der Stellung des Unternehmens auf diesen Märkten und des beanstandeten Verhaltens vorzunehmen. Bei einer Verpflichtungsentscheidung wird der Verzicht auf die Feststellung einer Zuwiderhandlung und mögliche Geldbußen gegen eine schnellere Untersuchung und mehr Flexibilität bei der Gestaltung von Abhilfemaßnahmen eingetauscht.

Im Gegensatz zu den Abhilfemaßnahmen nach Artikel 7 sehen die Abhilfemaßnahmen nach Artikel 9 formale Markttests vor, sodass die vorgeschlagenen Abhilfemaßnahmen nicht nur auf ihre Überprüfbarkeit und Wirksamkeit hin getestet, sondern auch von vornherein transparent gemacht werden. Eine wichtige Rolle bei der Überwachung der Einhaltung und Überprüfung der Umsetzung von Abhilfemaßnahmen spielen nicht nur die Berichtspflichten der betroffenen Unternehmen gegenüber der Kommission eine Rolle, sondern auch die Einsetzung eines unabhängigen Überwachungstreuhänder, vorbehaltlich der Zustimmung der Kommission. Da jedoch das Urteil des Gerichts der Europäischen Union in der Rechtssache T-201/04, Microsoft Corp./Kommission, die Möglichkeiten der Kommission einschränkte, gemäß Artikel 7 ein Unternehmen dazu zu verpflichten, anzuweisen, einen Überwachungstreuhänder mit weitreichenden Ermittlungsbefugnissen zu beauftragen und für die Kosten

der Beauftragung eines Überwachungstreuhänders aufzukommen, werden diese seitdem nur noch in Fällen nach Artikel 9 beauftragt, wodurch die Auferlegung komplexer Abhilfemaßnahmen nach Artikel 7 mittelbar behindert wird.

Die Praxis der wettbewerbsrechtlichen Abhilfemaßnahmen gemäß Verordnung 1/2003 scheint wegen der insgesamt geringeren Zahl von Fällen und ihrer größeren Heterogenität der Fälle nicht so weit entwickelt wie die Praxis der Abhilfemaßnahmen in der Fusionskontrolle durch Verordnung 139/2004 zu sein. Es gibt bislang beispielsweise keinen Leitfaden für wettbewerbsrechtliche Abhilfemaßnahmen in der EU, der mit der Mitteilung der Kommission über Abhilfemaßnahmen bei Unternehmenszusammenschlüssen (2008) vergleichbar wäre. Es überrascht daher nicht, dass sich dieses Muster auch auf Ex-post-Evaluierungen erstreckt. Die vorliegende Studie soll sich an die Studie über Abhilfemaßnahmen in der Fusionskontrolle anlehnen, die die Kommission 2005 durchgeführt hat. In diesem Zusammenhang ist darauf hinzuweisen, dass die Abhilfemaßnahmen bei Fusionen in der EU teilweise die gleichen Merkmale aufweisen wie die Abhilfemaßnahmen nach Artikel 9, da es die fusionierenden Unternehmen sind, die Abhilfemaßnahmen anbieten, um eine mögliche Untersagung des geplanten Zusammenschlusses zu vermeiden, und dabei in der Regel die Beauftragung eines Überwachungstreuhänders vorsehen. Gleichzeitig gibt es wichtige Unterschiede, beispielsweise heißt es in der Mitteilung der Kommission über Abhilfemaßnahmen bei Unternehmenszusammenschlüssen, dass „Verpflichtungen struktureller Art vorzuziehen sind“. Während dieser Vorzug auf den ersten Blick im Widerspruch zu dem in Artikel 7 der Verordnung Nr. 1/2003 zum Ausdruck gebrachten Vorzug verhaltensbezogener Abhilfemaßnahmen zu stehen scheint, lässt sich diese Diskrepanz mindestens zum Teil dadurch erklären, dass ein Zusammenschluss eine strukturelle Veränderung hervorruft, (die, wenn daraus wettbewerbsschädigende Auswirkungen zu erwarten sind, vorzugsweise durch eine strukturelle Abhilfemaßnahme beseitigt wird. Bei der Anwendung des Wettbewerbsrechts unter Artikel 101 oder Artikel 102 AEUV ist jedoch das wettbewerbswidrige Verhalten, das gegebenenfalls durch eine bestimmte Unternehmensstruktur gefördert werden kann, das zentrale Thema.

Statistische Analyse. Im Rahmen dieses Projekts haben wir einen neuen, detaillierten und umfassenden Datensatz zu allen nicht kartellbezogenen Wettbewerbsentscheidungen erstellt, die die Kommission zwischen dem Inkrafttreten der Verordnung 1/2003 am 24. Januar 2003 und dem 31. Dezember 2022 erlassen hat. Wir zählen 51 Entscheidungen nach Artikel 9 sowie insgesamt 57 Entscheidungen nach Artikel 7, von denen zwölf eine Abhilfemaßnahme beinhalten. In den 57 Artikel-7-Entscheidungen sind auch sieben Entscheidungen (darunter zwei Abhilfeentscheidungen) enthalten, die vor Beginn des Inkrafttretens der neuen Verordnung am 1. Mai 2004, noch unter der Vorgängerverordnung 17/1962 getroffen wurden.

Unser Datensatz basiert in erster Linie auf der öffentlichen Fassung der jeweiligen Entscheidung, der zugehörigen Pressemitteilung und den Urteilen des Gerichtshofs der Europäischen Union und enthält Informationen über die Merkmale der Entscheidung (z. B. Datum und Länge), die Art der wettbewerbsrechtlichen Bedenken, die Art der Abhilfemaßnahme, die Modalitäten und flankierenden Maßnahmen der Abhilfemaßnahme sowie den Status der gerichtlichen Überprüfung.

Neben anderen Mustern ist festzustellen, dass sich die Entscheidungen in ähnlichem Umfang auf Wettbewerbsbedenken nach Artikel 101 AEUV und Artikel 102 AEUV beziehen, wobei Verbotsentscheidungen das häufigste Rechtsinstrument zur Behebung wettbewerbsbeschränkender Vereinbarungen und Verpflichtungsentscheidungen das häufigste Instrument zur Beseitigung von Missbräuchen darstellen. Bei den wettbewerbsbeschränkenden Vereinbarungen überwiegen die horizontalen gegenüber den vertikalen Absprachen. Bei den Missbräuchen handelt es sich in etwa zwei Dritteln der Fälle um Behinderungsmissbräuche, gefolgt von Missbräuchen im Zusammenhang mit dem Binnenmarkt und einer Handvoll Ausbeutungsmissbräuchen. Die Zahl der Verpflichtungsentscheidungen, sowohl in absoluten Zahlen als auch im Verhältnis zur Zahl der Verbotsentscheidungen, erreichte ihren

Höhepunkt, als zuerst Neelie Kroes und dann Joaquín Almunia das Amt des Wettbewerbskommissars innehatten. Etwa zwei Drittel der Entscheidungen nach Artikel 7 wurden oder werden (zum Zeitpunkt der Erstellung dieses Berichts) gerichtlich überprüft, während dies bei weniger als zehn Prozent der Entscheidungen nach Artikel 9 der Fall ist.

Was die Abhilfemaßnahmen betrifft, so stellen wir fest, dass sie zwar in allen Entscheidungen nach Artikel 9 enthalten sind, spezifische, positive Abhilfemaßnahmen, die über eine Unterlassungsanordnung hinausgehen, jedoch nur in 20 % der Entscheidungen nach Artikel 7 festgelegt wurden. Unterscheidet man zwischen strukturellen Abhilfemaßnahmen (wie der Veräußerung von Vermögenswerten), rein verhaltensbezogenen Abhilfemaßnahmen (d. h. Abhilfemaßnahmen, die dem betroffenen Unternehmen bestimmte Verpflichtungen für sein künftiges Verhalten auferlegen) und verhaltensbezogenen Abhilfemaßnahmen mit strukturellen Elementen (d. h. verhaltensbezogene Abhilfemaßnahmen mit potenziell dauerhaften Auswirkungen auf den Anreiz und die Fähigkeit der Marktteilnehmer, am Wettbewerb teilzunehmen), so stellt man außerdem fest, dass rein verhaltensbezogene Abhilfemaßnahmen die am häufigsten angewandte Abhilfemaßnahme darstellen. Nur eine strukturelle Abhilfemaßnahme (AT.39759 – *ARA Foreclosure*) und keine verhaltensbezogene Abhilfemaßnahmen mit strukturellen Elementen wurden gemäß Artikel 7 auferlegt, während sechs gemäß Artikel 9 akzeptierte Abhilfemaßnahmen strukturelle Abhilfemaßnahmen und sieben verhaltensbezogene Abhilfemaßnahmen mit strukturellen Elementen waren. Rein verhaltensbezogene Abhilfemaßnahmen (von denen uns 49 Fälle vorliegen) haben verschiedene Formen, darunter die Verpflichtung, ein bestimmtes Verhalten zu zeigen oder zu unterlassen (zwölf Fälle), bestehende Verträge/Ausschließlichkeitsklauseln zu kündigen oder zu ändern (neun Fälle), Zugang zu technischen Informationen zu gewähren (sechs Fälle) und die Verpflichtung, bestimmte Preisobergrenzen/Bedingungen einzuhalten (sechs Fälle).

Was die Modalitäten und flankierenden Maßnahmen der Abhilfemaßnahmen betrifft, so wurde bei allen sechs strukturellen Abhilfemaßnahmen, bei sechs der sieben verhaltensbezogenen Abhilfemaßnahmen mit strukturellen Elementen und bei der Hälfte der rein verhaltensbezogenen Abhilfemaßnahmen ein Überwachungstreuhänder gemäß Artikel 9 eingesetzt. Die am häufigsten festgelegten Laufzeiten für verhaltensbezogene Abhilfemaßnahmen betragen fünf und zehn Jahre.

Fallstudien. Aus diesen 108 Fällen wählten wir fünf bedeutende Fälle nach Artikel 7 und sieben bedeutende Fälle nach Artikel 9 aus, für die wir eine Ex-post-Evaluierung der Umsetzung und Wirksamkeit der Abhilfemaßnahmen durchführten. Dies, nachdem wir die 45 Fälle ausgeschlossen hatten, die mit einer einfachen Unterlassungsanordnung beigelegt wurden, Fälle, die vom Gerichtshof der Europäischen Union ganz oder weitgehend für nichtig erklärt wurden (AT.38698 – *CISAC Agreement* and AT.40023 – *Cross-border access to pay-TV*), und Fälle, die zur Zeit der Fallauswahl gerichtlich noch überprüft wurden (AT.39740 – *Google Search (Shopping)*, AT.40099 – *Google Android*, AT.40411 – *Google Search (AdSense)*, AT.40208 – *International Skating Union's Eligibility Rules* and AT.39816 – *Upstream gas supplies in Central and Eastern Europe*). Die Auswahl der Fälle nach Artikel 7 war angesichts der geringen Zahl der in Frage kommenden Fälle einfach. Für die Auswahl der Fälle nach Artikel 9 erstellten wir einen quantitativen Index für die Bedeutung des Falles und die Bedeutung der Abhilfemaßnahme, indem wir eine Kombination von Faktoren wie die Länge der Entscheidung und die Anzahl der Downloads der Entscheidung von der DG COMP Website heranzogen, die Fälle auf dieser Grundlage in eine Rangfolge brachten und die Fälle mit der höchsten Rangfolge auswählten, wobei wir darauf achteten, dass sowohl Fälle nach Artikel 101 als auch Artikel 102 AEUV, Fälle mit verschiedenen Arten der Wettbewerbsbedenken und Fällen mit verschiedenen Arten von Abhilfemaßnahmen erfasst wurden. Die sich daraus ergebende Fallauswahl ist in Tabelle 1 dargestellt. Wie in der Tabelle dargestellt dauern in einigen dieser Fälle die Abhilfemaßnahmen noch an.

Tabelle 1: Fallauswahl

Fall	Entscheidungstyp	Jahr	Rechtliche Grundlage	Wettbewerbsbedenken	Art der Abhilfemaßnahme	Implementierung	Effektivität
AT.37792 *Microsoft I*	Art. 7	2004	Art. 102	Behinderung a) Kopplung;	Rein verhaltensorientiert (Entkopplung/Entflechtung;	Vollständig;	Nein;
AT.37792 *Microsoft I*	Art. 7	2004	Art. 102	b) Einschränkung der Interoperabilität	Zugang zu technischen Informationen)	Teilweise	Teilweise
AT.34579 *MasterCard I*	Art. 7	2007	Art. 101	Horizontale Absprachen	Rein verhaltensorientiert (Preisobergrenzen)	Nein	Nein
AT.39985 *Motorola*	Art. 7	2014	Art. 102	Behinderung (SEP Verfügungen)	Verhaltensorientiert (Vertragsklauseln entfernen)	Vollständig	Vollständig
AT.39759 *ARA Marktabschottung*	Art. 7	2016	Art. 102	Behinderung (Zugangsverweigerung)	Strukturell	Vollständig	Vollständig
AT.40134 *AB InBev*	Art. 7	2019	Art. 102	Binnenmarkt	Rein verhaltensorientiert (mehrsprachige Etiketten)	Vollständig	Vollständig
AT.38636 *Rambus*	Art. 9	2009	Art. 102	Ausbeutung (Patenthinterhalt und überhöhte Preise)	Rein verhaltensorientiert (Preisobergrenzen)	Vollständig	Teilweise
AT.39596 *BA/AA/IB**	Art. 9	2010	Art. 101	Horizontale Absprachen (Luftfahrtbündnis)	Verhaltensorientiert mit strukturellen Elementen („Flughafen-Slots“)	Teilweise	Teilweise
AT.39315 *ENI*	Art. 9	2010	Art. 102	Behinderung (strategisches Unterinvestment)	Strukturell	Vollständig	Teilweise
AT.39847 *E-books*	Art. 9	2012	Art. 101	Horizontale and vertikale Absprachen	Rein verhaltensorientiert (Verträge ändern)	Vollständig	Teilweise

Fall	Entscheidungstyp	Jahr	Rechtliche Grundlage	Wettbewerbsbedenken	Art der Abhilfemaßnahme	Implementierung	Effektivität
AT.39678/AT.39731 *Deutsche Bahn I/II*	Art. 9	2013	Art. 102	Behinderung (Kosten-Preis-Schere)	Verhaltensorientiert mit strukturellen Elementen	Vollständig	Vollständig
AT.40608 *Broadcom**	Art. 9	2020	Art. 102	Behinderung (Exklusiver Vertrieb und Kopplung/ Bündelung)	Rein verhaltensorientiert (Klauseln entfernen)	Unschlüssig (Fehlen einschlägiger Indizien)	Unschlüssig (Fehlen einschlägiger Indizien)
AT.40394 *Aspen**	Art. 9	2021	Art. 102	Überhöhte Preise	Rein verhaltensorientiert (Preisobergrenzen)	Vollständig	Vollständig

Anmerkung: Das Sternchen kennzeichnet Fälle, in denen die Abhilfemaßnahmen noch andauern.

In der Sache AT.37792 – *Microsoft I* wurden zwei unterschiedliche Wettbewerbsbedenken mit zwei verschiedenen Abhilfemaßnahmen adressiert, so dass insgesamt 13 Abhilfemaßnahmen bewertet wurden.

Methodologischer Ansatz. Die Methodik, die wir in dieser Studie anwenden, kombiniert verschiedene Quellen, wobei wir neben der rückblickenden Betrachtung einer beträchtlichen Anzahl von bedeutenden Fällen die Literatur durchgesehen, Expertenbefragungen durchgeführt und eine statistische Analyse aller EU-Wettbewerbsrechtsfälle der letzten zwanzig Jahre vorgenommen haben. Die Hauptstärken dieser Methodik sind: (i) signifikante/grenzwertige Fälle können über den Einzelfall hinaus wertvolle Aufschlüsse über die Ziele und die Ausrichtung der Kommission geben; (ii) in Anbetracht ihres Umfangs und ihrer Komplexität dürften solche Fälle zu einer Reihe von Problemen bei der Implementierung der Abhilfemaßnahmen geführt haben, aus denen wir lernen können; (iii) die Anzahl der Fallstudien ist relativ groß - sie umfasst die meisten Fälle, in denen Abhilfemaßnahmen nach Artikel 7 getroffen wurden, und einen von sieben Fällen, in denen Abhilfemaßnahmen nach Artikel 9 getroffen wurden - und bietet uns daher eine breite Perspektive; und (iv) diese Perspektive wird durch die Einbeziehung der statistischen Analyse aller Abhilfemaßnahmen, der Expertenbefragungen und der Literaturauswertung noch erweitert.

Gleichzeitig unterliegt die Methodik der Studie einer Reihe von Einschränkungen, von denen die wichtigsten darin bestehen, dass: (i) wir eine Reihe bedeutender neuerer Fälle nicht einbeziehen konnten, da sie beim EuGH anhängig sind; und (ii) die Ex-post-Bewertung notwendigerweise nur qualitativ war, da eine strengere quantitative Analyse uns gezwungen hätte, uns auf eine viel geringere Zahl von Fällen zu beschränken, wodurch der bewusst breit angelegte Rahmen der Studie verfehlt worden wäre.

Ergebnisse der Fallstudien. Auf der Grundlage von mündlichen Befragungen und schriftlichen Fragebögen mit Fallmanagern, Entscheidungsadressaten und Marktteilnehmern sowie OSINT-Recherchen kommen wir zu dem Schluss, dass neun der 13 Abhilfemaßnahmen vollständig umgesetzt wurden, während zwei Abhilfemaßnahmen nur teilweise umgesetzt wurden und eine nicht umgesetzt wurde. Die Bewertung der Umsetzung von einer Abhilfemaßnahme blieb ergebnislos, da es an entsprechenden Nachweisen mangelte und die Abhilfemaßnahme noch nicht ausgelaufen ist. Was die Wirksamkeit anbelangt, so kommen wir zu dem Schluss, dass nur fünf Abhilfemaßnahmen bei der Erreichung der angestrebten Ziele vollständig effektiv waren, während dies bei weiteren fünf Abhilfemaßnahmen nur teilweise der Fall war. Bei der Bewertung stellten wir fest, dass zwei Abhilfemaßnahmen unwirksam waren, während wir den Grad der

Wirksamkeit der anderen Abhilfemaßnahme nicht beurteilen konnten, wiederum aufgrund fehlender einschlägiger Informationen.

Die Ex-post-Evaluierung ergab auch, dass die Umsetzung und Wirksamkeit der Abhilfemaßnahmen je nach Art der Entscheidung, der Art der Abhilfemaßnahme und im Zeitverlauf variierten. Im Allgemeinen stellen wir fest, dass es bei Abhilfemaßnahmen nach Artikel 7 mehr Probleme mit der Umsetzung und Wirksamkeit gibt als bei Abhilfemaßnahmen nach Artikel 9. Was die Art der Abhilfemaßnahmen betrifft, so zeigt die Ex-post-Evaluierung, dass rein verhaltensbezogene Abhilfemaßnahmen am seltensten vollständig umgesetzt werden und vollständig wirksam sind, was auf Probleme bei der Ausgestaltung der Abhilfemaßnahmen, auf die relative Unfähigkeit rein verhaltensbezogener Abhilfemaßnahmen, die Anreize für Fehlverhalten des betreffenden Unternehmens zu ändern, sowie auf Schwierigkeiten bei der Überwachung der Umsetzung hindeutet. Schließlich zeigt die Ex-post-Evaluierung, dass sich der Umgang der Kommission mit Abhilfemaßnahmen im Laufe der Zeit verbessert hat, wenn man bedenkt, dass in älteren Fällen (beginnend mit AT.37792 - *Microsoft I* und AT.34579 **–** *MasterCard I*) eher Probleme bei der Umsetzung und Wirksamkeit festgestellt wurden als in neueren Fällen.

Der Nachweis der Wirksamkeit einer Reihe von Abhilfemaßnahmen im Hinblick auf ihr angestrebtes Ziel kann jedoch die weiterreichenden Auswirkungen dieser Abhilfemaßnahmen unterbewerten. Eine Erkenntnis aus diesem Projekt ist nämlich, dass einige der von uns bewerteten Abhilfemaßnahmen (und die Entscheidungen, in denen sie enthalten sind) auch eine breitere Wirkung hatten, die die Beeinflussung künftiger Wettbewerbsgesetze und Richtlinien, wettbewerbsrechtlicher Urteile und sektorspezifischer Regulierung umfasst, wie etwa die horizontalen Leitlinien der Kommission, das Urteil des Gerichtshofs der Europäischen Union in der Rechtssache Huawei/ZTE, die EU Multilateral Interchange Fees (MIFs) Verordnung, die vorgeschlagene SEP-Verordnung sowie der *Digital Markets Act* (DMA).

Herausforderungen und gewonnene Erkenntnisse. Neben der Durchführung von OSINT-Recherchen und der Befragung von Fallmanagern der DG COMP, Entscheidungsadressaten, Marktteilnehmern und deren Beratern im Rahmen unserer zwölf Fallstudien haben wir die Literatur gesichtet und mit Mitarbeitern von DG COMP und vier weiteren Wettbewerbsbehörden, Rechts- und Wirtschaftswissenschaftlern sowie Überwachungstreuhändern gesprochen, um die wichtigsten Herausforderungen und Best Practices bei der Gestaltung und Umsetzung von Abhilfemaßnahmen zu ermitteln.

Unsere Untersuchungen und Befragungen zeigen, dass die Verordnung 1/2003 in den letzten 20 Jahren einen wertvollen Rechtsrahmen für die Anwendung von wettbewerbsrechtlichen Abhilfemaßnahmen unter Artikel 101 und Artikel 102 AEUV in der EU geschaffen hat. Dies hat es der Kommission ermöglicht, in wichtigen Wettbewerbsfragen zu intervenieren, nicht selten an der Schnittstelle zu sektoraler Regulierung und geistigem Eigentumsrecht. Wir sind außerdem der Ansicht, dass die Anforderungen der grundlegenden Urteile des EuGH zu wettbewerbsrechtlichen Abhilfemaßnahmen, die in der Verordnung 1/2003 verankert sind, nach wie vor ein solider Leitgrundsatz für die Gestaltung wettbewerbsrechtlicher Abhilfemaßnahmen sind, nämlich die „Abstellung der Zuwiderhandlung und deren wirksame Beendigung".

Obwohl der von der Verordnung 1/2003 geschaffene Rechtsrahmen auch 20 Jahre nach Inkrafttreten wertvoll bleibt, haben unsere Untersuchungen einige Herausforderungen in ihrer Anwendung zutage gebracht. Die vier Hauptherausforderungen bei der Gestaltung von Abhilfemaßnahmen betreffen jeweils die Anpassung des Ziels der Abhilfemaßnahmen an die Wettbewerbsbedenken, die Wahl des Abhilfemaßnahmentyps (ob strukturelle oder verhaltensbezogene Abhilfemaßnahmen), die Wahl des Rechtsinstruments (ob eine Verbotsentscheidung oder eine Verpflichtungsentscheidung) und die Überwachung der Einhaltung.

Was die erste Herausforderung betrifft, so stellt unsere Studie fest, dass die Beendigung des wettbewerbswidrigen Verhaltens, welche das unmittelbare Ziel wettbewerbsrechtlicher

Abhilfemaßnahmen ist, in vielen Fällen durch eine einfache Unterlassungsanordnung erreicht werden kann. In bestimmten Fällen mag eine reine Unterlassungsanordnung jedoch nicht ausreichen, um das wettbewerbswidrige Verhalten wirksam zu beenden, und positive Abhilfemaßnahmen sind demnach erforderlich, die das wettbewerbskonforme Verhalten des betroffenen Unternehmens genauer spezifizieren. Das Ziel wettbewerbsrechtlicher Abhilfemaßnahmen kann gegebenenfalls über die Beendigung des wettbewerbswidrigen Verhaltens hinausgehen, und die Verhinderung seiner Wiederholung und einer Umgehung umfassen. Abhängig von den Marktbedingungen, dem wettbewerbswidrigen Verhalten, und des zeitgerechten wettbewerbsrechtlichen Eingreifens, können Abhilfemaßnahmen auch so gestaltet werden, dass die negativen Folgen des wettbewerbswidrigen Verhaltens beseitigt oder rückgängig gemacht werden, sodass der unverfälschte Wettbewerb wiederhergestellt wird. In Fällen des Behinderungsmissbrauchs stellt das letztere Ziel die Kommission vor das Problem, ein relevantes kontrafaktisches Szenario zu identifizieren, und die Abhilfemaßnahme so zu gestalten, dass der Marktwettbewerb auf dieses Szenario zurückgeführt wird. Die Wiederherstellung des unverfälschten Wettbewerbs als Ziel sollte dennoch ernsthaft verfolgt werden, solange der zu erwartende Nutzen von Abhilfemaßnahmen zur Wiederbelebung des effektiven Wettbewerbs die Umsetzungskosten des betreffenden Unternehmens und das Risiko, die Wettbewerbs- und Innovationsanreize auf dem Markt zu beeinträchtigen, überwiegt.

Bezüglich der zweiten Herausforderung bestätigen unsere Untersuchungen, dass die traditionelle Unterscheidung zwischen strukturellen und verhaltensbezogenen Abhilfemaßnahmen zwar nicht immer eindeutig ist, aber nach wie vor Bestand hat. Je nach den Fakten eines Falls, und wie in mehreren Interviews, die für unsere Studie durchgeführt wurden, argumentiert, sind verhaltensbezogene Abhilfemaßnahmen (die meistgenutzte Art von Abhilfemaßnahmen), möglicherweise nur schwer effektiv zu implementieren, und können ebenso einmischend und kostspielig sein wie strukturelle Abhilfemaßnahmen. Konsistent mit Artikel 10 der ECN+ Richtlinie bedeutet dies in der Praxis, dass die Wirksamkeit und Verhältnismäßigkeit der Abhilfemaßnahmen die wesentlichen Kriterien für die endgültige Wahl von Abhilfemaßnahmen sein sollten, unabhängig vom Typ der Abhilfemaßnahmen.

Bezüglich der dritten Herausforderung stellt unsere Studie fest, dass Abhilfemaßnahmen sowohl durch Verbots- als auch durch Verpflichtungsentscheidungen angewendet werden können, wobei beide ihre eigenen Vor- und Nachteile haben, die sorgfältig abgewogen werden müssen. Im ersteren Fall (Verbot) erweitern sie den Inhalt und Umfang einer Unterlassungsanordnung, sind jedoch durch eine Vielzahl von Faktoren in ihrer Wirksamkeit eingeschränkt, einschließlich der notwendigen Fokussierung der Behörde auf die Feststellung des Wettbewerbsverstoßes, die geregelte Unterordnung struktureller gegenüber verhaltensbezogene Abhilfemaßnahmen, und die Übernahme der Kosten eines Überwachungstreuhänders oder technischer Experten durch die Kommission. Im letzteren Fall (Verpflichtungsentscheidung) hat die Kommission einen größeren Ermessensspielraum bei der Wahl der Art der Abhilfemaßnahme, aber die Zusammenarbeit der betroffenen Unternehmen ist eine notwendige Voraussetzung. Letztlich hat die Studie ergeben, dass einstweilige Maßnahmen sinnvoll sein können, und die Wirksamkeit von Abhilfemaßnahmen erhöhen können. Zum Beispiel kann die Aushandlung von Abhilfemaßnahmen auf der Grundlage einstweiliger Maßnahmen eine angemessene Lösung beschleunigen, da das betroffene Unternehmen ihr wettbewerbswidriges Verhalten bereits eingestellt hat, ein Interesse hat, ein baldiges Ende der Untersuchung anzustreben.

Was die vierte Herausforderung betrifft, so ist die Überwachung der Umsetzung von Abhilfemaßnahmen von entscheidender Bedeutung, da das betroffene Unternehmen einen Anreiz hat, die Auswirkungen der Abhilfemaßnahmen auf sein Geschäft zu minimieren. Im Falle struktureller Maßnahmen wird eine Abhilfemaßnahme, wenn sie wirksam umgesetzt werden soll, eine Neuverteilung der Marktstrukturen bewirken, die dem betroffenen Unternehmen den Anreiz nimmt, sich weiterhin wettbewerbswidrig zu verhalten. Im Falle einer verhaltensbezogenen Abhilfemaßnahme wird die Fähigkeit, sich

wettbewerbswidrig zu verhalten, nur beseitigt, wenn die Abhilfemaßnahme wirksam umgesetzt wird, auch wenn der Anreiz sich wettbewerbswidrig zu verhalten fortbesteht, solange sich die Marktbedingungen nicht ändern, sei es von sich aus oder durch die möglichen strukturellen Elemente der verhaltensbezogenen Abhilfemaßnahmen. In Anbetracht dieses Anreizproblems wird der laufende Überwachungsaufwand bei komplexen verhaltensbezogenen Abhilfemaßnahmen besonders hoch sein. Der Aufwand kann durch die Verpflichtung zur Compliance-Berichterstattung, die derzeit in einfachen Unterlassungsanordnungen (möglicherweise aufgrund der abschreckenden Wirkung von Unterlassungsentscheidungen) nicht vorgesehen ist, und die Ernennung von Überwachungstreuhändern, die ihrerseits möglicherweise die Unterstützung von Fachleuten benötigen, erleichtert werden.

Bei unserer Ex-post-Evaluierung der zwölf Fallstudien stellen wir fest, dass zwar die meisten Abhilfemaßnahmen in unserer Stichprobe vollständig umgesetzt wurden, aber weniger als die Hälfte der bewerteten Abhilfemaßnahmen bei der Erreichung des angestrebten Ziels vollständig wirksam waren. Die weniger zufriedenstellenden Ergebnisse bei der Wirksamkeit als bei der Umsetzung sind auf die Tatsache zurückzuführen, dass Abhilfemaßnahmen teilweise nicht vollständig umgesetzt wurden (AT.37792 - *Microsoft I* (Interoperabilität), AT.34579 - *MasterCard I*, AT.39596 - *BA/AA/IB*), während andere Abhilfemaßnahmen trotz vollständiger Umsetzung nicht vollständig wirksam waren (AT.37792 - *Microsoft I* (Kopplung), AT.38636 - *Rambus*, AT.39315 – *ENI,* AT.39847 - *E-Books*). Dies deutet darauf hin, dass die Abhilfemaßnahmen, die in den letztgenannten Fällen so konzipiert wurden, dass sie nicht geeignet waren, um das von der Kommission angestrebte Ziel zu erreichen. In einem Fall (AT.40608 - *Broadcom*) konnten wir auf der Grundlage des von uns gesammelten Inputs und in Anbetracht der Tatsache, dass die Abhilfeverpflichtungen noch laufen, zu keiner abschließenden Bewertung kommen.

Unsere Ex-post-Evaluierung zeigt auch, dass die Umsetzung und Wirksamkeit der Abhilfemaßnahmen je nach Art der Entscheidung, der Art der Abhilfemaßnahmen und im Laufe der Zeit variiert. Bei Abhilfemaßnahmen, die durch Verbotsentscheidungen auferlegt wurden, gibt es insgesamt mehr Probleme bei der Umsetzung und Wirksamkeit als bei Abhilfemaßnahmen, die durch Verpflichtungsentscheidungen verbindlich gemacht wurden. In Bezug auf die Art der Abhilfemaßnahmen deutet die Ex-post-Evaluierung darauf hin, dass rein verhaltensbezogene Abhilfemaßnahmen am wenigsten wahrscheinlich vollständig umgesetzt werden und voll wirksam sind. Schließlich zeigt die Bewertung anhand unserer zwölf Fallstudien, dass sich die Umsetzung und Wirksamkeit der von der Kommission auferlegten Abhilfemaßnahmen im Laufe der Zeit verbessert zu haben scheint, da Probleme bei der Umsetzung und Wirksamkeit eher in älteren Fällen (vor allem AT.37792 - *Microsoft I* und AT.34579 - *MasterCard I*) als in neueren Fällen festgestellt wurden.

Empfehlungen. In Anbetracht dieser Beobachtungen führt diese Studie zu den folgenden Empfehlungen.

1. Die Bestrebung der wettbewerbsrechtlichen Abhilfemaßnahmen sollte immer darin bestehen, nicht nur das wettbewerbswidrige Verhalten der betroffenen Unternehmen zu beenden, sondern auch dessen Wiederholung (und Umgehung) zu verhindern, und deren negative Auswirkungen auf den Markt, wenn möglich, zu beseitigen.

2. Im Einklang mit der bestehenden Rechtsprechung sollte das Prinzip der Wirksamkeit das grundlegende Prinzip bei der Gestaltung von wettbewerbsrechtlichen Abhilfemaßnahmen sein.

3. Ein zeitnahes wettbewerbsrechtliches Eingreifen ist kritisch für die Wirksamkeit der Abhilfemaßnahmen. Die Einführung von Maßnahmen zur zeitlichen Optimierung der Verfahren sollte erwogen werden.

4. Im Einklang mit Artikel 10 der Richtlinie 01/2019 (der ECN+ Richtlinie) sollte die Unterordnung struktureller Abhilfemaßnahmen gegenüber verhaltensbezogenen Abhilfemaßnahmen aus dem Text von Artikel 7 der Verordnung 1/2003 entfernt werden, sodass allein die Prinzipien der Wirksamkeit

und der Verhältnismäßigkeit die Wahl für den besten Abhilfemaßnahmentyp je nach den Besonderheiten eines Falls bestimmen.

5. Um den Mangel an rechtlicher Grundlage in der Verordnung 1/2003 zu überwinden, wie es das Microsoft-Urteil festgestellt hat, sollte die Kommission Befugnis erhalten, von einem Adressaten einer Verbotsentscheidung verlangen zu können, die Kosten für die Überwachung der Umsetzung von Abhilfemaßnahmen zu tragen, damit die Beauftragung eines Überwachungstreuhänders auch in Fällen nach Artikel 7 praktikabel ist.

6. In komplexen Fällen nach Artikel 7 sollte eine Trennung zwischen der Entscheidung über die Zuwiderhandlung und der Entscheidung über die Abhilfemaßnahmen in Betracht gezogen werden, um eine gezielte Ausarbeitung von Abhilfemaßnahmen, die Durchführung von Markttests der in Betracht gezogenen Abhilfemaßnahmen und mehr Transparenz bei den letztlich auferlegten Abhilfemaßnahmen zu ermöglichen.

7. Die Vorteile des im Rahmen von Artikel 9 vorgeschriebenen Markttests gelten auch für Abhilfemaßnahmen nach Artikel 7. Dementsprechend sollte diese Praxis so weit wie möglich auch in komplexen Artikel 7-Fällen gefördert werden.

8. Die Formalisierung eines Kooperationsverfahrens im Rahmen von nicht kartellbezogenen Artikel 7-Fällen sollte erwogen werden, um den Unternehmen mehr Sicherheit hinsichtlich der Bedingungen und Vorteile dieses Verfahrens zu geben.

9. In geeigneten Fällen sollte die Kommission den Gebrauch des Verfahrens nach Artikel 9 fördern, das im Allgemeinen eine kürzere Dauer, mehr Flexibilität bei der Gestaltung von Abhilfemaßnahmen, eine bessere Überwachung der Umsetzung und ein geringeres Risiko gerichtlicher Anfechtungen bietet, wenn auch auf Kosten einer geringeren Abschreckungswirkung durch Präzedenzfälle.

10. Die Formalitäten im Zusammenhang mit Markttests, wie die Veröffentlichung der vorgeschlagenen Abhilfemaßnahmen im EU-Amtsblatt und die damit verbundenen Übersetzungsanforderungen, könnten im Interesse der Schnelligkeit vereinfacht werden.

11. In dringenden Fällen sollte der Erlass von einstweiligen Maßnahmen nach Artikel 8 gefördert werden, insbesondere dann, wenn die substanziellen und verfahrenstechnischen Synergien zwischen den einstweiligen Maßnahmen und den möglicherweise anschließenden Abhilfemaßnahmen am größten sind.

12. Die Umsetzung von Abhilfemaßnahmen muss überprüft werden. Die Kommission sollte die Aufnahme von Berichterstattungspflichten zur Standardpraxis machen, dass auch in einfachen Unterlassungsanordnungen.

13. Die Kommission sollte die Beauftragung eines Überwachungstreuhänders zur Standardpraxis machen, sofern keine zwingenden Gründe dagegensprechen. Dabei könnte die Rolle der Kommission bei der Ernennung des Überwachungstreuhänders gestärkt werden, indem die Kommission beispielsweise (i) die Möglichkeit hat, mehr als einen Überwachungstreuhänder vorzuschlagen; (ii) das letzte Wort bei der Auswahl des Überwachungstreuhänders hat; (iii) die Möglichkeit hat, den Überwachungstreuhänder während seines Mandats bei Problemen, einschließlich vermuteter Konflikte, schnell zu ersetzen; (iv) angemessene Grenzen für die Befugnisse des Überwachungstreuhänders festlegt; (v) die Bestellung von technischen Sachverständigen ermöglicht; und (vi) ein geeignetes Governance-System für komplexe Fälle einrichtet, die ressourcenintensive Überwachungsmaßnahmen erfordern.

14. Die Kommission sollte zur frühzeitigen Ernennung eines unabhängigen Beraters der Kommission in der Endphase der Konzipierung der Abhilfemaßnahmen befugt werden, beispielsweise wenn die Konzipierung von Abhilfemaßnahmen technisches Fachwissen erfordert oder ihre Umsetzung besonders komplex ist.

15. Die Veröffentlichung eines Leitfadens für wettbewerbsrechtliche Abhilfemaßnahmen, ähnlich der Bekanntmachung über Abhilfemaßnahmen bei Fusionen (2008) und der Mustertext der Kommission für das Treuhandmandat im Rahmen der EU-Fusionskontrolle (2013) sollte erwogen werden, die allen Beteiligten erhebliche Vorteile bringen, die Umsetzung und Wirksamkeit von Abhilfemaßnahmen verbessern und den Prozess der Abhilfegestaltung beschleunigen kann.

16. Die Verstärkung der Ex-post-Evaluierung von Abhilfemaßnahmen als Standardverfahren durch Einholung einschlägiger Marktinformationen (z. B. Marktanteile) von den betroffenen Unternehmen und Marktteilnehmern bei Abschluss eines jeden Verfahrens sollte erwogen werden.

17. Die Kommission sollte weiterhin Synergien zwischen verschiedenen wettbewerbsrechtlichen Abhilfemaßnahmen nutzen, und den damit verbundenen Erfahrungen und Marktkenntnisse so einsetzen, um sektorspezifische Regulierung und die Anwendung des geistigen Eigentumsrechts wettbewerbsfördernd zu verbessern.

18. Die Kommission sollte in Erwägung ziehen, ein eigenes Referat einzurichten, das die Fallteams bei der Gestaltung, Umsetzung und Wirksamkeit von Abhilfemaßnahmen in komplexen Fällen unterstützt und alle relevanten Bereiche der EU-Wettbewerbspolitik (Antitrust, Fusionskontrolle, Beihilfe, DMA und Drittstaatensubventionsverordnung) abdeckt. Zumindest sollte ein Wissensspeicher für Abhilfemaßnahmen eingerichtet werden.

Résumé analytique (FR)

Contexte et objectifs de l'étude. À l'occasion du vingtième anniversaire du règlement 1/2003, qui régit l'application des règles antitrust dans l'Union européenne, la direction générale de la concurrence de la Commission européenne a lancé en octobre 2022 (appel d'offres COMP/2022/OP/0009) un appel d'offres pour une étude sur l'évaluation ex post de la mise en œuvre et de l'efficacité des mesures correctives antitrust par la Commission. Un consortium pluridisciplinaire composé du cabinet d'avocats Grimaldi Alliance, du cabinet de conseil économique NERA, du professeur Peter Whelan de la faculté de droit de l'université de Leeds et de Thomas Hoehn, mandataire de surveillance et expert en mesures, s'est vu attribuer le contrat en mai 2023. Le présent rapport contient les résultats des recherches que nous avons menées au cours des seize derniers mois.

L'objectif de l'étude consiste à évaluer l'efficacité de la politique et des pratiques de la Commission en matière d'ententes et d'abus de position dominante dans les affaires comportant des mesures correctives, et de mettre en évidence les domaines susceptibles d'être améliorés. A cet effet, l'étude rassemble des éléments d'information à partir de diverses sources, notamment : (i) la doctrine juridique et économique sur les mesures correctives en matière d'ententes et d'abus de position dominante ; (ii) des entretiens avec des gestionnaires de dossiers d'ententes et d'abus de position dominante et de fusions de la DG COMP, des fonctionnaires d'autres autorités de concurrence (l'Autorité de la concurrence en France, le Bundeskartellamt en Allemagne et la division antitrust du ministère de la justice et de la Federal Trade Commission aux États-Unis), des juristes et des économistes, ainsi que des mandataires chargés du suivi des mesures correctives ; (iii) un ensemble de données que nous avons constitué à partir de toutes les décisions antitrust non liées à des ententes que la Commission a prises entre l'entrée en vigueur du règlement 1/2003 le 24 janvier 2003 et le 31 décembre 2022 ; et (iv) des entretiens oraux et des questionnaires écrits avec des gestionnaires de dossiers, des destinataires de décisions et des acteurs du marché, ainsi que des recherches utilisant Open Source Intelligence (OSINT), dans douze affaires importantes de mesures antitrust de l'UE que nous avons sélectionnées à partir de l'ensemble de données, à l'exclusion des affaires dans lesquelles la décision a été annulée par la Cour de justice de l'Union européenne ou étaient l'objet d'un contrôle juridictionnel au moment de la sélection.

Principales caractéristiques du cadre juridique régissant les mesures. Le règlement 1/2003 régit l'application des règles antitrust dans l'UE depuis vingt ans et a apporté un changement radical par rapport à l'ancien règlement 17/1962, en décentralisant l'application des règles antitrust vers les autorités de la concurrence et les tribunaux des États membres, et en donnant à la Commission une plus grande flexibilité pour fixer les priorités en matière d'application. Les règles communautaires en matière d'ententes et d'abus de position dominante sont énoncées à l'article 101 du traité sur le fonctionnement de l'Union européenne, qui interdit les accords entre entreprises qui restreignent la concurrence, et à l'article 102 du TFUE, qui interdit les abus de position dominante. Les mesures pour l'application de ces règles sont prévues aux articles 7 et 9 du règlement (CE) n° 1/2003. Dans les décisions prises au titre de l'article 7 (également appelées décisions d'interdiction ou d'infraction), la Commission peut, en plus d'ordonner aux entreprises en cause de mettre fin à l'infraction, imposer à ces mêmes entreprises "*toute mesure corrective de nature structurelle ou comportementale, qui soit proportionnée à l'infraction commise et nécessaire pour faire cesser effectivement l'infraction*". Conformément à l'article 7, "*une mesure structurelle ne peut être imposée que s'il n'existe pas de mesure comportementale qui soit aussi efficace ou si, à efficacité égale, cette dernière s'avérait plus contraignante pour l'entreprise concernée que la mesure structurelle*". Dans les décisions au titre de l'article 9 (également appelées décisions relatives aux engagements), les entreprises en question peuvent proposer des engagements à la Commission et "l*a Commission peut, par voie de décision, rendre ces engagements obligatoires*" pour elles si ces engagements "*offrent des engagements de nature à répondre aux préoccupations dont la Commission les a informées dans son*

évaluation préliminaire". Outre les mesures correctives prévues à l'article 7 et à l'article 9, la Commission peut également adopter, en cas "*d'urgence justifiés par le fait qu'un préjudice grave et irréparable risque d'être causé à la concurrence*", des mesures provisoires au titre de l'article 8. La communication de la Commission (2011) sur les meilleures pratiques pour la conduite des procédures relatives aux articles 101 et 102 du TFUE, ainsi que le manuel de procédures antitrust de la DG COMP, fournissent des orientations procédurales sur la conception des mesures correctives en matière d'ententes et d'abus de position dominante dans l'UE.

Dans tous les cas, il sera au moins prononcé une décision d'interdiction enjoignant les entreprises concernées de mettre fin à l'infraction. Cette injonction peut être formulée de deux manières différentes dans les décisions : il peut s'agir d'une injonction "*de base*" de "*mettre fin à l'infraction*" ou, de plus en plus, d'une injonction visant les actes "*ayant un objet ou un effet similaire*" qui, en outre d'ordonner aux entreprises concernées de "*s'abstenir de répéter*" l'infraction, leur ordonne également de s'abstenir de "*tout acte ou comportement ayant un objet ou un effet identique ou équivalent*". Si les injonctions de cesser et de s'abstenir peuvent être considérées comme une forme particulière de mesures correctives (comportementales), une décision d'interdiction peut en outre inclure des mesures correctives (positives) qui élargissent le détail et la portée de l'injonction de cesser et de s'abstenir, en vue non seulement de mettre fin au comportement anticoncurrentiel, mais aussi d'empêcher qu'il ne se reproduise et d'en supprimer les conséquences négatives, rétablissant ainsi les conditions d'une concurrence non faussée. Ces mesures correctives sont généralement précisées dans le préambule ou le dispositif d'une décision, mais il se peut aussi que la décision d'interdiction se contente d'ordonner aux entreprises concernées de proposer une mesure corrective qui, si elle est acceptée, sera imposée par la Commission dans une décision ultérieure. Au fil du temps, sur la base de la procédure de transaction pour les enquêtes sur les ententes, une procédure de coopération pour les enquêtes antitrust autres que les ententes ont vu le jour, qui récompense le destinataire d'une décision d'interdiction pour sa contribution à la découverte de l'infraction ou à sa solution, cette dernière prenant la forme d'une proposition de mesures correctives.

Les décisions relatives aux engagements sont généralement beaucoup plus courtes que les décisions d'interdiction et se concentrent sur les engagements proposés par l'entreprise concernée et rendus obligatoires par la Commission, plutôt que de fournir une évaluation approfondie des marchés en cause, de la position de l'entreprise sur ces marchés et de son comportement problématique. Dans le cas d'une décision d'engagement, le renoncement à la constatation d'une infraction et à des amendes potentielles est compensé par une enquête plus rapide et une plus grande souplesse dans l'élaboration des mesures correctives.

Contrairement aux mesures correctives prévues à l'article 7, les mesures correctives prévues à l'article 9 prévoient une consultation formelle des acteurs du marché, ce qui permet non seulement de vérifier la fiabilité et l'efficacité des mesures correctives proposées, mais aussi de les rendre transparentes en premier lieu. Un rôle important dans le contrôle de la conformité et la vérification de la mise en œuvre de toute mesure corrective peut être joué non seulement par les obligations de rapport que les entreprises concernées peuvent avoir à l'égard de la Commission, mais aussi par un mandataire de contrôle indépendant désigné par une entreprise sous réserve de l'approbation de la Commission. Toutefois, l'arrêt du Tribunal dans l'affaire T-201/04, Microsoft Corp. contre Commission a limité la capacité de la Commission à ordonner à une entreprise de nommer un mandataire chargé du contrôle disposant de pouvoirs d'enquête étendus et de prendre en charge les frais de nomination d'un mandataire chargé du contrôle, les mandataires chargés du contrôle n'ont depuis lors été nommés que dans les affaires relevant de l'article 9, ce qui a créé une contrainte latente sur l'imposition de mesures correctives élaborées au titre de l'article 7.

Peut-être en raison du nombre globalement plus faible d'affaires et de leur plus grande hétérogénéité, la pratique des mesures correctives en matière d'ententes et d'abus de position dominante ne semble pas

aussi bien développée que celle des mesures correctives en matière de concentrations. À ce jour, par exemple, il n'existe aucune orientation de fond sur les mesures correctives en matière d'ententes et d'abus de position dominante de l'UE qui soit comparable à l'orientation offerte en matière de contrôle des concentrations de l'UE par la communication de la Commission sur les mesures correctives en matière de concentrations (2008). En effet, cette étude vise à suivre l'étude sur les mesures correctives en matière de concentrations qu'elle a elle-même entreprise en 2005. À cet égard, il est important de noter que les mesures correctives de l'UE en matière de concentrations présentent des caractéristiques communes, notamment avec les mesures correctives antitrust de l'article 9, en ce sens qu'elles sont proposées par les parties à la concentration, afin d'éviter l'interdiction éventuelle d'un projet de concentration, et qu'elles comprennent généralement la désignation d'un mandataire chargé du contrôle. En même temps, il existe des différences importantes, par exemple, selon la communication de la Commission sur les mesures correctives en matière de concentrations, "*les engagements de nature structurelle sont préférables*". Si, à première vue, cette préférence peut sembler en contradiction avec la préférence statutaire pour les mesures correctives comportementales exprimée à l'article 7 du règlement (CE) n° 1/2003, cette divergence peut s'expliquer en partie par le fait qu'une concentration donne intrinsèquement lieu à un changement structurel (qui, s'il est considéré comme susceptible d'avoir des effets anticoncurrentiels, est alors de préférence éliminé par une mesure corrective de nature structurelle). Dans l'application de la législation antitrust, cependant, c'est le comportement anticoncurrentiel, qui peut ou non être intrinsèquement encouragé par une certaine structure de l'entreprise, qui est la question clé.

Analyse statistique**.** Dans le cadre de ce projet, nous avons construit un nouvel ensemble de données sur toutes les décisions antitrust non liées à des ententes que la Commission a adoptées entre l'entrée en vigueur du règlement 1/2003 le 24 janvier 2003 et le 31 décembre 2022. Nous comptons 51 décisions au titre de l'article 9 ainsi qu'un total de 57 décisions au titre de l'article 7 non liées à des ententes, dont douze comprennent une mesure corrective. Les 57 décisions au titre de l'article 7 comprennent également sept décisions équivalentes (dont deux décisions relatives à des mesures correctives) qui étaient encore adoptées en vertu du précédent règlement 17/1962 avant l'entrée en vigueur du nouveau règlement en date du 1 mai 2004.

Basé principalement sur la version publique de la décision, le communiqué de presse associé et les arrêts de la CJUE, notre ensemble de données contient des informations sur les caractéristiques de la décision (telles que sa date et sa durée), le type de problème de concurrence, le type de mesure corrective, les modalités de la mesure corrective et les mesures d'accompagnement, ainsi que le statut de la révision judiciaire.

Parmi d'autres tendances, nous constatons que les décisions ont abordé en nombre similaire les problèmes de concurrence liés à l'article 101 du TFUE et à l'article 102 du TFUE, les décisions d'interdiction étant l'instrument juridique le plus fréquent pour lutter contre les accords restrictifs et les décisions d'engagement étant l'instrument le plus fréquent pour lutter contre les abus. Parmi les accords, les accords horizontaux l'emportent sur les accords verticaux en termes de nombres de décisions. En ce qui concerne les abus, environ deux tiers des cas sont des abus d'exclusion, suivis des abus liés au marché intérieur et d'une poignée d'abus d'exploitation. Le nombre de décisions d'engagements, tant en termes absolus que par rapport au nombre de décisions d'interdiction, a atteint son maximum lorsque Neelie Kroes et Joaquín Almunia étaient respectivement commissaire à la concurrence. Environ deux tiers des décisions au titre de l'article 7 ont fait ou étaient (au moment de la rédaction) l'objet d'un contrôle juridictionnel, alors que c'est le cas pour moins de 10 % des décisions au titre de l'article 9.

En ce qui concerne les mesures correctives, nous constatons que si elles sont nécessairement incluses dans toutes les décisions au titre de l'article 9, des mesures correctives spécifiques et positives allant au-delà d'une injonction de cesser et de s'abstenir n'ont été incluses que dans 20 % des décisions au titre de l'article 7. En distinguant les mesures correctives structurelles (telles que la cession d'actifs), les mesures

correctives purement comportementales (qui prévoient des obligations spécifiques concernant le comportement de l'entreprise concernée à l'avenir) et les mesures correctives comportementales ayant des éléments structurels (qui peuvent avoir un effet durable sur l'incitation et la capacité des acteurs du marché à se faire concurrence et sont en outre hors de portée de l'entreprise concernée), nous constatons en outre que les mesures correctives purement comportementales sont le type de mesure corrective le plus fréquemment utilisé. Seules une mesure corrective structurelle (AT.39759 - *ARA foreclosure*) et aucune mesure comportementale avec des éléments structurels n'a été imposée en vertu de l'article 7, alors que six mesures correctives acceptées en vertu de l'article 9 étaient des mesures correctives structurelles et sept des mesures correctives comportementales ayant des éléments structurels. Les mesures correctives purement comportementales (dont nous disposons de 49 cas) prennent diverses formes, notamment l'obligation d'adopter ou de ne pas adopter certains comportements douze cas, de résilier ou de modifier des contrats existants/clauses d'exclusivité neuf cas, de prévoir l'accès aux informations techniques six cas et l'obligation de respecter certains plafonds/conditions de prix six cas.

Parmi les modalités des mesures correctives et les mesures d'accompagnement, nous constatons qu'un mandataire chargé du suivi a été désigné en vertu de l'article 9 dans les six mesures correctives structurelles, dans six des sept mesures correctives comportementales avec des éléments structurels et dans la moitié des mesures correctives purement comportementales. Les durées les plus fréquentes des mesures correctives comportementales sont de cinq et dix ans.

Études de cas. Parmi ces 108 affaires, nous avons sélectionné cinq importantes affaires relevant de l'article 7 et sept importantes affaires relevant de l'article 9 pour lesquelles nous avons procédé à une évaluation ex post de la mise en œuvre et de l'efficacité des recours, après avoir exclu les 45 affaires qui ont été résolues par une simple injonction de cesser et de s'abstenir, les affaires qui ont été entièrement ou largement annulées par la CJUE (AT.38698 – *CISAC Agreement* et AT.40023 – *Cross-border access to pay-TV*), et les affaires qui les affaires faisant l'objet d'un contrôle juridictionnel au moment de la sélectionl (AT.39740 – *Google Search (Shopping)*, AT.40099 – *Google Android*, AT.40411 – *Google Search (AdSense)*, AT.40208 – *International Skating Union's Eligibility Rules* and AT.39816 – *Upstream gas supplies in Central and Eastern Europe*). La sélection des affaires relevant de l'article 7 a été relativement simple compte tenu du nombre limité d'affaires éligibles,. Pour la sélection des affaires relevant de l'article 9, nous avons établi un indice quantitatif de l'importance de l'affaire et de l'importance de la mesure corrective combinant une série de facteurs, dont la longueur de la décision et le nombre de téléchargements de la décision à partir du site web COMP Case Search de la Commission, classé les affaires sur cette base et sélectionné les affaires les mieux classées, tout en veillant à assurer une couverture dans le temps et entre les affaires relevant de l'article 101 et de l'article 102 du TFUE, le type de préoccupation en matière de concurrence et le type de mesure corrective. La sélection d'affaires qui en résulte est présentée dans le Tableau 1. Dans certaines de ces affaires, les obligations de réparation sont toujours en cours.

Tableau 1: Sélection des cas

Cas	Type de décision	Année	Base juridique	Problèmes de concurrence	Type de remède	Mise en œuvre	Efficacité
AT.37792 *Microsoft I*	Art. 7	2004	Art. 102	Exclusion a) ventes liées	Purement comportementale (délier/dégrouper)	Complet	Non
AT.37792 *Microsoft I*	Art. 7	2004	Art. 102	b) Restreindre	Purement comportem	Partiel	Partiel

Cas	Type de décision	Année	Base juridique	Problèmes de concurrence	Type de remède	Mise en œuvre	Efficacité
				l'interopérabilité	entale (accès à l'information technique)		
AT.34579 *MasterCard I*	Art. 7	2007	Art. 101	Accord horizontal	Purement comportementale (plafonnement des prix)	Non	Non
AT.39985 *Motorola*	Art. 7	2014	Art. 102	Exclusion (injonctions du SEP)	Purement comportementaux (suppression de clauses contractuelles)	Complet	Complet
AT.39759 *ARA foreclosure*	Art. 7	2016	Art. 102	Exclusion (refus d'accès)	Structurel	Complet	Complet
AT.40134 *AB InBev*	Art. 7	2019	Art. 102	Marché intérieur	Purement comportementale (étiquettes multilingues)	Complet	Complet
AT.38636 *Rambus*	Art. 9	2009	Art. 102	Exploitation (embuscade de brevets et prix excessifs)	Purement comportementale (plafonnement des prix)	Complet	Partiel
AT.39596 *BA/AA/IB**	Art. 9	2010	Art. 101	Accord horizontal (alliance de compagnies aériennes)	Comportementale avec des éléments structurels(créneaux aéroportuaires)	Partiel	Partiel
AT.39315 *ENI*	Art. 9	2010	Art. 102	Exclusion (sousinvestissement stratégique)	Structurel et comportemental	Complet	Partiel
AT.39847 *E-books*	Art. 9	2012	Art. 101	Accords horizontaux et verticaux	Purement comportementale	Complet	Partiel

Cas	Type de décision	Année	Base juridique	Problèmes de concurrence	Type de remède	Mise en œuvre	Efficacité
					(contrats de changement)		
AT.39678/AT.39731 *Deutsche Bahn I/II*	Art. 9	2013	Art. 102	Exclusion (compression des marges)	Comportementale avec des éléments structurels	Complet	Complet
AT.40608 *Broadcom**	Art. 9	2020	Art. 102	Exclusion (exclusivité et vente groupée)	Purement comportementale (supprimer les clauses)	Non concluant (manque de preuves pertinentes)	Non concluant (manque de preuves pertinentes)
AT.40394 *Aspen**	Art. 9	2021	Art. 102	Prix excessifs	Purement comportementale (plafonnement des prix)	Complet	Complet

Note : L'astérisque indique les cas dans lesquels les obligations de réparation sont encore en cours.

Il convient de noter que dans l'affaire AT.37792 - Microsoft, deux problèmes de concurrence différents ont été traités par deux mesures correctives distinctes, ce qui donne un total de 13 mesures correctives qui ont été évaluées.

Approche méthodologique globale. La méthodologie que nous appliquons dans cette étude combine différentes sources de données : outre l'examen rétrospectif d'un nombre considérable d'affaires individuelles importantes, nous avons analysé la littérature, mené des entretiens avec des experts et effectué une analyse statistique de toutes les affaires de recours antitrust de l'UE au cours des vingt dernières années. Les principaux atouts de cette méthodologie sont les suivants (i) les affaires importantes sont susceptibles d'apporter un éclairage précieux sur les objectifs et l'orientation de la politique de la Commission qui va au-delà de l'affaire individuelle ; (ii) compte tenu de leur taille et de leur complexité, ces affaires sont susceptibles d'avoir donné lieu à un certain nombre de questions de mise en œuvre dont nous pouvons tirer des enseignements ; (iii) l'échantillon d'affaires est raisonnablement large - couvrant la plupart des affaires de recours au titre de l'article 7 et une affaire sur sept au titre de l'article 9 - et nous offre donc une large perspective ; et (iv) cette perspective est encore élargie par l'inclusion de l'analyse statistique de toutes les affaires de recours, des entretiens avec les experts et de l'analyse littéraire.

Toutefois, la méthodologie de l'étude a dû faire face à un certain nombre de limites, dont les principales sont les suivantes : (i) nous n'avons pas pu inclure un certain nombre d'affaires récentes importantes, parce qu'elles sont pendantes devant la CJUE ; et (ii) l'évaluation ex post n'était nécessairement que qualitative, puisqu'une analyse quantitative plus rigoureuse nous aurait obligés à nous limiter à un nombre beaucoup plus restreint d'affaires, manquant ainsi délibérément l'objectif de l'étude.

Résultats des études de cas. Sur la base d'entretiens oraux et de questionnaires écrits avec des gestionnaires de dossiers, des destinataires de décisions et des acteurs du marché, ainsi que de recherches

OSINT, nous concluons que neuf des treize mesures correctives ont été pleinement mises en œuvre, tandis que deux mesures correctives n'ont été que partiellement mises en œuvre et qu'une autre n'a pas été mise en œuvre. L'évaluation de la mise en œuvre d'une mesure corrective n'a pas été concluante en raison du fait qu'elle est en cours et d'un manque de preuves pertinentes. Passant de la mise en œuvre à l'efficacité, nous concluons que seules cinq mesures ont été pleinement efficaces pour atteindre les objectifs visés, tandis que dans cinq cas, les mesuresn'ont été que partiellement efficaces. Dans l'évaluation, nous avons trouvé deux mesures inefficaces tandis que nous n'avons pas pu conclure au niveau d'efficacité d'une mesure restante, encore une fois en raison du fait qu'elle est en cours ainsi que d'un manque de preuves pertinentes.

L'évaluation ex post a également révélé que tant la mise en œuvre que l'efficacité des mesures varient en fonction du type de décision, du type de mesures et de la durée. Généralement, les mesures prévues à l'article 7 présentent davantage de problèmes de mise en œuvre et d'efficacité que les mesures prévues à l'article 9. En ce qui concerne le type de mesures, l'évaluation ex post indique que les mesures purement comportementales sont les moins susceptibles d'être pleinement mises en œuvre et pleinement efficaces, ce qui met en évidence des problèmes de conception des mesures, l'impossibilité pour les mesures purement comportementales de modifier les incitations de l'entreprise concernée à se comporter de manière incorrecte, ainsi que des difficultés dans le suivi de la mise en œuvre. Enfin, l'évaluation rétrospective suggère que la pratique de la Commission en matière de mesures correctives s'est améliorée au fil du temps, étant donné que les problématiques de mise en œuvre et d'efficacité ont été constatées davantage dans des affaires plus anciennes (à commencer par AT.37792 - *Microsoft I* et AT.34579 – *MasterCard I*) que dans des affaires plus récentes.

Le bilan sur l'efficacité d'un ensemble de mesures correctives par rapport à l'objectif visé peut toutefois sous-estimer l'impact plus large que ces mesures ont eu. En effet, l'un des enseignements tirés de ce projet est que certaines des mesures correctives que nous avons évaluées (et les décisions dans lesquelles elles sont incluses) ont également eu un impact plus large qui comprend l'influence tant sur le droit dur que le droit mou futur en matière antitrust , les jugements antitrust et la réglementation sectorielle, tels que les lignes directrices horizontales de la Commission, l'arrêt de la CJUE dans l'affaire Huawei c. ZTE, le règlement de l'UE sur les commissions multilatérales d'interchange (CMI), la proposition de règlement SEP, ainsi que la loi sur les marchés numériques.

Défis identifiés et enseignements tirés. Outre les recherches OSINT et les entretiens avec les gestionnaires de dossiers de la DG COMP, les destinataires des décisions, les acteurs du marché et leurs conseillers dans le cadre de nos douze études de cas, nous avons examiné la littérature et nous nous sommes entretenus avec des fonctionnaires de quatre autorités de la concurrence, des juristes et des économistes, ainsi qu'avec des administrateurs chargés du suivi, afin d'identifier les principaux défis et les meilleures pratiques en ce qui concerne la conception et la mise en œuvre des mesures correctives en matière d'ententes et d'abus de position dominante.

Nos recherches suggèrent que le règlement 1/2003 a fourni un cadre juridique précieux pour l'imposition de mesures correctives antitrust dans l'UE au cours des vingt dernières années. Il a permis à la Commission d'intervenir sur des questions de concurrence essentielles, notamment à l'intersection de la réglementation sectorielle et du droit de la propriété intellectuelle. Nous constatons également que les exigences des arrêts fondamentaux de la CJUE sur les mesures correctives en matière d'ententes et d'abus de position dominante, qui sont inscrites dans le règlement (CE) n° 1/2003, restent un principe directeur solide pour la conception des mesures correctives en matière d'ententes et d'abus de position dominante, à savoir "*supprimer l'infraction et y mettre fin de manière effective*".

Si le cadre juridique du règlement 1/2003 reste valable aujourd'hui, 20 ans après son adoption, nos recherches ont mis en lumière un certain nombre de difficultés dans son application. Les quatre principaux

défis liés à l'élaboration des mesures correctives concernent, respectivement, l'adaptation de l'objectif de la mesure corrective au problème de concurrence, le choix du type de mesure corrective (mesures structurelles ou comportementales), le choix de l'instrument juridique (interdiction ou décision d'engagement) et le contrôle du respect des règles.

Concernant le premier défi, notre étude constate que l'arrêt du comportement anticoncurrentiel est l'objectif le plus immédiat des mesures correctives en matière d'ententes et d'abus de position dominante, qui peut, dans de nombreux cas, être atteint par une simple injonction de cesser et de s'abstenir. Dans certains cas, une simple ordonnance de cessation et d'abstention peut ne pas être suffisante pour mettre fin efficacement au comportement problématique et des mesures correctives positives peuvent être alors nécessaires, qui préciseront de manière plus détaillée le comportement que l'entreprise concernée devra adopter à l'avenir. L'objectif des mesures correctives peut alors aller au-delà de la cessation du comportement anticoncurrentiel et inclure un caractère préventif. En fonction des conditions du marché, du comportement problématique et de la rapidité de l'intervention des autorités, les mesures correctives peuvent également être conçues de manière à empêcher la répétition du comportement problématique et/ou à supprimer ou à annuler ses conséquences négatives, c'est-à-dire rétablir une concurrence non faussée. Dans les cas d'exclusion, ce dernier objectif confronte la Commission au problème complexe de l'identification du scénario hypothétique pertinent et de l'élaboration de la mesure corrective pour ramener le marché à ce scénario. La poursuite d'objectifs de réparation doit néanmoins être prise au sérieux tant que le potentiel des mesures correctives à relancer le processus concurrentiel l'emporte sur la charge que représente la mise en œuvre des mesures correctives pour l'entreprise concernée et sur le risque qu'elles impactent négativement les incitations à la concurrence et à l'innovation sur le marché.

En ce qui concerne le deuxième défi, l'objectif de la mesure corrective peut être poursuivi avec différents types de mesures correctives et nos recherches confirment que, même si elle n'est pas toujours évidente, la distinction traditionnelle entre les mesures correctives structurelles et comportementales reste omniprésente. En fonction des faits de l'espèce, et comme l'ont souligné un certain nombre d'entretiens menés dans le cadre de notre étude, les mesures comportementales, qui sont les plus souvent utilisées dans les affaires d'ententes et d'abus de position dominante, peuvent être difficiles à mettre en œuvre, et peuvent être autant intrusives et contraignantes que les mesures structurelles. En fait, cela signifie que l'efficacité et la proportionnalité des mesures devraient être considérés comme étant les critères essentiels pour le choix de la mesurefinale, et ce quel que soit le type de mesure.

En ce qui concerne le troisième défi, notre étude note que les mesures correctives peuvent être appliquées à la fois par le biais de décisions d'interdiction et d'engagements, présentant leurs propres avantages et inconvénients qu'il convient de contrebalancer scrupuleusement. Dans le premier cas (interdiction), elles augmentent le détail ou la portée d'une injonction de cesser et de s'abstenir, et sont limitées par divers facteurs, notamment l'accent mis par les gestionnaires du dossier sur l'établissement de l'infraction plutôt que sur la recherche d'une solution, la subordination statutaire des mesures structurelles aux mesures comportementales et l'exigence pour la Commission de prendre en charge le coût de la nomination d'un mandataire chargé du contrôle ou d'experts techniques. Dans ce dernier cas (engagements), la Commission dispose d'un plus grand pouvoir d'appréciation dans le choix du type de mesure corrective, mais la coopération des entreprises concernées est une condition préalable à l'adoption de ces mesures. À cet égard, la négociation de mesures correctives sur la base de mesures provisoires peut améliorer l'efficacité des mesures. Plus précisément, la négociation de mesures correctives sur la base de mesures provisoires peut accélérer la recherche d'une solution adéquate, étant donné que l'entreprise concernée aura déjà mis un terme à son comportement problématique et sera peut-être désireuse de tourner la page.

Enfin, en ce qui concerne le quatrième défi, le suivi de la mise en œuvre des mesures correctives est crucial, car l'entreprise concernée sera incitée à minimiser l'impact de la mesure corrective sur ses activités. Dans le cas des mesures structurelles, si elles sont effectivement mises en œuvre, la mesure corrective

entraînera une réaffectation des ressources sur le marché qui éliminera l'incitation de l'entreprise concernée à adopter un comportement anticoncurrentiel. Dans le cas d'une mesure corrective comportementale, la capacité d'adopter un comportement anticoncurrentiel sera éliminée si la mesure corrective est effectivement mise en œuvre, même si l'incitation anticoncurrentielle peut persister tant que les conditions du marché ne changent pas, que ce soit par elles-mêmes ou provenant des éléments structurels éventuels de la mesure corrective comportementale. Compte tenu de ce problème d'incitation, les efforts de surveillance continue seront particulièrement importants pour les mesures correctives comportementales complexes et seront facilités par l'inclusion d'obligations de déclaration (qui ne sont actuellement pas prévues dans les simples ordonnances de cessation et d'abstention, peut-être en raison de l'effet dissuasif des décisions d'interdiction) et par la désignation de mandataires chargés de la surveillance, qui peuvent à leur tour nécessiter le soutien d'experts techniques.

Dans notre évaluation ex post des douze études de cas, nous avons constaté que si la majorité des mesures correctives dans notre échantillon ont été pleinement mises en œuvre, moins de la moitié des mesures correctives évaluées ont été pleinement efficaces pour atteindre l'objectif visé. Les résultats moins satisfaisants pour l'efficacité que pour la mise en œuvre sont dus au fait que parfois les mesures correctives n'ont pas été pleinement mises en œuvre (AT.37792 - *Microsoft I* (interopérabilité), AT.34579 - *MasterCard I*, AT.39596 - *BA/AA/IB*) mais qu'à d'autres moments les mesures correctives étaient inefficaces ou seulement partiellement efficaces bien qu'elles aient été pleinement mises en œuvre (AT.37792 - *Microsoft I* (ventes liées), AT.38636 - *Rambus*, AT.39315 - *ENI*, AT.39847 - *E-books*). Cela suggère que ces dernières mesures correctives ont été conçues d'une manière qui n'était pas adaptée pour atteindre l'objectif visé en premier lieu. Dans un cas (AT.40608 - *Broadcom*), nous n'avons pas pu parvenir à une évaluation concluante sur la base des éléments de preuve que nous avons recueillis et compte tenu du fait que les obligations liées à la mesure corrective sont toujours en cours.

Notre évaluation ex post révèle également que la mise en œuvre et l'efficacité des mesures correctives varient en fonction du type de décision, du type de mesure corrective et du temps. Dans l'ensemble, les mesures correctives imposées par des décisions d'interdiction posent davantage de problèmes de mise en œuvre et d'efficacité que celles qui ont été rendues obligatoires par des décisions d'engagement. En ce qui concerne le type de mesure corrective, l'évaluation ex post suggère que les mesures correctives purement comportementales sont les moins susceptibles d'être mises en œuvre. Enfin, l'évaluation de nos douze études de cas montre que la pratique de la Commission en matière de recours semble s'être améliorée au fil du temps, les problèmes de mise en œuvre et d'efficacité ayant été constatés dans des affaires plus anciennes (notamment AT.37792 - *Microsoft I* et AT.34579 - *MasterCard I*) plutôt que dans des affaires plus récentes.

Recommandations. À la lumière de ces observations, nous formulons les recommandations suivantes:

1. Les mesures correctives en matière d'ententes et de positions dominantes devraient toujours viser non seulement à mettre fin au comportement anticoncurrentiel des entreprises concernées, mais également à empêcher sa répétition et à supprimer les effets préjudiciables qu'il a pu avoir sur le marché.

2. Conformément au cadre juridique existant, le principe d'efficacité devrait être le principe fondamental dans la conception des mesures correctives en matière d'ententes et d'abus de position dominante.

3. Pour que les mesures correctives soient efficaces, il est important que les autorités de la concurrence interviennent en temps utile. La Commission devrait envisager la mise en place de mesures visant à rationaliser la durée des procédures en matière d'ententes et d'abus de position dominante.

4. Conformément à la directive 2019/01 (directive ECN+), la subordination des mesures correctives structurelles aux mesures correctives comportementales devrait être supprimée du texte de l'article 7 du règlement 1/2003. Les principes d'efficacité et de proportionnalité détermineraient alors le meilleur type de mesure corrective, en fonction des faits de l'espèce.

5. En surmontant l'absence de base juridique, comme déjà déclaré par l'arrêt Microsoft, la Commission devrait être autorisée à demander au destinataire d'une décision d'infraction de supporter les coûts du contrôle de la mise en œuvre des mesures correctives, ce qui rendrait la désignation d'un mandataire chargé du contrôle plus simple dans la pratique, y compris dans les affaires relevant de l'article 7.

6. Dans les affaires complexes relevant de l'article 7, la Commission devrait envisager de séparer la décision d'infraction de la décision relative aux mesures correctives, ce qui permettrait de consacrer des efforts à la conception des mesures correctives, de tester les mesures envisagées sur le marché et d'assurer une plus grande transparence sur les mesures correctives finalement imposées.

7. Les avantages d'une consultation des acteurs du marché sur les mesures correctives, requise dans le cadre de l'article 9, s'appliquent également aux mesures correctives prévues à l'article 7. Par conséquent, cette pratique devrait être encouragée, dans la mesure du possible, également dans ce dernier cas.

8. Envisager de formaliser une procédure de coopération dans le cadre des affaires non liées à des ententes relevant de l'article 7, en garantissant aux entreprises une plus grande certitude quant aux conditions et aux avantages liés à cette procédure.

9. Lorsque cela est approprié, la Commission devrait encourager le recours à la procédure de l'article 9, qui permet des procédures plus courtes, une plus grande souplesse dans la conception des mesures correctives, un meilleur suivi de la mise en œuvre et un risque plus faible de recours juridictionnels, au prix toutefois d'une contribution moindre à la jurisprudence et à la dissuasion.

10. Les formalités entourant les études de marché, telles que la publication des mesures correctives proposées au Journal officiel de l'UE et les exigences de traduction correspondantes, pourraient être simplifiées dans un souci de rapidité.

11. En cas d'urgence, étudier plus systématiquement l'adoption de mesures provisoires au titre de l'article 8, en particulier dans les cas où il peut y avoir de fortes synergies de fond et de procédure entre les mesures provisoires et les éventuelles mesures ultérieures.

12. La mise en œuvre des mesures correctives doit être vérifiée. Des obligations de rapport devraient être incluses dans les décisions de la Commission en tant que pratique courante, y compris dans les simples ordonnances de cessation et d'abstention.

13. La désignation d'un mandataire chargé du contrôle devrait être la pratique par défaut dans les décisions relatives aux mesures correctives en matière d'ententes et d'abus de position dominante, à moins que des raisons impérieuses ne s'y opposent. Lors de ce processus, le rôle de la Commission dans la nomination du mandataire chargé du contrôle pourrait être renforcé en ce sens que la Commission pourrait par exemple : (i) avoir la possibilité de demander que plusieurs mandataires chargés du contrôle soient proposés ; (ii) avoir le dernier mot sur le mandataire chargé du contrôle sélectionné ; (iii) avoir la capacité de remplacer rapidement le mandataire chargé du contrôle au cours de son mandat en cas de problèmes, y compris de conflits présumés ; (iv) définir des limites appropriées aux pouvoirs du mandataire chargé du contrôle ; (v) permettre la désignation d'experts techniques ; et (vi) établir un système de gouvernance approprié dans les affaires complexes qui nécessitent des efforts de contrôle intensifs en termes de ressources.

14. La désignation d'un conseiller indépendant auprès de la Commission pour la phase de conception des mesures correctives devrait être envisagée dans les cas appropriés, par exemple lorsque la conception des mesures correctives peut nécessiter une expertise technique ou que leur mise en œuvre peut être particulièrement complexe.

15. Envisager la publication d'orientations sur les mesures correctives en matière d'ententes et d'abus de position dominante, à l'instar de la communication sur les mesures correctives en matière de concentrations (2008) et des textes types de la Commission relatifs au mandat du chargé du contrôle dans le cadre du contrôle des concentrations de l'UE (2013), qui peuvent apporter des avantages significatifs à toutes les parties, améliorer la mise en œuvre et l'efficacité des mesures correctives et accélérer le processus d'élaboration des mesures correctives.

16. Envisager de renforcer l'évaluation ex post des mesures correctives en tant que pratique courante, en recueillant des informations pertinentes sur le marché (telles que les parts de marché) auprès des entreprises concernées et des acteurs du marché à la fin de chaque affaire d'entente ou d'abus de position dominante.

17. La Commission devrait continuer à exploiter les synergies entre les mesures correctives adoptées dans différentes décisions et utiliser l'expérience et la connaissance du marché acquises grâce aux mesures correctives pour informer et renforcer la réglementation sectorielle dans un sens favorable à la concurrence, tout en respectant les limites juridiques du règlement (CE) n° 1/2003.

18. La Commission devrait envisager la création d'une unité spécialisée chargée de soutenir les gestionnaires des dossiers en ce qui concerne la conception, la mise en œuvre et l'efficacité des mesures correctives, de tous les domaines pertinents de la politique de concurrence de l'UE (antitrust, contrôle des fusions, aides d'État, DMA et règlement sur les subventions étrangères). Au minimum, un référentiel de connaissances sur les mesures correctives, comprenant idéalement tous les domaines politiques, devrait être mis en place.

1. Introduction

The purpose of this study (the "Study") is to evaluate the implementation and effectiveness of the remedies imposed by the European Commission (the "Commission" or the "EC") in non-cartel antitrust cases ("Commission Antitrust Cases") since the entry into force of Regulation 1/2003 on 24 January 2003 up until 31 December 2022.[1] More specifically, the Study covers the Commission's antitrust decisions based on Articles 101 and 102 TFEU (the "Antitrust Provisions"), with the exception of cartel decisions, and further excludes Article 106 TFEU decisions, which deal with public undertakings.

Regulation 1/2003 brought about a radical change in the way in which the Antitrust Provisions are enforced. The previous enforcement regime, under Regulation 17/1962, was characterised by a centralised notification and authorisation system for Article 101 TFEU. Regulation 1/2003 abolished this system, replacing it with a system of ex post enforcement. The objectives of this reform were to allow the Commission to become more active in the pursuit of serious infringements of the Antitrust Provisions, as well as to decentralise enforcement to the Member States' competition authorities and to the national courts, while maintaining consistency across the European Union ("**EU**") and securing greater leeway to define its administrative priorities.[2]

The applicable legal framework for examining remedies in Commission Antitrust Cases comprises Articles 7, 8 and 9 of Regulation 1/2003. Article 7 governs prohibition (or infringement) decisions, whereas Article 9 governs commitments decisions. In addition, Article 8 foresees the imposition of interim measures. Unless otherwise specified or made clear from the context, in this Study we will use the word "*remedies*" to mean both remedies imposed under Article 7 and commitments accepted under Article 9, with the exception of simple orders to bring an infringement to an end under Article 7, as is done in cartel cases.

In order to assist the Commission to evaluate the implementation and effectiveness of antitrust remedies, the Study is divided into the following sections:

- An overview of the applicable legal framework (Section 2);
- The analysis of the practicalities of antitrust remedies in the EU, including a comparison to remedies in EU merger control and antitrust remedies in other jurisdictions (Section 3);
- The provision of a comprehensive dataset and statistical analysis of all antitrust decisions taken by the Commission since the entry into force of Regulation 1/2003 and until 31 December 2022 (Section 4);
- The identification of common challenges and global best practices regarding the design, implementation and effectiveness of antitrust remedies, based on a review of the literature and interviews with antitrust experts (Section 5);
- The ex post evaluation of the implementation and the effectiveness of remedies in twelve significant cases that have been selected from the dataset we constructed (Section 6);
- Based on the evidence collected, the identification of lessons learned and recommendation in the antitrust remedies practice and policy (Section 7).

1 Official Journal of the European Union, *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 L1/1, 2003.
2 See Ibáñez Colomo P., *The New EU Competition Law*, Hart Publishing, Oxford, 2023, p. 69.

2. The legal framework for EU antitrust remedies

2.1 General legal context

The provisions of EU antitrust law are found in Articles 101 and 102 TFEU. Article 101(1) TFEU prohibits "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*". Article 101(2) TFEU provides that any agreements or decisions prohibited under Article 101(1) TFEU shall be "*automatically void*". Article 101(3) TFEU foresees an exception to the prohibition in Article 101(1) TFEU, if certain conditions are met.

Under Article 102 TFEU *"[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States"*. Since the entry into force of Regulation 1/2003, the Commission enforces Articles 101 and 102 TFEU with powers conferred upon it by that Regulation. These powers include, inter alia, the power to impose antitrust fines upon undertakings that have negligently or intentionally violated Article 101 or 102 TFEU.[3] Accordingly, when it finds an infringement of Article 101 or 102 TFEU, the Commission is empowered *"to require the undertakings concerned to bring such an infringement to an end"*.[4] To ensure that the EU antitrust provisions are enforced, the Commission should address decisions to undertakings or associations of undertakings in order to bring to an end infringement of Articles 101 and 102 TFEU.[5]

Under Article 7 of Regulation 1/2003, whenever the Commission finds that the Antitrust Provisions have been infringed, it may impose remedies according to the applicable rules. Specifically, the Commission may, in addition to ordering the undertakings in question to cease the infringement, impose on the undertakings *"any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end"*. In this regard, Article 7(1) further requires that *"structural remedies can only be imposed either where there is no equally effective behavioural remedy, or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy"*.

Article 9 of Regulation 1/2003 confers on the Commission the powers to accept commitments: "*where the Commission intends to adopt a decision requiring that an infringement be brought to an end and undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings*".[6]

Finally, under Article 8 of Regulation 1/2003 interim measures can be imposed by the Commission "*on the basis of a prima facie finding of infringement*" in cases of "*urgency due to the risk of serious and irreparable damage to competition*", when the preliminary antitrust concern requires urgent intervention.[7]

3 See Regulation 1/2003, Article 4, Articles 7-10 and Articles 17-24.
4 Ibid., Article 7(1).
5 Ibid., at recital 11.
6 Ibid., Article 9(1).
7 Ibid., Article 8(1).

2.2 Legal rules on EU antitrust remedies

2.2.1 Prohibitions and remedies

2.2.1.1 Legal foundation: Article 7 of Regulation 1/2003

Article 7 of Regulation 1/2003 provides the legal basis for the exercise of the Commission's authority to address decisions to undertakings or associations of undertakings in order to bring to an end infringements of Articles 101 and 102 TFEU.[8] In addition to finding an infringement and ordering the undertakings in question to cease this infringement, through an Article 7 decision the Commission can in addition impose remedies to ensure that the infringement is brought to an end "*effectively*",[9] where the adverb "*effectively*" should be interpreted as "fully". Remedies therefore pursue increasingly ambitious goals: (i) stopping the anticompetitive conduct, (ii) preventing the anticompetitive conduct from happening again, and eventually (iii) restoring competition by eliminating the anticompetitive consequences that the conduct may have already had.[10]

Stopping the anticompetitive conduct is the most immediate goal of antitrust remedies. In certain cases, a so-called cease-and-desist order, that is a simple order to refrain from continuing the anticompetitive conduct to bring the infringement to an end, may be sufficient to attain this goal. In other cases, however, a cease-and-desist order may not be sufficient, either because the conduct is so complex that it requires more specific guidance to be ceased or because the incentives and the ability to engage in the conduct need to be altered in the first place. In addition, a cease-and-desist order may not be sufficient if the goal of antitrust remedies is not just to stop the anticompetitive conduct but also to prevent it from happening again and to remove the anticompetitive effects that it may have already had.

The range of options for the Commission thus covers (i) cease-and-desist orders, (ii) behavioural remedies and (iii) structural remedies.

According to Article 7, the Commission may impose on undertakings concerned "*any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end*".[11] The literal wording of this article leads to the conclusion that all types of remedies should be assessed with respect to the principle of necessity and the principle of proportionality.

In accordance with Article 7, the employment of both structural and behavioural remedies is foreseen, although the Commission can only impose structural remedies instead of behavioural ones in two instances: (a) where there is "*no equally effective behavioural remedy*"; or (b) where "*any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy*".[12]

In other words, the text of Article 7 provides an expressed obligation for the Commission to follow a so-called subsidiarity principle of structural remedies relative to behavioural remedies.

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8 Ibid., Article 7(1).

9 Recital 12 of Regulation 1/2003 mentions the Commission's power to impose any remedy which is necessary to "*bring the infringement effectively to an end*".

10 Ritter C., *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, 7(9) Journal of European Competition Law & Practice, 2016 pp. 587- 588, citing in support Maier-Rigaud F., *Behavioural Versus Structural Remedies in EU Competition Law*, 2014 and Lowe P., Marquis M., Monti G., *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, Oxford, 2016, p. 207.

11 See Regulation 1/2003, Article 7(1).

12 Ibid.

Moreover, recital 12 of Regulation 1/2003 discusses a particular form of structural remedies and stipulates that *"[c]hanges to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking*".

To respect these three principles (necessity, proportionality and subsidiarity) one must pay attention both to the type and to the duration of remedies to impose under Article 7.

Under Article 24 of Regulation 1/2003, the Commission can impose a periodic penalty payment (of up to "*5% of the average daily turnover in the preceding business year per day*")[13] upon an undertaking to compel it to comply with an Article 7 decision. These periodic penalty payments come in addition to the fines that the Commission, pursuant to Article 23, can impose on undertakings that have infringed the Antitrust Provisions in the first place.

2.2.1.2 Relevant jurisprudence

The EU Courts have acknowledged in several seminal judgments that the Commission can impose positive obligations upon infringing undertakings.[14]

Specifically, in interpreting Article 3 of Regulation 17, which foresees that where the Commission finds an infringement of the Antitrust Provisions, "*it may by decision require the undertakings [...] concerned to bring such infringement to an end"*,[15] it held that thereunder the Commission could adopt "*an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty*".[16] This power is aimed at eliminating or neutralising any anticompetitive effects that have occurred in the past and effects which may continue after the conduct which caused them has ceased.[17] The adoption of an infringement decision is also aimed at preventing *"repetition of the infringement"*.[18] This power now finds its source in Article 7 of Regulation 1/2003.

It can be seen from the caselaw that the application of Article 7 of Regulation 1/2003 may involve a prohibition on continuing certain activities, practices or situations which have been found to be unlawful, but also a prohibition on adopting similar future conduct.[19]

According to EU case law, the Commission's power to impose remedies is not unlimited: *"the Commission does not have unlimited discretion when formulating remedies to be imposed on undertakings for the purpose of putting an end to an infringement"*.[20]

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13 Ibid., Article 24(1)(a).

14 Judgment of the Court of Justice of 29 June 2010, E*uropean Commission* v *Alrosa Company Ltd.*, Case C-441/07 P, ECLI:EU:C:2010:377, [39] and Judgment of the General Court (First Chamber, Extended Composition) of 18 November 2020, *Lietuvos geležinkeliai AB* v *European Commission*, Case T-814/17, ECLI:EU:T:2020:545, p. 311.

15 Official Journal of the European Union, *Regulation 17/62 of 6 February 1962: First Regulation Implementing Articles 85 and 86 of the Treaty*, OJ 13/204, 1962.

16 Judgment of the Court of Justice of 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v *Commission*, Joined Cases 6 and 7/73, ECLI:EU:C:1974:18, [45].

17 Judgment of the Court of Justice of 4 March 1999, *Ufex and others* v *Commission*, Case C-119/97 P, ECLI:EU:C:1999:116, [94].

18 Judgment of the Court of Justice of 3 July 1991, *AKZO Chemie BV* v *Commission*, Case C-62/86, ECLI:EU:C:1991:286, [155].

19 Judgment of the Court of Justice of 28 April 2010, *Gütermann and Zwicky* v *Commission*, Joined Case T-456/05 and T-457/05, ECLI:EU:T:2010:168, [61].

20 Ibid., [1276].

The EU Courts have regularly emphasised that the power of the Commission to impose antitrust remedies is constrained by the principle of proportionality.[21] Accordingly, Commission decisions imposing remedies must "*not exceed the limits that are appropriate and necessary in order to achieve the aim pursued*" by them.[22] Given that the power to order remedies is applied "*according to the nature of the infringement found*", the obligations imposed upon infringing undertakings "*may not […] exceed what is appropriate and necessary to attain the objective sought, namely to restore compliance with the rules infringed*".[23]

In another major judgment, *Automec* v *Commission*, the principle was established that when there are several effective and proportionate measures that can be adopted to terminate an infringement, the choice of the measure should be left to the parties: "*it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty*".[24] Indeed, the Court of Justice in the mentioned judgment specified that *"[a]s freedom of contract must remain the rule, the Commission cannot in principle be considered to have, among the powers to issue orders which are available to it for the purpose of bringing to an end infringements of [Article 105 TFEU], the power to order a party to enter into contractual relations, since in general the Commission has suitable remedies at its disposal for the purpose of requiring an undertaking to terminate an infringement*".[25] The choice of a future trading relationship is not always fully within the autonomy of the parties, however: "*the Commission cannot, without going beyond the powers conferred on it both by the competition rules of the [TFEU] and by Regulation No 1/2003, adopt on the basis of Article 7(1) of that regulation a decision prohibiting absolutely any future trading relations between two undertakings unless such a decision is necessary to re-establish the situation which existed prior to the infringement*".[26]

In some circumstances, the Commission indeed has the power to impose a specific and prescriptive remedy, when there is no other option that addresses the infringement and its effects. That is the case for access remedies imposed in *Magill*.[27] In this case, the Court found that the constituent elements of the infringement revealed by the consideration of the first plea justified the measures imposed in Article 2 of the decision: *"[t]he requirement that the applicant must supply RTE, the BBC and third parties on request and on a non-discriminatory basis with its weekly listings with view to their publications is, in the light of the specific circumstances of the case as found by the Court when considering the constituent elements of the infringement, the only means of bringing that infringement to an end, as the Commission established in the contested decision. By ordering the applicant to permit third parties, on request and on a non-discriminatory basis, to publish its weekly listings, the Commission did not deprive it of its choice between the various measures which could bring the infringement to end"*.[28] On appeal, the Court of Justice confirmed this judgment and held that *"in the present case […], the Commission was entitled under Article 3, in order to ensure that its decision was effective, to require the appellants to provide that information. As the Court of First Instance rightly found, the imposition of that obligation – with the possibility of making authorization of publication dependent on certain conditions, including payment of royalties – was the only way of bringing the infringement to an end*".[29]

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21 See, e.g., Judgment of the Court of Justice of 6 April 1995, *RTE and ITP* v *Commission*, Joined Cases C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98, [93].

22 See. e.g., Judgment of the Court of Justice of 23 October 2003, *Van den Bergh Foods Ltd* v *Commission*, Case T-65/98, ECLI:EU:T:2003:281, [201].

23 Judgment of the Court of Justice of 14 May 1998, *Finnish Board Mills Association - Finnboard* v *Commission*, Case T-338/94, ECLI:EU:T:1998:99, [242].

24 Judgment of the Court of Justice of 23 October 2017, *Automec* v *Commission*, Case T-24/90, ECLI:EU:T:1992:97, [52].

25 Ibid., [51].

26 Judgment of the Court of Justice of 11 July 2007, *Alrosa Company Ltd* v *Commission*, Case T-170/06, ECLI:EU:T:2007:220, [103].

27 Judgment of the Court of Justice of 10 July 1991, *ITP* v *Commission*, Case T-76/89, ECLI:EU:T:1991:41.

28 Ibid., [71].

29 Judgment of the Court of Justice of 6 April 1995, *RTE and ITP* v *Commission*, Joined cases C-241/91 P and C-242/91 P, [91].

Regarding the monitoring of the implementation of remedies, in the important *Microsoft Corp.* v *Commission* judgment the EU Courts took a strict view on the obligations of infringing undertakings: *"[w]hen the Commission finds in a decision that an undertaking has infringed [the EU antitrust provisions], that undertaking is required to take, without delay, all the measures necessary to comply with that provision, even in the absence of specific measures prescribed by the Commission in that decision. Where remedies are provided for in the decision, the undertaking concerned is required to implement them - and to assume all the costs associated with their implementation - failing which it exposes itself to liability for periodic penalty payments imposed*".[30]

The Commission can monitor the implementation of the remedies that it orders and is entitled to ensure that "*measures necessary to put an end to the anti-competitive effects of the infringement are fully implemented without delay*".[31] To perform this role, it may rely upon its powers of investigation (contained within Regulation 1/2003) and is entitled, "*where necessary, to use an external expert in order, inter alia, to resolve technical issues*".[32] In *Microsoft Corp.* v *Commission*, however, the Court considered that the Commission *"went far beyond the situation where it retains its own external expert*",[33] imposing a requirement that *"goes beyond a mere obligation to report to the Commission on Microsoft's actions"*.[34]

The Commission would thus exceed its powers if it were to order an infringing undertaking "*to submit a proposal for the establishment of a mechanism which must include the appointment of an independent monitoring trustee empowered to access, independently of the Commission, [the undertaking's] assistance, information, documents, premises and employees […] and also provides that [the undertaking] is to bear all the costs of the appointment of the monitoring trustee, including his remuneration.*[35] The Commission is not invested with the ability "*to impose such a mechanism by adopting a decision in the event that it considers that the mechanism proposed by [the undertaking] is not suitable".*[36]

The same restrictions do not apply in Article 9 decisions, where the remedies are proposed by the concerned undertakings.[37]

2.2.1.3 Other jurisdictions

The European Competition Network (ECN), created by Regulation 1/2003, permits the Commission and the Member States' national competition authorities to work closely on enforcing the EU antitrust rules. In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be involved more closely in their application. To this end, they should be empowered to apply Community law. As provided by Article 11 of Regulation 1/2003, *"the Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation"*.[38]

In order to ensure this task, it is essential that national competition authorities have all the powers they need to apply the EU antitrust rules effectively.

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30 Judgment of the Court of Justice of 17 September 2007, *Microsoft Corp.* v *Commission*, Case T-201/04, ECLI:EU:T:2007:289, [1256].
31 Ibid., [1265].
32 Ibid. [1265].
33 Ibid., [1268].
34 Ibid., [1269].
35 Ibid., [1278].
36 Ibid.
37 The role of monitoring trustees is discussed in more detail in Section 3.7 of the Study.
38 See Regulation 1/2003, Article 11(1).

For this reason, following a Commission proposal, Directive (EU) 2019/1 was signed into law on 11 December 2018 and Member States had to transpose it in national law by 4 February 2021,[39] with the aim of enabling national competition authorities to be more effective when applying the EU antitrust rules.

According to Article 10 of this Directive, *"Member States shall ensure that where national competition authorities find an infringement of Article 101 or 102 TFEU, they may by decision require the undertakings and associations of undertakings concerned to bring that infringement to an end. For that purpose, they may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. When choosing between two equally effective remedies, national competition authorities shall choose the remedy that is least burdensome for the undertaking, in line with the principle of proportionality"*.[40]

This Article should be read in conjunction with recital 37 which explicitly refers to the restorative aim of remedial action in antitrust (highlighted in bold) and justifies the imposition of structural remedies when their superior effectiveness supports such measures. According to this recital *"it is indispensable for NCAs to be able to require undertakings and associations of undertakings to bring infringements of Article 101 or 102 TFEU to an end, including where the infringement continues after the NCAs have formally initiated proceedings. Moreover, NCAs should have effective means to restore competition in the market by imposing structural and behavioural remedies which are proportionate to the infringement committed and which are necessary to bring the infringement to an end. The principle of proportionality requires that, when choosing between two equally effective remedies, NCAs should choose the remedy that is least burdensome for the undertaking. Structural remedies, such as obligations to dispose of a shareholding in a competitor or to divest a business unit, affect the assets of an undertaking and can be presumed to be more burdensome for the undertaking than behavioural remedies. However, this should not preclude NCAs from finding that the circumstances of a particular infringement justify the imposition of a structural remedy because it would be more effective in bringing the infringement to an end than a behavioural remedy*".[41]

In Germany, under Section 32 of the Competition Act ("*Gesetz gegen Wettbewerbsbeschränkungen*" or "GWB"), the *Bundeskartellamt* can order undertakings to terminate an infringement of German or EU competition law.[42]

To achieve this purpose, it *"may require them to take all necessary behavioural or structural remedies that are proportionate to the infringement identified and necessary to bring the infringement effectively to an end"*.[43]

In analogy with EU law, the two types of remedies are differentially treated: *"[s]tructural remedies may be imposed only if there is no behavioural remedy which would be equally effective, or if the behavioural remedy would entail a greater burden for the undertakings concerned than the structural remedies"*.[44]

Nevertheless, in practice, remedies are rarely imposed in prohibition decisions.

In France, competition law is enforced by the *Autorité de la Concurrence*, the French Competition Authority (FCA). Article L464-2(I) of the Commercial Code provides that the FCA *"may order interested parties to put*

39 Official Journal of the European Union, *Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*, OJ L11/3, 2019.
40 See Ibid., Article 10(1).
41 See Ibid., at recital 37.
42 See the GWB, Section 32(1).
43 Ibid., GWB Section 32(2).
44 Ibid. GWB Section 32(2

an end to anti-competitive practices within a specified period or impose on them any corrective measure of a structural or behavioural nature proportionate to the offense committed and necessary to effectively put an end to the offense".[45]

Until 2021, the FCA was not allowed to impose a structural remedy in antitrust cases. Therefore, as highlighted also by the interviews conducted for this Study, the FCA reported a lack of experience with structural remedies in an antitrust setting.

In the United States, federal competition law is enforced by the US Department of Justice Antitrust Division ("DoJ") and the US Federal Trade Commission ("FTC").

The FTC has its own statutory power to adopt *"cease-and-desist orders"* that aim to remedy unfair methods of competition,[46] as well as to seek in court preliminary and permanent injunctions to remedy *"any provision of law enforced by the FTC"*.[47]

The DoJ must also seek a remedy in court.

Courts, when enforcing competition law, *"are invested with large discretion to model their judgments to fit the exigencies of the particular case"*.[48] When an antitrust violation has been found, the courts will impose a remedy that is necessary and appropriate to restore competition in the market concerned.[49] A remedy in this context can include injunctive relief.[50] Such relief can be extensive in scope; for example, with monopolisation offences, injunctive relief *"is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal"*.[51] When injunctions are imposed they aim to prevent companies from engaging in both the unlawful activity in question and equivalent conduct that may be employed to achieve the same outcome.[52] Structural remedies, such as asset divestitures and break-ups of monopolists can be ordered in appropriate cases.[53]

2.2.2 Commitments

2.2.2.1 Legal foundation: Article 9 of Regulation 1/2003

Commitments decisions allow the Commission to obtain remedies, by making binding those commitments proposed by an undertaking in order to meet the competition concerns that the Commission identified in a preliminary assessment, without finding an infringement.

The Commission has the express power to adopt commitments decisions. In other words, the Commission has the ability in law to accept remedies in the form of commitments that are proposed by the undertakings concerned following their reception of the Commission's preliminary assessment, and in doing so close its investigation.[54]

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45 See the French Commercial Code, Article L464-2(I).
46 See the US Code, 15 § 45.
47 Ibid., 15 § 53(b).
48 Judgment of the Supreme Court of 10 November 1947, *International Salt Co., Inc.* v *United States*, 332 US 392, pp. 400-401.
49 See, e.g., Judgment of the Supreme Court of 13 June 1966, *United States* v *Grinnell Corp.*, 384 US 577.
50 See, e.g., Directorate For Financial And Enterprise Affairs Competition Committee, *Remedies and Commitments in Abuse Cases - Contribution from the United States*, DAF/COMP/GF/WD(2022)37, 2022, p. 3.
51 Judgment of the Supreme Court of 27 November 1950, *United States* v *US Gypsum Co.*, 340 U.S. 76, 1950, pp. 88-89.
52 For examples of cases, see Directorate For Financial And Enterprise Affairs Competition Committee, *Remedies and Commitments in Abuse Cases - Contribution from the United States*, DAF/COMP/GF/WD(2022)37, 2022, p. 4.
53 See ibid., citing in support Judgment of the Supreme Court of 11 June 1956, *United States* v *E. I. du Pont de Nemours & Co.*, 366 US 316, 1961, pp. 330-331.
54 OECD, *Remedies and Sanctions in Abuse of Dominance Cases*, DAF/COMP(2006)19, 2006, p. 182.

Article 9 of Regulation 1/2003 constitutes a clear legal basis for this power. It stipulates that "*[w]here the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission*".[55]

It is accepted that a commitments decision does not involve a finding by the Commission that an undertaking has in fact violated the Antitrust Provisions. Indeed, recital 13 of Regulation 1/2003 emphasises that "*Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement*".[56] This allows the Commission to negotiate with the undertaking appropriate remedies to deal with a competition concern found in its preliminary assessment, without declaring that an infringement has actually occurred. Although Article 9 of Regulation 1/2003 states that a commitments decision may be adopted for a specified period, there is no requirement for a time period to be specified in the decision. In fact, the Commission has the legal power also to make commitments binding for *"an indefinite period"*.[57]

Regulation 1/2003 acknowledges that commitments decisions should not be available for all types of EU antitrust violations. Recital 13 of Regulation 1/2003 states that "c*ommitment decisions are not appropriate in cases where the Commission intends to impose a fine*". This recital has been interpreted to mean that commitments decisions are not appropriate in cartel cases.[58] Moreover, a commitments decision does not preclude the national enforcement of EU competition law with respect to the conduct in question: "*Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make a finding [of a past or ongoing infringement] and decide upon the case*".[59]

As with remedies imposed under Article 7 of Regulation 1/2003, the Commission has the power to impose a periodic penalty payment (of up to "*5% of the average daily turnover in the preceding business year per day*") upon an undertaking in order to compel that undertaking to comply with commitments made binding as a result of a decision adopted under Article 9.[60] Pursuant to Article 23 of Regulation 1/2003, the Commission may in addition fine an undertaking where that entity has negligently or intentionally failed to adhere to a commitment which was made binding by a commitments decision.[61] In three circumstances, it is possible for the Commission, upon request or on its own initiative, to reopen the proceedings that led to the adoption of a commitments decision; these circumstance are: "*(a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties*".[62]

55 See Regulation 1/2003, Article 9(1).
56 See Regulation 1/2003, at recital 13.
57 Judgment of the Court of Justice of 11 July 2007, *Alrosa Company Ltd* v *Commission*, Case T-170/06, ECLI:EU:T:2007:220, [91].
58 European Commission, *Antitrust: Commitment Decisions - Frequently Asked Questions*, MEMO/13/189, 2013, p. 2. See also Official Journal of the European Union, *Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU*, OJ C308/6, 2011, [116].
59 See Regulation 1/2003, at recital 13. See also ibid., at recital 20.
60 See Regulation 1/2003, Article 24(1)(c).
61 Ibid., Article 23(2)(c).
62 Ibid., Article 9(2).

2.2.2.2 Relevant jurisprudence

According to Article 9 of Regulation 1/2003, commitments decisions can be adopted when "*the parties concerned"* offer commitments. The term *"the parties concerned"* is confined solely to those undertakings which were parties to the Commission proceedings in question.[63] The Commission has "*a wide discretion*" on whether to accept, and make binding, a party's proposed commitments or to reject them.[64] The existence of such a discretion follows naturally from the wording of Article 9.[65]

The Court of Justice has emphasised that commitments decisions help to ensure that the EU antitrust provisions "*are applied effectively*" and "*provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement*". [66] The commitments procedure is thus acknowledged as being founded upon "*considerations of procedural economy*", allowing undertakings "*to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns*".[67]

Although, in contrast to Article 7 of Regulation 1/2003, Article 9 does not expressly mention the concept of proportionality, it is clear that the principle of proportionality (as a general principle of EU law) is applicable to commitments decisions as well.[68] That said, the proportionality assessment undertaken for commitments decisions is different to that applicable to decisions imposing structural or behavioural remedies pursuant to Article 7. Commitments offered by undertaking(s) should be proportionate and should not go above and beyond what is needed to address the competition concern(s) identified by the Commission.[69] However, the Court of Justice has indicated that the proportionality test for commitments under Article 9 is less strict than the proportionality test under Article 7.[70]

With respect to commitments decisions, a proportionality assessment is confined merely "*to verifying that the commitments in question address the concerns [the Commission] expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately*".[71] The said assessment must, however, take into account the interests of third parties.[72] If it receives several proposals of commitments that "*address equally adequately the competition concerns expressed by the Commission*", the Commission, in adopting a commitments decision, should make binding the commitments which "*will have a less pronounced effect concerning those third parties*".[73] Importantly though, the Commission does not have "*to seek out less onerous or more moderate solutions than the commitments offered to it*".[74] In effect, due to the specifics of the proportionality assessment undertaken with commitments decisions, it is possible (and indeed "*consciously accepted[ed]*" by undertakings offering commitments) that the content of binding commitments "*may go beyond*" what the Commission could impose by relying upon Article 7 of Regulation 1/2003.[75] This position is justified on the basis of the powerful

63 Judgment of the Court of Justice of 29 June 2010, *Commission* v *Alrosa Company Ltd*, Case C-441/07 P, ECLI:EU:C:2010:377, [90]-[91].
64 Ibid., [94]. See also Judgment of the Court of Justice of 11 July 2007, *Alrosa Company Ltd* v *Commission*, Case T-170/06, ECLI:EU:T:2007:220, [96].
65 Judgment of the Court of Justice of 29 June 2010, *Commission* v *Alrosa Company Ltd*, Case C-441/07 P, ECLI:EU:C:2010:377, [94].
66 Ibid., [35].
67 Ibid.
68 Ibid., [36].
69 European Commission, *Antitrust Manual of Procedures*, 2012, available at http://ec.europa.eu/competition/antitrust/information_en.html, [46].
70 Judgment of the Court of Justice of 29 June 2010, *Commission* v *Alrosa Company Ltd*, Case C-441/07 P, ECLI:EU:C:2010:377, [48]
71 Ibid., [41].
72 Ibid.
73 Judgment of the Court of Justice of 9 December 2020, Case T-873/16, *Groupe Canal +* v *Commission*, ECLI:EU:T:2018:904, [117].
74 Judgment of the Court of Justice of 29 June 2010, *Commission* v *Alrosa Company Ltd*, Case C-441/07 P, ECLI:EU:C:2010:377, [61].
75 Ibid., [48].

advantages that commitments decisions bring for the undertakings concerned: "*the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine*".[76]

Although Article 9 of Regulation 1/2003 states that a commitments decision may be adopted for a specified period, there is no requirement for a time period to be specified in the decision.[77] In fact, the Commission has the legal power to make commitments binding for "*an indefinite period*".[78] In the case of non-compliance with a commitments decision, the Commission has discretion whether to reopen the procedure against the undertaking concerned; it is not required to do so.[79] Moreover the Commission also has discretion whether to impose fines or periodic payments for failure to comply with commitments made binding by a decision taken pursuant to Article 9.[80]

Moreover, recent case law has also clarified the interaction between the decisions adopted pursuant to Article 9 and national courts' authority.

Jurisprudence acknowledges that commitments do not affect the power of the national courts and the National Competition Authorities to apply the EU antitrust provisions.[81] It follows that commitments decisions "*cannot create a legitimate expectation in respect of the undertakings concerned as to whether their conduct complies with Article 101 TFEU*";[82] it "*can, at most, influence the findings of the national court only in so far as it contains a preliminary assessment which the national court must take into account solely as an indication of the anticompetitive nature*" of the concerned undertaking's conduct.[83]

2.2.2.3 Other jurisdictions

The use of commitments decisions is also foreseen by German competition law.

Indeed, under 32b (1) GWB, where undertakings "*offer to enter into commitments which are capable of dispelling the concerns communicated to them by the competition authority upon preliminary assessment*", the *Bundeskartellamt* may adopt a decision making these commitments legally binding upon the undertakings.[84]

The *Bundeskartellamt* may rescind a commitments decision where: "*1. The factual circumstances have subsequently changed in an aspect that is material for the decision; 2. The undertakings concerned fail to meet their commitments; 3. The decision was based on incomplete, incorrect or misleading information provided by the parties*".[85]

In France, the *Autorité* may "*accept commitments, of a fixed or indefinite duration, proposed by companies or associations of companies and likely to put an end to its competition concerns likely to constitute prohibited practices*".[86]

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76 Ibid.
77 Judgment of the Court of Justice of 11 July 2007, *Alrosa Company Ltd* v *Commission*, Case T-170/06, ECLI:EU:T:2007:220, [91].
78 Ibid.
79 Judgment of the Court of Justice of 6 February 2014, *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) and Asociación de Gestores de Estaciones de Servicio* v *Commission*, Case T-342/11, ECLI:EU:T:2014:60, [48].
80 Ibid., [49].
81 Judgment of the Court of Justice of 23 November 2017, *Gasorba SL and Others* v *Repsol Comercial de Productos Petrolíferos SA*, Case C-547/16, ECLI:EU:C:2017:891, p. 27.
82 See ibid., p. 28.
83 Judgment of the Court of Justice of 9 December 2020, Case T-873/16, *Groupe Canal +* v *Commission*, ECLI:EU:T:2018:904, p. 100.
84 See the GWB, Section 32b(1).
85 See the GWB, Section 32b(2).
86 See the French Commercial Code, Article L464-2(I).

It can fine companies for failing to adhere to a commitments decision.[87] It can change or put an end to the commitments it has accepted in two circumstances: *"(a) If any of the facts on which the commitment decision is based have undergone a material change, or (b) If the commitment decision is based on incomplete, inaccurate or misleading information provided by the parties to the procedure*".[88] The objective of a commitments decision is merely to determine whether the commitments proposed by the parties are capable of addressing adequately the competition concerns articulated by the French Competition Authority and not to determine whether an actual infringement has occurred.[89]

As already mentioned above, the FCA does not have much experience in utilising structural remedies in antitrust, since until 2021 the FCA was not allowed to impose structural remedies in antitrust settings.

In federal US antitrust practice, the "*consent decree*" or "*consent order*" is the counterpart of the EU commitments decision.[90] Both the DoJ and the FTC resolve the majority of their civil non-merger cases through such decrees or orders.[91] The respective agencies follow similar but parallel procedures to resolve their cases in this manner.[92]

To obtain relief without taking a case to trial, the DoJ will file a consent decree (or civil consent judgment) in a US Federal District Court.[93] For the DoJ, adequate relief is relief that will "*(1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred*".[94] Ordinarily, the government is viewed as being entitled "*to any relief that is reasonable and necessary to accomplish these ends*".[95] The Tunney Act governs the operation of consent decrees and allows the courts to make an independent objective assessment of whether the decree would be in the public interest.[96] A court must approve the consent decree if it falls within the "*reaches of the public interest*".[97] The FTC similarly uses its own statutory authority to issue consent orders, thereby resolving cases without going to trial.[98] The content of the order will be negotiated by the FTC staff, with FTC senior management oversight and, where necessary, with input provided by the FTC Commissioners. In the interviews that were held for this Study, both the FTC and the DoJ underlined that the extent to which remedies should strive to restore the counterfactual situation depends on a range of case-specific factors, such as the ease in establishing the counterfactual scenario and the time that has elapsed since the beginning of the conduct.

2.2.3 Interim measures

Regulation 1/2003 makes explicit the fact that the Commission has the legal power to impose interim measures.[99] Specifically, Article 8(1) stipulates that "*in cases of urgency due to the risk of serious and*

87 Ibid.
88 Ibid.
89 *Decision of the Conseil Constitutionnel of 10 February 2023, Sony interactive entertainment France*, Conseil Constitutionnel, N. 2022-1035, pp. 8-9.
90 Directorate For Financial And Enterprise Affairs Competition Committee, *Commitment Decisions in Antitrust Cases - Note by the United States*, DAF/COMP/WD(2016)23, 2016, p. 2.
91 Ibid.
92 Ibid.
93 US Department of Justice Antitrust Division, *Antitrust Division Manual*, 5th Edition, 2015, IV-50.
94 Ibid.
95 Ibid.
96 See the U.S. Code, Title 15 Chapter 16.
97 Judgment of the United States Court of Appeals for the District of Columbia Circuit of 16 June 1995, *United States* v *Microsoft Corp.*, 56 F.3d pp. 1448, 1461-1462.
98 See the Code pf Federal Regulations, Title 16 §§0.0 et seq.
99 See Regulation 1/2003, at recital 11.

irreparable damage to competition, the Commission, acting on its own initiative, may by decision, on the basis of a prima facie finding of infringement, order interim measures".[100] Such interim measures are not of indefinite duration. Indeed, Article 8(2) of the Regulation emphasises that a decision imposing interim measures "*shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate*".[101]

In accordance with Article 8(2) of Regulation 1/2003, interim measures should only apply "*for a specified period of time*".[102] Consequently, interim measures in antitrust proceedings are meant to be a preliminary step towards taking an enforcement decision with more lasting effects. According to Article 8(2) interim measures "*may be renewed in so far as this is necessary and proportionate*".[103]

As with commitments, the Commission may fine an undertaking where that entity has negligently or intentionally contravened an order imposing interim measures.[104] As with decisions adopted under Article 7 and Article 9, the Commission also has to the power to impose a periodic penalty payment (of up to "*5% of the average daily turnover in the preceding business year per day*") upon an undertaking in order to compel that undertaking to comply with a decision adopted under Article 8 of Regulation 1/2003.[105]

100 See Regulation 1/2003, Article 8(1).
101 See Regulation 1/2003, Article 8(2).
102 Ibid.
103 Ibid.
104 See Regulation 1/2003, Article 23(2)(b).
105 Ibid., Article 24(1)(b).

3. The practicalities of EU antitrust remedies

The purpose of Section 3 is to provide an overview of the procedures and practicalities pertaining to the design and implementation of remedies in EU antitrust enforcement, pursuant to Regulation 1/2003.[106] For reference, it can be helpful to note that, based on the dataset that was constructed as part of this Study and is presented in Section 4, a total of 108 antitrust decisions were taken by the Commission in the period between 24 January 2003 and 31 December 2022. By decision type, 57 of them are non-cartel Article 7 decisions and 51 of them are Article 9 decisions. By legal basis, there are 52 Article 101 TFEU decisions, 51 Article 102 TFEU decisions, and five decisions that are based on both Article 101 and Article 102 TFEU.[107] These are the cases that have informed the practicalities of EU antitrust remedies and we will discuss in this section.

Specifically:

- Section 3.1 discusses procedures applicable to prohibition decisions pursuant to Article 7;
- Section 3.2 analyses practicalities of prohibition decisions;
- Section 3.3 discusses procedures applicable to commitments decisions pursuant to Article 9;
- Section 3.4 discusses practicalities of commitments decisions;
- Section 3.5 describes procedures and practicalities applicable to interim measures pursuant to Article 8 of Regulation 1/2003;
- Section 3.6 describes the process of the market testing of proposed commitments;
- Section 3.7 pertains to the role of the monitoring trustee; and
- Sections 3.8 and 3.9 compare procedures and practicalities applicable to antitrust remedies with, respectively, those applicable to remedies in EU merger control and those applicable to antitrust remedies in selected national jurisdictions.

3.1 Procedural framework applicable to prohibition decisions pursuant to Article 7

The Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU ("Commission Best Practices Notice")[108] provides rules about the procedures applicable to prohibition decisions pursuant to Article 7.

Pursuant to Section 81 of the Commission Best Practices Notice, before adopting an Article 7 decision the Commission must give the undertaking(s) concerned the opportunity to be heard, by adopting a Statement of Objections ("**SO**"), which must be notified to the undertaking(s). In accordance with Section 83 of the

106 Grimaldi took the lead in the preparation of this section.
107 The cases are AT.38381 – *ALROSA + DBCAG (part of de Beers group) + City and West East (part of de Beers group)*, AT.39230 – *Rio Tinto Alcan*, AT.39612 – *Perindopril (Servier)*, AT.39745 – *CDS Information market* (ISDA) and AT.39745 – *CDS Information market* (Markit).
108 Official Journal of the European Union, *Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Text with EEA relevance*, OJ C308/6, 2010.

Commission Best Practices Notice, the SO must also indicate the remedies envisaged by the Commission to bring the alleged antitrust infringement to an end. Pursuant to Section 84 of the Commission Best Practices Notice, the SO must also indicate if the Commission intends to impose a fine on the undertaking(s), should its competition objections be upheld.

3.2 Practicalities of prohibition decisions pursuant to Article 7

Our analysis of all decisions taken between 24 January 2004 and until 31 December 2022 indicates that remedies have been imposed in twelve out of 57 Article 7 cases, or about 20%. For the vast majority of Article 7 decisions only a cease-and-desist order was issued. Moreover, and most importantly for this Study, in some prohibition decisions, the Commission has decided to go beyond a simple order and impose behavioural and/or structural remedies.

In the twelve (out of 57) Article 7 decisions, in which the Commission imposed a positive remedy going beyond a cease-and-desist order, nine were behavioural remedies, one was a structural remedy and two were behavioural remedies with structural elements. In the 45 cease-and-desist orders that were issued (without counting Article 7 cases that impose a positive remedy on top of a cease-and-desist order), only seven are basic orders, while the remaining 38 are "like object or effect" orders. In the case AT.39759 – *ARA Foreclosure* of 2016,[109] the Commission made use of a new cooperation procedure in non-cartel cases for the first time.

The cooperation procedure in non-cartel cases under Article 7 is a relatively new practice of the Commission that allows undertakings involved in a competition infringement to benefit from fine reductions as a reward for their cooperation.

The Commission Notice on the conduct of the settlement procedure (2008/C 167/01) has inspired the cooperation procedure, albeit established a less formal process and not limiting the fine reductions to ten per cent. The cooperation procedure has at the same time, some similarity to the leniency procedure (2006/C 298/11).

Since then, although such practice has been applied in different cases until now, the Commission preferred avoiding providing a legislative codification of cooperation procedure, with the aim of maintaining more flexibility and discretion in its application.

In this context, regarding the formulation of prohibition decisions, it has been observed that its structure contains:

- Sections related to the background of the case, the definition of relevant markets, the assessment of dominance (in Article 102 proceedings).
- Sections determining the competition infringement.
- Sections determining the effect on trade between Member States.
- Sections determining the duration of the infringement, the description of any remedies and the calculation of any fines.

109 Commission Decision of 20 September 2016, ARA Foreclosure, Case AT.39759.

- In some circumstances, the Commission omits the inclusion of a cease-and-desist order (for example in case AT.37860 – Morgan Stanley/Visa),110 if at the time of the adoption of the decision the competition infringement has already been terminated.
- Moreover, there can be instances where the Commission may not include a cease-and-desist order (for example in case AT. 38784 – Telefonica SA),111 even if the competition infringement is still ongoing at the time of the proceedings. This can be attributed to the fact that Articles 101 and 102 TFEU are self-executing and cease-and-desist orders are merely declaratory.112
- In most cases, remedies are mentioned both in the descriptive and the operative parts of the decision.
- Nonetheless, there can be exceptions, such as in AT.39839 – Telefonica and AT.39893 – Portugal Telecom,[113] [114] where remedies were only discussed in the descriptive, but not the operative part of the decision. Similarly, in AT.40411 – Google Search (AdSense), [115] AT.39740 – Google Search (Shopping)[116] and AT.40099 – Google Android,[117] the positive remedies imposed by the Commission in the recitals of the decisions were not mentioned in the operative part of the decision, which only mentioned the cease-and-desist order imposed. While in the latter two cases the Commission does not provide positive remedy guidance in the operative part of the decision, it does ask the addressees to propose specific measures to comply with the decision. The same is true for case AT.39813 – Baltic Rail,[118] where however the guidance provided in the descriptive part of the decision is so open as to explicitly leave both structural and behavioural remedies as a possible solution.[119]

Finally, our Study shows that the relationship between the simple order and the remedies imposed by the Commission is in fact a variable one.

In some cases analysed, for example, remedies are adopted with the aim to further specify the behaviour that the authority expects to take in order to comply with the simple order and, ultimately, the Antitrust Provisions. This power aims to eliminate or neutralise any anticompetitive effects, which may continue after the conduct which caused them has ceased.

In other cases, the Commission could adopt preventive remedies which are "*aimed at preventing repetition of the infringement, or the circumvention of the behavioural prohibition"*. In particular, preventing the repetition of the infringement is the purpose of remedies imposed in *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v *Commission*,[120] *AKZO Chemie BV* v *Commission*,[121] and *Irish Sugar plc* v *Commission* cases.[122] In all three cases, the remedies only set up what the undertaking should or should not

110 Commission Decision of 14 April 2011, Morgan Stanley/Visa International and Visa Europe, Case COMP/D1/37860.
111 Commission Decision of 4 July 2007, Telefonica SA, Case AT.38784.
112 Ritter C., *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, 7(9) Journal of European Competition Law & Practice 587, 588, 2016 citing in support Maier-Rigaud F., *Behavioural Versus Structural Remedies in EU Competition Law*, and Lowe P., Marquis M. and Monti G., *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, Oxford, 2016, p. 207.
113 Commission Decision of 4 July 2007, Telefonica SA, Case AT.38784.
114 Commission Decision of 6 September 2012, Portugal Telecom, Case AT.39893.
115 Commission Decision of 20 March 2019, Google Search (AdSense), Case AT.40411.
116 Commission Decision of 27 June 2017, Google Search (Shopping), Case AT.39740.
117 Commission Decision of 18 July 2018, Google Android, Case AT.40099.
118 Commission Decision of 2 October 2017, Baltic Rail, Case AT.39813.
119 See the Decision, at recital 394.
120 Judgment of the Court of Justice of 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v *Commission*, Joined cases 6 and 7-73, ECLI:EU:C:1974:18.
121 Judgment of the Court of Justice of 3 July 1991, *AKZO Chemie BV* v *Commission*, Case C-62/86, ECLI:EU:C:1991:286.
122 Judgment of the Court of Justice of 7 October 1999, Irish Sugar plc v Commission, Case T-228/97, ECLI:EU:T:1999:246.

do in the future, without removing the undertaking's capacity to commit the infringement again. Moreover, in other circumstances, restorative remedies can also be imposed in order to remove the ongoing effects of an action that the undertaking has taken in the past. For example, eliminating the consequences of the infringement is a further aim of the remedies contained in the *AKZO Chemie BV* v *Commission* case.[123]

The Commission could adopt different types of remedies for the purpose of restoring competition in the relevant market.

- In exclusionary cases, when the competitive process was distorted by preventing rivals from competing, the Commission may impose remedies to restore the status quo ante, in other words the competitors' positions as they existed before the infringement. According to Ritter (2016),124 the actual elimination of the consequences of the infringement would generally require the establishment of a counterfactual situation, placing the competitors in the situation that would have existed if the infringement would have never occurred, also to ensure the maximum deterrent effect on undertakings.
- In exploitative cases, when competitive outcomes were directly distorted, the Commission may impose different type of restorative remedies with the aim of restoring competitive outcomes directly.

3.3 Procedural framework applicable to commitments decisions pursuant to Article 9

As discussed in Section 2.2.2, decisions pursuant to Article 9 of the Regulation 1/2003 commitments decisions may be adopted by the Commission *in lieu* of Article 7 prohibition decisions, in circumstances where the Commission deems that the commitments offered by the undertaking(s) concerned adequately address the competition concerns identified in its preliminary assessment.

It should also be noted that pursuant to Section 128 of the Commission Best Practices Notice, a monitoring or divestiture trustee may be appointed to assist the Commission in monitoring the implementation of commitments.

3.4 Practicalities of commitments decisions pursuant to Article 9

From the analysis of all decisions taken between 24 January 2004 and until 31 December 2022, also for commitments decisions, we observe that behavioural remedies are considerably more frequent than structural remedies.

There are 36 behavioural, nine behavioural with structural elements, and six structural remedies out of the 51 Article 9 cases.

Where the Commission intends to adopt a commitments decision under Article 9, it publishes in principle a brief summary of the case and the main content of the commitments at issue.[125] Interested third parties are allowed to submit their observations concerning the commitments in question, in a process that is called the market testing of the proposed commitments.[126] They must do so within a time limit specified by the

123 Judgment of the Court of Justice of 3 July 1991, *AKZO Chemie BV* v *Commission*, Case C-62/86, ECLI:EU:C:1991:286.
124 Ritter C., *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, 7(9) Journal of European Competition Law & Practice 587, 588, 2016.
125 Ibid., Article 27(4).
126 We discuss market testing in more detail in Section 3.6 of the Study.

Commission in its said publication, a time limit which cannot be under one month.[127] In publishing the summary, the Commission must consider "*the legitimate interest of undertakings in the protection of their business secrets*".[128]

With regards to the formulation of commitments decisions, it is important to note that they tend to be shorter than prohibition decisions, because they do not entail the finding of an infringement and concentrate on the commitments. In particular, commitments decisions typically contain:

- Initial sections which describe the proceedings.
- Sections on preliminary assessment, which describe the background of the case, the relevant markets and practices raising preliminary competition concerns.
- In its preliminary assessment, the Commission does not always perform an in-depth analysis of the relevant markets or of the problematic behaviour. This process depends on how early the parties propose commitments during the procedure.129
- Sections which concern proposed commitments, responses received to the market test and the assessment of final commitments.
- The Commission verifies that the principle of proportionality has been respected, in particular that:
- the commitments offered are sufficient to address its competition concerns; and
- the undertaking(s) has not offered less onerous commitments which adequately address the identified competition concern(s).

3.5 Article 8 interim measures

Interim measures may be utilised by the Commission to address competitive concerns on an urgent but temporary basis. As discussed in Section 2.2.3 above the legal test for imposing interim measures according to Article 8 of Regulation 1/2003 is that of a "*risk of serious and irreparable damage to competition*".[130]

Section 17 of the Commission's manual of antitrust proceedings ("Commission Antitrust Manual")[131] provides useful information on the procedure for adopting interim measures.

To adopt interim measures, the Commission must open proceedings pursuant to Article 2 of Commission Regulation 773/2004 relating to the Conduct of Antitrust Proceedings ("Antitrust Proceedings Regulation"). Pursuant to the Commission Antitrust Manual, the Commission must send an SO to the proposed addressee.[132]

Article 27 of Regulation 1/2003 provides that the proposed addressee must be granted an oral hearing, upon prior request, but in view of the urgency requirement, the Antitrust Proceedings Regulation foresees shortened time limits. Moreover, third parties who can demonstrate sufficient interest to be heard should

127 Ibid.
128 Ibid.
129 See for example case AT. 39847 – *E-books*, which does not contain a dedicated section on market definition. As another example see AT.39692 – *IBM Maintenance services*, where the definition of the relevant market(s) is suspended *"without having reached a definitive view"*.
130 See Regulation 1/2003, Article (1).
131 European Commission, Antitrust Manual of Procedures, 2012, available at http://ec.europa.eu/competition/antitrust/information_en.html.
132 Ibid.

be taken into consideration. A Commission decision ordering interim measure(s) can be appealed before the EU Courts pursuant to Section 17 of the Commission Antitrust Manual.[133]

However, even though interim measures in antitrust proceedings are meant to be a preliminary step in the process, they can be crucial in shaping the further process of the investigation, the bargaining position of the authority and the concerned undertakings, and the ultimate outcome. In particular, without interim measures the undertaking under investigation may have an incentive to draw out the investigation and meanwhile continue to benefit from its possibly anticompetitive behaviour, whilst with interim measures such behaviour has already been temporarily prohibited and the undertaking is keener to end a possibly costly investigation that distracts it from pursuing its ordinary business. The change in the status quo that interim measures trigger also has implications for the ease with which the Commission can monitor compliance with the ultimate decision and the implementation of remedies.

3.6 Market testing

Market testing in Article 9 antitrust proceedings refers to the process whereby the Commission seeks feedback from market participants and stakeholders prior to making commitments binding on the undertakings concerned pursuant to Article 27 of Regulation 1/2003. In particular, the Commission may seek feedback from competitors, customers and other stakeholders to gather further information to be utilised in assessing the effectiveness of proposed commitments. The need to market test proposed commitments arises from the fact that they are proposed by the undertaking concerned as opposed to remedies which are designed by the Commission itself. Consequently, the process of market testing may reveal weaknesses and shortcomings, which may lead the Commission to ask the undertaking to improve them or abandon them altogether, thereby possibly reverting to a prohibition decision. In accordance with the Commission Best Practices Notice Section 129, whenever the Commission intends to adopt a decision pursuant to Article 9, it *"must conduct a market test of the commitment before making them binding by decision"*.[134] Pursuant to Article 27 (4) of Regulation 1/2003, "*interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication, which may not be less than one month*".[135]

Pursuant to Section 129 of the Commission Best Practices Notice, the Commission must publish in the Official Journal of the European Union a market test notice containing a concise summary of the case and the main content of the commitments. The Commission also publishes on DG COMP's website the full text of the commitments. To enhance the transparency of the process, the Commission also issues a press release setting out the key issues of the case and the proposed commitments. Moreover, if the case is based on a complaint, the Commission informs at this stage the complainant about the market test and invites them to submit comments. Similarly, third parties are informed and invited to submit comments within a fixed time limit of not less than one month.[136] Pursuant to Section 132 of the Commission Best Practices Notice, following the receipt of the replies to the market test, a State of Play meeting will be organised with the parties where the Commission will inform them - orally or in writing - of the substance of the replies received.

Pursuant to Section 133 of the Commission Best Practices Notice, if the Commission deems that the market test illustrated that the competition concerns identified have not been addressed, parties may submit an

133 Ibid.
134 Official Journal of the European Union, *Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Text with EEA relevance*, OJ C308/6, 2010, §129.
135 See Regulation 1/2003, Article 27(4).
136 Ibid.

amended version of the commitments which will be once more market tested for its adequacy. If undertakings are unwilling to submit the amended commitments, the Commission can revert to an Article 7 procedure. For example, in *Google Shopping* (on appeal Case T-612/17, *Google* v *Commission*) the Commission decided not to accept the commitments offered by Google and reverted to an Article 7 prohibition decision.[137] Whereas Regulation 1/2003 does not provide an equivalent provision for market testing remedies pursuant to Article 7, the addressees of remedies are nonetheless granted an opportunity to be heard following the issuing of an SO which contains a description of any remedies that the Commission intends to impose. Indeed, in accordance with Section 83 of the Commission Best Practices Notice, an SO should be sufficiently detailed in its indication of the envisaged remedies, in order to allow parties to defend themselves, with regards to the necessity and proportionality of the proposed remedies.

3.7 Monitoring trustees

As in other areas of European competition law enforcement such as merger control and State aid, a monitoring trustee may be appointed by the Commission to oversee the implementation of antitrust remedies - both behavioural and structural - and particularly the compliance with the commitments.[138] As we show in Section 4, our statistical analysis of all antitrust decisions taken by the Commission from 23 January 2004 and 31 December 2022 indicates that monitoring trustees have been appointed in 32 out of all 51 Article 9 decisions, or about 60% of cases.

For the purposes of monitoring the compliance with and effective implementation of remedies, the role of the monitoring trustee includes ensuring the timely and effective implementation of the remedies and adherence to commitments made binding on the undertaking that offered them under Article 9. As confirmed by the interviews with enforcement officials, experts and practitioners, this requires dedicated resources and regular interaction and communication with the undertaking giving the commitments and also third parties and beneficiaries, particularly in the case of access remedies.

Monitoring trustees also have a crucial role in mitigating enforcement costs for the Commission. Such costs entail the time and resources dedicated by the Commission to monitor compliance and the resolution of any disputes that may arise in the implementation of remedies. In that respect, the Commission has indicated its preference for utilising monitoring trustees, reserving intervention by the Commission for strategic and complex cases, where close and extensive monitoring is required which would be beneficial also for future learning. An important reason why a monitoring trustee is appointed in numerous Article 9 cases can be attributed to the fact that it is easier for the Commission to appoint a monitoring trustee under Article 9, as opposed to Article 7, since the costs under Article 9 are covered by the undertaking (s) concerned.

As discussed in section 2.2.1 above the Court of First Instance (CFI) in *Microsoft Corp.* v *Commission* limited the scope for appointing a monitoring trustee in Article 7 cases with the consequence that the Commission has to take into account the monitoring costs of any Article 7 remedy (whether they are internal resource costs or the costs of an external monitor or expert) when balancing the options of pursing an Article 7 or Article 9 decision, favouring - all else remaining equal - the lower monitoring cost route of an Article 9 decision.[139]

137 Judgment of the Court of Justice of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc.* v *Commission*, Case T-612/17, ECLI:EU:T:2021:763.

138 In addition, a divestiture trustee may be required should the undertaking fail to sell the divestment business in the first divestiture period.

139 Judgment of the Court of Justice of 17 September 2007, *Microsoft Corp.* v *Commission*, Case T-201/04, ECLI:EU:T:2007:289.

The monitoring trustee provides detailed reports to the Commission regarding the implementation of the remedies and compliance with commitments. The reports provided by the monitoring trustee assist the Commission to determine whether an undertaking is compliant, and the remedies have achieved their intended objective. In the case of non-compliance, the Commission may open proceedings and if non-compliance is confirmed this may lead to substantial fines.[140] A monitoring trustee is particularly useful in situations where the market is not transparent and/or customers are not vocal, such that monitoring cannot be left to market participants. Alternatives to the monitoring of remedies by a monitoring trustee are self-reporting by undertakings, reliance on third parties to bring any non-compliance to the attention of the Commission, or arbitration clauses. In some instances, these mechanisms are combined.

The monitoring trustee will often act as an intermediary between the undertakings and the Commission, facilitating communication, thereby ensuring that both parties understand what is expected of them and resolving any issues that may arise in the implementation of the remedies or commitments. Typically, if a monitoring trustee receives a complaint from a market participant and/or beneficiary, she investigates whether there is an implementation issue and if so, how this can be resolved. A monitoring trustee may also reject a complaint if unfounded but would always report such a complaint to the Commission which may also be directly contacted by a complainant. Monitoring trustees may often be experts in a particular sector or industry. Trustees typically bring business experience and can provide more context and a better understanding to the Commission regarding the implications of what is happening in a business. Trustees also have the possibility to recruit further technical experts to assist them in their reporting obligations. For example, in cases where remedies are particularly complex and involve highly technical features and processes, there is the possibility for additional independent expert(s) to be appointed to facilitate monitoring and ensure effective implementation. Such experts include technical experts with relevant sector or functional experience (e.g., automotive and aerospace engineering, medical technology etc.), or legal experts (e.g. intellectual property licensing), and information technology experts (software and hardware). These experts have proved to be enormously useful in ensuring that commitments are effective. For example, the provision of interoperability information to be useful to third parties needs to be comprehensive, operational and timely. The involvement of a technical expert with deep knowledge of communication and software protocols will avoid potentially lengthy disputes between a beneficiary and the undertaking obliged to provide this information.

With respect to statistical trends concerning the relationship between the type of decision and the appointment of a monitoring trustee several observations can be made (see also Section 4 below). First, a monitoring trustee has never been appointed in a decision involving a pure cease-and-desist order. However, one remedy expert reported a cease-and-desist order with respect to Fair, Reasonable and Non-Discriminatory ("FRAND") licensing with ancillary reporting obligations where the monitoring trustee only reported on the ancillary reporting obligation leaving compliance with the main element of the cease-and-desist order to arbitration. Also, one case manager interviewed for this Study observed that there could be advantages in having a trustee overseeing cease-and-desist orders, because apart from implementing the legal act required by a cease-and-desist order, there are practical aspects of implementation which the Commission should monitor in relation to the undertaking(s) concerned. Second, when the decision entails behavioural remedies the relationship between remedy type and trustee nomination becomes more nuanced. In many of the Article 9 decisions in which behavioural remedies were made binding a monitoring trustee was appointed. Exceptions have been made when a remedy is considered particularly easy to monitor, for example because compliance can be easily and credibly self-reported, or because there are sophisticated and vocal commitments beneficiaries who would notice and complain about failing compliance.

140 Among others, see Judgment of the Court of Justice of 27 June 2012, *Microsoft Corp.* v *Commission*, Case T-167/08, ECLI:EU:T:2012:323.

Third, when the decision entails structural remedies, then it is most likely to be accompanied by a requirement for a monitoring trustee to supervise the divestiture. In particular, nine structural remedies imposed in Article 9 decisions were accompanied by a monitoring trustee. On the other hand, for the only Article 7 case with a structural remedy - namely AT.39759 – *ARA Foreclosure* -[141] no monitoring trustee was appointed during the divestiture period.

3.8 Comparison with EU merger control

The EU Merger Regulation ("**EUMR**") complements the EU antitrust law provisions by establishing an ex ante regime of notification and review of merger projects.[142] Applying to "*concentrations*" with an EU dimension, the EUMR implements "*the principle that a concentration […] which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market*".[143]

More specifically, the Commission can accept commitments that resolve the likely competition concerns raised by a notified concentration, a power that exists both at the "*Phase I*" investigation (Article 6 EUMR) and at the "*Phase II*" investigation (Article 8 EUMR). The Commission may revoke its decision to clear a merger where the relevant commitments have not been observed by the parties concerned.[144] The Commission's Notice on remedies provides guidance on the use of commitments to modify concentrations in the context of EU-level merger review.[145] It provides that "*the Commission only has power to accept commitments that are deemed capable of rendering the concentration compatible with the common market so that they will prevent a significant impediment of effective competition. The proposed commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled*".[146]

Given the extensive use of remedies in EU merger control with the overall framework of European antitrust law, this Section compares the practicalities of designing and implementing remedies which may be imposed or accepted under Regulation 1/2003 in antitrust, with remedies which may be accepted under Regulation 139/2004 (EUMR) in merger control. First, recital 30 of the EUMR emphasises the importance of proportionality and the need for commitments to deal fully with the competition concern in question: *"[s]uch commitments should be proportionate to the competition problem and entirely eliminate it*".[147]

Second, merger remedies share procedural similarities with commitments decisions pursuant to Article 9 of Regulation 1/2003, given that they are also proposed by undertakings. Pursuant to Section 19 of the Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and under the

141 Commission Decision of 20 September 2016, ARA Foreclosure, Case AT.39759.
142 Official Journal of the European Union, *Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation)*, OJ L124/1, 2004.
143 Ibid., recital 26.
144 See Article 6(3) EUMR (for Phase I decisions) and Article 8(6) EUMR (for Phase II decisions).
145 Official Journal of the European Union, *Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004*, OJ C267/01, 2008.
146 Ibid., [9]
147 Official Journal of the European Union, *Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation)*, OJ L124/1, 2004, recital 30.

Commission Notice on Remedies, commitments can be offered by undertakings subject to merger control.[148] Specifically, in accordance with Section 78 of the Commission Notice on Remedies undertakings may submit to the Commission commitments within 20 working days from the date of the receipt of the notification of a proposed concentration. Furthermore, pursuant to Section 88 of the Commission Notice on Remedies, if the Commission investigation proceeds to a Phase II stage, undertakings may submit commitments to the Commission within 65 working days from the day on which proceedings were initiated. Third, merger remedies share procedural similarities with Article 9 decisions, because they are both subject to market testing. Specifically, Sections 80 and 94 of the Commission Notice on Remedies prescribe that commitments proposed in Phase I and Phase II are subject to market testing purporting to determine whether the commitments adequately address the identified competition concerns. Fourth, merger remedies are similar to antitrust remedies and especially Article 9 decisions, given that they typically require the appointment of a monitoring trustee. The role of the monitoring trustee is further described in Sections 117 to 120 of the Commission Notice on Remedies and this is complemented by a Model Text of a Trustee Mandate.[149] According to Section 117 of the Commission Notice on Remedies, undertakings must appoint a monitoring trustee to oversee their compliance with commitments and the divestiture process, given that the Commission cannot be directly involved in overseeing the implementation of commitments on a day-to-day basis. In addition, for divestiture remedies the appointment of a divestiture trustee may be required should the undertaking fail to sell the divestment business in the first divestiture period.[150]

With regard to the differences between merger remedies and antitrust remedies, in merger control there is a clear preference for utilising structural remedies whereas in antitrust there is a stated preference for utilising behavioural remedies.[151] Fundamentally, commitments aim to preserve competitive market structures.[152] Where a proposed concentration would significantly impede effective competition, "*the most effective way to maintain effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties*".[153] Such statutory preference for structural remedies (a divestiture) in merger control reflects the belief that the best solution to a competition problem that is created by a structural change (the merger itself) is a structural remedy. That said, a case-by-case approach is adopted in assessing the suitability of the type of remedy to be adopted.[154]

Proposed structural commitments will only be acceptable if they allow the Commission "*to conclude, with certainty, that it will be possible to implement them*" and that the resulting structural change "*will be sufficiently workable and lasting*" to deal effectively with the competition issue in question.[155] Key to acceptability here is effective implementation as well as the ability of the Commission to monitor the

148 Recital 30 thereof states that *"[w]here the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market"*.

149 European Commission, Trustee Mandate, n.d., available at: https://competition-policy.ec.europa.eu/document/download/7b4b6512-cde6-4735-b8fd-becb1282485f_en?filename=trustee_mandate_en.pdf.

150 Official Journal of the European Union, *Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004*, OJ C267/01, 2008, [19].

151 In particular, §15 of the Commission Notice Remedies indicates that *"commitments which are structural in nature are preferable from the point of view of the Merger Regulation's objective"* given that they do not require medium or long-term monitoring. According to §17 of the Commission Notice on Remedies, divestitures (i.e., structural remedies) are *"the best way to eliminate competition concerns resulting from horizontal overlaps and may also be the best means of resolving problems resulting from vertical or conglomerate concerns"*. On the other hand, behavioural remedies *"may be acceptable only exceptionally in very specific circumstances"* such as per Art. 69 *"in respect of competition concerns arising from conglomerate structures*".

152 Ibid., [15].

153 Ibid., [22].

154 Ibid., [16].

155 Judgment of the Court of Justice of 14 December 2015, *General Electric Company* v *Commission*, Case T-210/01, ECLI:EU:T:2005:456, [555].

divestiture commitments.[156] Divestiture is particularly suited to dealing with competition issues engendered by horizontal overlaps, whilst access and interoperability remedies "*may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects*".[157] By contrast, commitments concerning the future behaviour of the concentration would be acceptable "*only exceptionally in very specific circumstances*".[158] Regarding effectiveness and efficiency, divestiture is viewed as "*the benchmark*" for other types of remedies: "*[t]he Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture*".[159] It is accepted that, due to resource constraints, the implementation of commitments cannot be undertaken by the Commission on a day-to-day basis. The parties must therefore propose the appointment of a monitoring trustee to assess compliance with any commitments.[160] In effect, through such a process, "*the parties guarantee the effectiveness of the commitments submitted by them and allow the Commission to ensure that the modification of the notified concentration, as proposed by the parties, will be carried out with the requisite degree of certainty*".[161]

3.9 Comparison with other jurisdictions

In Germany, competition law is enforced by the *Bundeskartellamt* or the German Competition Authority ("**GCA**"). As discussed in Section 2, in German competition law enforcement behavioural remedies are preferred over structural remedies, which are only considered by the authority if behavioural remedies are not feasible. As also expressed by interviewees from the European Commission, the GCA considers that structural remedies can be very invasive, since they affect ownership rights. In relation to commitments, these are favourably viewed, being considered as instrument which has helped the authority to end several infringements at the early stages of the procedure. In particular, commitments have often prevented the GCA from going through a lengthy procedure which could last several years and could entail the involvement of courts. The GCA follows a step-by-step approach in relation to the design of commitments, whereby if commitments proposed by the undertaking(s) are deemed insufficient by the GCA and parties may return to the negotiation table and renegotiate potential commitments. Nonetheless, in the most complex cases which it handles, the GCA still prefers to utilise simple cease-and-desist orders, with the objective to avoid the risk of non-compliance and/or the risk of undertakings challenging a decision on grounds of lack of proportionality. Regarding the monitoring of antitrust remedies, in German competition law enforcement, this is the task of the division in charge of the case. The GCA may request the submission of relevant reports from time to time and may seek the opinion of market participants. However, it may not always be necessary to monitor antitrust remedies, as in transparent markets, the market can monitor itself.

In France, as discussed in Section 2, the FCA until 2021 was not allowed to impose structural remedies in antitrust settings and therefore has a history of imposing behavioural remedies which can be of two types: (i) hybrid behavioural remedies with structural elements (i.e., behavioural remedies which in a few years will have changed the structure of the market and therefore have an expiry date); and (ii) pure behavioural remedies. The FCA expressed its desire to move away from imposing pure behavioural remedies which entail

156 See Judgment of the Court of Justice of 4 July 2006, *easyJet Airline Co. Ltd* v *Commission*, Case T-177/04, ECLI:EU:T:2006:187, [188].
157 Official Journal of the European Union, Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004, OJ C267/01, 2008, [§17].
158 Ibid., relying upon Judgment of the Court of Justice of 15 February 2005, *Commission* v *Tetra Laval BV*, Case C-12/03 P, ECLI:EU:C:2005:87, [85] and [89].
159 Official Journal of the European Union, Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004, OJ C267/01, 2008, [§61].
160 Ibid., [117].
161 Ibid.

significant monitoring costs and adopt more cease-and-desist orders, which can be immediately implemented and have a structural impact. However, despite the extensive experience of the FCA in designing and implementing behavioural remedies, such remedies are recognised to be complicated to design and negotiate, especially considering the likely asymmetry of information between the authority and the undertaking(s) involved and the fact that they are costly to monitor and may not always be effective. This is why the FCA is attempting to shift the policy towards the adoption of more cease-and-desist orders. As with regards to commitments, the experience of the FCA has not been so positive; (i) because of the cost of monitoring, (ii) because of possible litigation before the Court of Appeal if parties disagree with the commitments accepted by the FCA, (iii) because of the resources which will be consumed if the FCA has to reopen a case because competitors complain that the commitments have not been respected and (iv) because markets can rapidly change, so there may be circumstances in which new behaviours are not caught up by the commitments imposed. The FCA remarked that the market test is utilised by that authority also when negotiating remedies, considering the asymmetry of information between the undertaking concerned and the competition authority. The view of the FCA is that the market test allows the authority to decrease the asymmetry of information in the design of remedies and to balance the negotiation between the undertaking(s) and the competition authority. Concerning the supervision of remedies, a distinction in French antitrust enforcement must be made between short-term and long-term behavioural remedies. Specifically, where short-term behavioural remedies are applicable, compliance is typically monitored by the case team. However, in circumstances where the supervision of long-term behavioural remedies is required, case handlers who know the case are likely have left the unit responsible for the case after some time, leaving the monitoring to case handlers who do not know the case well, thereby compromising the effectiveness of monitoring. Therefore, in the case of long-term behavioural remedies, it is almost systematic that the FCA appoints a monitoring trustee.

In the United States, under the Sherman Act, antitrust is enforced both by the DoJ and the FTC. The DoJ is responsible for criminal antitrust enforcement, whereas the FTC has civil and administrative authority to enforce antitrust laws. Interestingly, in US antitrust enforcement, there is no statutory provision, as in Regulation 1/2003 where structural remedies are subsidiary to behavioural remedies. Therefore, the FTC is free to impose the remedy which deems as the most appropriate to address the anticompetitive concern in question, thereby allowing the adoption of remedies which are sufficiently tailored to address the underlying competition concern(s). With regards to monitoring compliance with antitrust remedies, the FTC has been successful with using independent monitoring trustees. In that respect, the DoJ choses individuals with the time and capacity to dedicate themselves to the monitoring of remedies, since it would be difficult for the DoJ as the regulator to take on this additional role. The DoJ has expressed its preference for utilising trustees over industry regulators, whose concerns are different from maintaining healthy competition.

4. Statistical analysis of all Article 7 and Article 9 remedy decisions

4.1 Construction of the dataset

In this part of the Study we create a novel, detailed and comprehensive dataset of all (non-cartel) antitrust remedy decisions adopted by the European Commission since the entry into force of Regulation 1/2003 on 24 January 2003. To this end, we first identify all relevant decisions.[162][163] On this basis, we compile a dataset that, in addition to a range of other characteristics, includes a novel two-level typology for both the relevant competition concern and the relevant remedy type. To our knowledge, this is the first time that such an exercise has been accomplished in the antitrust space. Section 4.1.1 describes the procedures undertaken to identify pertinent cases for the Study, whilst Section 4.1.2 outlines the key steps taken to construct the dataset encompassing the case information required for the comprehensive descriptive analysis.

4.1.1 Universe of the dataset

To identify the pertinent cases for the Study, we primarily relied on the COMP Case Search website,[164] as complemented by the Lexis PSL Competition database and additional data sources. As a first step, our process entailed the identification of all relevant cases using the COMP Case Search website. We applied a set of filters, which included:

- Policy area (antitrust cases);
- Document date (ranging from 24 January 2003 to 31 December 2022);
- Legal basis (Article 101 TFEU and Article 102 TFEU); and
- Document type ("*Commitments decision*" and "*Prohibition decision*").[165]

Employing these filters, our search yielded an initial list of 102 cases, composed of 47 cases related to a Commitments decision and 55 cases related to a Prohibition decision.

To check the completeness of our initial list, we compared it with the lists of Article 7 and Article 9 decisions accessible through the Lexis PSL Competition database. After filtering out the cartel decisions featured in these lists, we identified three cases that had not been captured by our initial selection filters.[166] Moreover, after reviewing the press release of the case AT.39140 – *DaimlerChrysler - Access to technical information*, we identified three additional cases related to it.[167] Our final list contains 108 pertinent cases, composed of 51 cases related to a commitments decision and 57 cases related to a prohibition decision. As a rule, a unit

162 NERA took the lead in the preparation of this section.
163 The starting population of decisions might therefore also include a few cases which were still based on the predecessor Regulation 17/62 EC. The Study will not cover informal settlements in antitrust cases, formal Article 7 decisions in cartel cases, or cartel settlements.
164 Available at the link: https://competition-cases.ec.europa.eu/search.
165 Prohibition decisions encompass not only decisions taken under Art. 7 of Regulation 1/2003 but also, at the beginning of the sample, some decisions taken under Art. 3 of the predecessor Regulation 17/1962 EC. Regulation 1/2003 became applicable on 1 May 2004.
166 The additional cases are: AT.39140 – *DaimlerChrysler - Access to technical information*, AT.39984 – *OPCOM/Romanian Power Exchange*, and AT.40134 – *AB InBev Beer Trade Restrictions*.
167 The additional cases are: AT.39141 – *Fiat – Access to technical information*, AT.39142 – *Toyota Motor Europe – Access to technical information* and AT.39143 – *Opel – Access to technical information.*

of observation in our dataset is a completed case, as identified by a case number. Nonetheless, we encountered a couple of instances in which the one-to-one relationship between completed case and case number does not hold. The first one is related to AT.4004 – *Mastercard II* where the case number corresponds to two different decisions: an Article 7 and an Article 9 decision. The second one is related to AT.39745 – *CDS – Information market*, where two different decisions were issued to two different addressees. For both cases, we consider separate unit of observations for each decision since some of the indicators used in our descriptive analysis are related to the content of the individual decision, such as the decision type and the different remedies possibly imposed on the different addressees. Lastly, there are the two *Deutsche Bahn* cases (AT.39678 – *Deutsche Bahn I* and AT.39731 – *Deutsche Bahn II*), which have separate case names and numbers but the same decision.[168] Thus, we merge these two cases into a single unit of observation. As a result of this mapping of the dataset universe and this determination of the unit of observation, the final dataset consists of 108 units of observation, which correspond to 108 antitrust cases and 107 case numbers.[169] For each unit of observation, we collected the public version of the main decision, the associated press release, the decision summary, and any other pertinent document, such as the commitments proposed by the addressees.

4.1.2 Fields in the dataset

4.1.2.1 Overview of the fields

Having established the universe of the dataset and its corresponding unit of observation, we populated a comprehensive list of fields, which we use in our descriptive analysis. The information needed for each field was recovered through the textual analysis of the main decision, the summary decision, the press release and the information available on the COMP Case Search website on each case.

The fields we populated relate to: (i) descriptive aspects of a case, such as the addressees of the decision, the decision type, the economic activity that the case concerns, the legal basis for the decision, and the date of decision; (ii) substantive antitrust aspects, such as the competition concerns and the adopted remedies; and (iii) measures of case and remedy importance, such as the length of the decision and the press release, and the total number of recitals (in the preamble of a decision) and articles (in the operative part of the decision) related to remedies. In Table 4.1 we report the list of fields included in the dataset, dividing them according to the source we used to retrieve them.

Table 4.1: Fields included in the dataset and sources

SOURCE	FIELDS INCLUDED IN THE DATASET
COMP Case Search website	▪ Case number ▪ Case name ▪ Economic activity ▪ Date of decision ▪ Link to the case page on COMP Case Search
Main decision	▪ Legal basis (Article 101 or Article 102 TFEU) ▪ Type of decision (Article 7 or Article 9) ▪ Addressees ▪ Length of the decision ✓ Number of pages (excluding annexes)

168 There is also the case AT.39915 – *Deutsche Bahn III*, which was however closed after the complainant withdrew its complaint.
169 Note that the two different decisions of AT.40049 – *Mastercard II* were already counted as two separate cases in our list of 108 pertinent cases.

SOURCE	FIELDS INCLUDED IN THE DATASET
	✓ Total number of recitals ✓ Total number of articles ✓ Number of annexes ▪ Earliest start and latest end date of (possible) infringement ▪ Fine imposed (in Article 7 cases) ▪ Competition concerns ▪ Main remedies ▪ Modalities and flanking measures ▪ Remedy references in the decision ✓ Number of recitals on remedies ✓ Number of articles on remedies
Summary decision	▪ Document number as notified ▪ Reference in the Official Journal
Press Release	▪ Total number of paragraphs ▪ Number of paragraphs related to remedies

Additionally, we included a field that contains information on whether a case was ever under judicial review. This field was completed by reviewing the judicial history of each case by the Court of Justice of the European Union.[170] We distinguished between cases that were under judicial review at the time of the of analysis[171] and cases whose judicial review had by then already been completed. Moreover, if the judicial review had been completed, we distinguished between (entirely or broadly) annulled and (entirely or broadly) upheld decisions.

4.1.2.2 Typology of competition concerns

One of the two main pieces of information that we extracted from the decision relates to the competition concerns that had been identified in the case. As pointed out in Section 3.1, for Article 7 cases, this information was taken from the section where the infringement is evaluated, while for Article 9 cases, this information was taken from a subsection dedicated to the "*Practices raising concerns*" in the "*Preliminary assessment*" section.

In most instances, we found that an antitrust case relates to a single competition concern. However, we also found some cases for which the Commission identified multiple (preliminary) competition concerns.

A well-known case raising multiple competition concerns is AT.37792 – *Microsoft I*, where in addition to the concerns raised by the tying of Windows Media Player to Windows operating system, the decision addresses also the issue of restriction of interoperability between PCs using a Windows operating system and non-Microsoft work group servers. In the end, for 16 cases we found that the Commission expressed more than one competition concern.

170 The Court of Justice of the European Union maintains a database collecting information on cases closed or pending before different courts. Available at: https://curia.europa.eu/juris/recherche.jsf?language=en.

171 As of 31 October 2023.

We categorised each of the competition concerns we identified based on a typology that we developed, building on existing typologies.[172] We built both a first-level and a second-level typology. For the former, we considered five categories encompassing agreements, abuses, and internal-market issues. Then, we assigned a second-level category that characterises in more detail the behaviour of concern, such as tying, predatory pricing and others.

Table 4.2: Typology of competition concerns

FIRST-LEVEL TYPOLOGY	SECOND-LEVEL TYPOLOGY
Concerns about horizontal agreements	▪ Airline alliances ▪ Horizontally coordinated restriction of access to technical information ▪ Horizontally coordinated restriction of access to technology/IP ▪ Joint selling of media rights ▪ Multilateral exchange fees ▪ Non-compete clauses ▪ Pay for delay ▪ Restrictions on association members' behaviour ▪ Other
Concerns about vertical agreements	▪ Resale price maintenance ▪ Vertically coordinated restriction of access to technical information ▪ Other
Single-firm exclusionary concerns	▪ Conditional rebates ▪ Exclusive dealing ▪ Margin squeeze ▪ Predatory pricing ▪ Refusal to supply ▪ Tying ▪ Other
Single-firm exploitative concerns	▪ Excessive prices ▪ Tying ▪ Other
Concerns about internal market	▪ Geo-blocking ▪ Other, such as restrictions on passive sales

4.1.2.3 Typology of remedies

We also developed a novel first- and a second-level typology for remedies and applied it to the main and any additional remedies related to the main competition concern, as well as to any additional remedies related to any other competition concerns expressed in the decision. This differentiation is particularly relevant for Article 9 decisions, where the remedies tend to be more complex and where the preliminary competition concerns tend to be articulated in less detail. Both the typology and the assignment of each remedy to the

172 See for instance Ibáñez Colomo, P., *The Shaping of EU Competition Law*, Cambridge University Press, Cambridge, 2018; Whish, R., and Bailey, D., *Competition Law (9th Edition)*, Oxford University Press, Oxford, 2021.

relevant type builds on a range of sources, including our literature review,[173] our expert interviews and of course our own examination of the individual decisions. While our typology is centred around the 108 EU antitrust cases that we have collected in our dataset, it also draws on neighbouring experiences, and in particular EU Merger Control and international antitrust enforcement. In a first level of analysis, we classified remedies according to four categories:

- Pure cease-and-desist orders (for Article 7 cases only);
- Behavioural remedies;
- Behavioural remedies with structural elements; and
- Structural remedies.

We then assigned a second-level typology that further articulates the obligations to which the concerned undertakings are subject.

Regarding cease-and-desist orders, we include two second-level types, distinguishing between basic orders and orders – which we call "like-object-or-effect" orders – that also prohibit similar behaviour.[174]

For behavioural remedies, which prescribe the future conduct that an undertaking will need to adopt, usually through specific obligations, we provide a detailed second-level classification, having found a number of types to which behavioural remedies can belong.

Among structural remedies, we have identified only two second-level typologies: (i) divestiture of businesses or assets; and (ii) removal of links with competitors. The first category encompasses the divestiture of businesses or various types of assets, while the second is a remedy that has been imposed under EU Merger Control.[175] This notion of structural remedies is in line with the literature on remedies which emphasises the clean break that a structural remedy such as a divestiture of a whole business represents, with an immediate and lasting impact on market structure that is permanently beyond the manipulatory reach of the concerned firm.[176] It is also in line with the property rights perspective, which stresses transfer of control and ownership of a business or assets to a new owner whose competitive position vis-à-vis the concerned firm transferring the assets will be strengthened and enhanced.[177]

This then leaves us with a fourth category of remedies which do not neatly fit into any of the first-level typology described so far. These are behavioural remedies in the form of specific obligations on the concerned firm that are designed to have a lasting effect on (actual or potential) rivals' incentive and ability to compete in the market and that are beyond the ongoing manipulatory reach of the concerned firm. Such obligations may take the form of a transfer of rights to another market participant or grant a rival access to a critical platform or infrastructure (e.g. rights to airport landing or take-off slots or network capacity shares)

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173 See Motta, M., Polo, M. and Vasconcelos, H., *Merger Remedies in the European Union: An Overview,* Chapter 7, p. 106-128, in Lévêque, P., and Shelanski, P., *Merger Remedies in American and European Competition Law*, Edward Elgar Publishing, 2003; Davies, S, and Lyons, B., *Mergers and Merger Remedies in the EU: Assessing the consequences for competition*, Edward Elgar Publishing, 2007; Maier-Rigaud, F. P., *Behavioural versus Structural Remedies in EU Competition Law*, Chapter 7, p. 207-224, in Lowe, P., et al., *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, 2016; and C. Ritter, "*How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*", 7(9) Journal of European Competition Law & Practice 587, 589, 2016.

174 Basic orders require an undertaking to cease the infringement and not to commit it again, whereas the "like object or effect" orders, going beyond a basic order, also prohibit acts or conducts having the same or similar object or effect.

175 See: (i) European Commission, Directorate-General for Competition, *Merger Remedies Study*, 2005. (ii) European Commission, *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004,* 2008.

176 Davies, S, and Lyons, B., *Mergers and Merger Remedies in the EU: Assessing the consequences for competition*, Edward Elgar Publishing, 2007

177 Motta (2003)

which are short of the transfer of property rights to a business or asset but do create clearly identifiable and enforceable rights for a remedy taker, whose take-up and usage cannot be interfered with by the concerned firm. Other obligations which contain structural elements include operational and accounting separation and explicit structural market design measures. With this category we stress the following features of a behavioural remedy, namely the aim to get closer to the root of the competition problem and to affect the competitive landscape on a lasting basis, as well as the strictly limited basis for the concerned firm to interfere with the process.

Table 4.3 presents the first- and second-level typologies that we developed, applied to the individual cases, and included in the dataset.

Table 4.3: Classification of remedies

FIRST-LEVEL TYPOLOGY	SECOND-LEVEL TYPOLOGY
Structural remedies	▪ Divestiture of business or assets ▪ Removal of links with competitors[178]
Behavioural remedies with structural elements	▪ Directly enforceable access to infrastructure/technology/IP (e.g. transfer of airport slots, granting of exclusive rights to network capacity or IP to defined beneficiaries) ▪ Sharing and developing interoperability protocols through independent third parties [178] ▪ Market redesign to prevent territorial discrimination ▪ Operational separation
Behavioural remedies	▪ Obligation to provide access to infrastructure/technology/IP ▪ Obligation to provide access to technical information ▪ Obligation to provide interoperability information ▪ Obligation to refrain from territorial discrimination ▪ Obligation to respect certain price caps/conditions ▪ Obligation to untie/unbundle products ▪ Obligation to terminate or change existing contracts/exclusivity clauses ▪ Obligation to terminate or change certain clauses of a horizontal/vertical agreement ▪ Obligation to engage/not to engage in certain behaviour ▪ Monetary equitable remedy (disgorgement/restitution)[178]
Cease-and-desist orders	▪ Basic order ▪ Like-object-or-effect order

It is important to note that the second-level typology shown above covers not only the types of remedies we identified within our universe of EU antitrust cases in the last twenty years but also certain types of remedies that have been adopted in different contexts and jurisdictions, such as EU Merger Control or US antitrust enforcement. As an example of the type of remedies included in this typology, we have the behavioural remedy "*monetary equitable remedy (disgorgement/restitution)",* which has been imposed by the FTC in the US.

Finally, we collected information about the modalities and flanking measures with which the main remedy may have been imposed in a specific case. In particular, we identified the modalities and measures listed in Table 4.4.

178 These are remedy types that are not found in our EU antitrust dataset but have been adopted in different contexts, in particular merger control and other antitrust jurisdictions.

Table 4.4: Modalities and flanking measures

▪ Deadline for implementing a remedy
▪ Duration of the remedy
▪ FRAND conditions
▪ Hold-separate and ring-fencing
▪ Information obligations
▪ Monitoring/Divestiture trustees
▪ **Non-compete and non-solicitation clauses**
▪ Periodic penalty payment for non-compliance
▪ Pricing and related conditions
▪ Reporting obligations
▪ Review clauses

Even though these measures are usually coupled with positive remedies, we note that for case AT.38233 – *Wanadoo*, reporting obligations were imposed as a flanking measure for the implementation of a pure cease-and-desist order.

4.2 Descriptive analysis

In this section we descriptively analyse the dataset of cases. In Figure 4.1, we provide an overview of the dataset to illustrate some high-level features of the 108 cases that we have identified. In Section 4.2.2, we focus on remedies and analyse how they relate to the other characteristics captured by our dataset, such as the decision type and competition concern.

4.2.1 Analysis of cases

A broad distinction that can be made in our universe of cases is between Article 7 (prohibition) and Article 9 (commitments) cases. As figure 4.1 shows the decision type is quite evenly split, as we identified 51 Article 9 and 57 Article 7 decisions in total.

Figure 4.1: Decision type

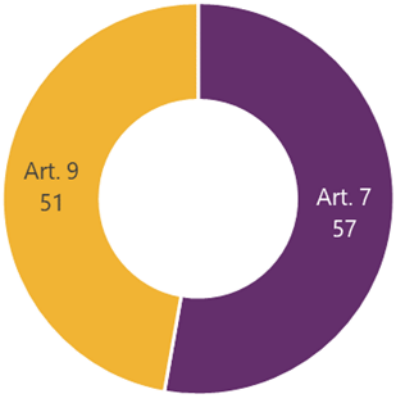


Figure 4.2 adds another dimension to the previous figure and describes how the adoption of different decision types evolved over time. We divide time into five intervals according to Commissioners' tenure and make the following three observations.

First, there were no commitments decisions during Mario Monti's term as Commissioner, given that Regulation 1/2003, introducing the commitments decision procedure as a new tool for competition law enforcement, only entered into force towards the end of Mr. Monti's tenure.[179] Second, the number of commitments decisions peaked during Neelie Kroes's and Joaquín Almunia's terms and that it has declined since then. Third, Margrethe Vestager's first term saw the highest number of prohibition decisions.

Figure 4.2: Evolution of decision type

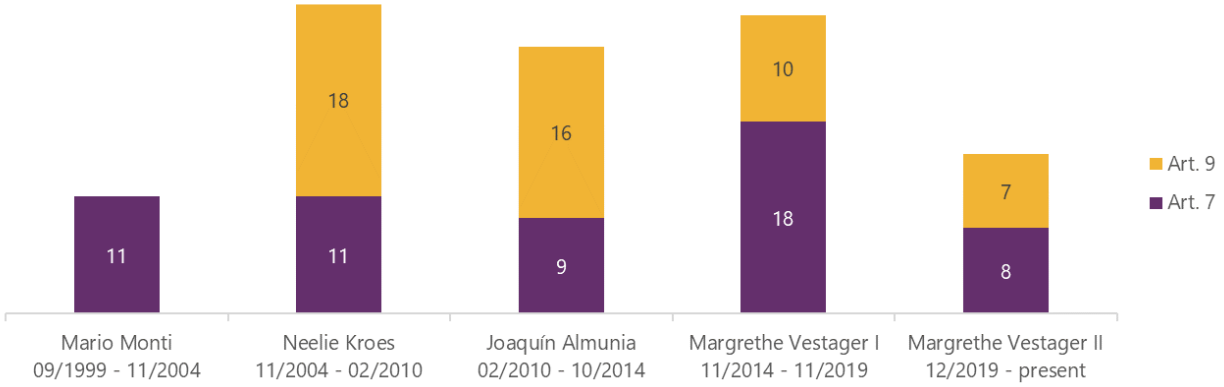
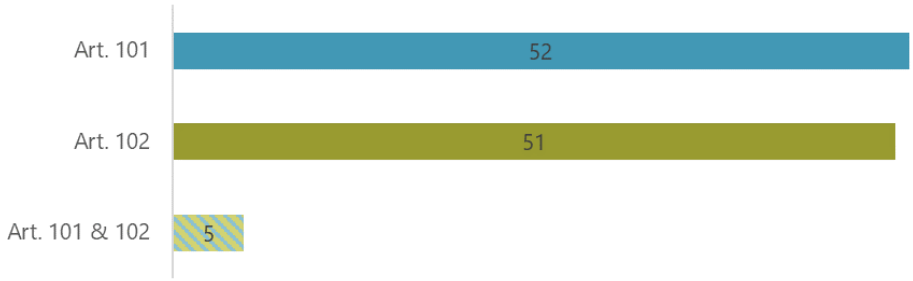


Figure 4.3 shows the legal basis for the cases. As shown, the cases are evenly split between Article 101 and Article 102 TFEU as a legal basis, with five cases based on both articles.[180]

179 During Monti's office, proceedings towards an Art. 9 decisions were initiated (e.g. AT.37214 – *DFB*), but final decisions were only adopted when he was no longer in office.

180 The five Art. 101 & 102 cases are AT.38381 – *ALROSA + DBCAG (part of de Beers group) + City and West East (part of de Beers group)*, AT.39230 – *Rio Tinto Alcan*, AT.39612 – *Perindopril (Servier)*, AT.39745 – *CDS – Information market*, and AT.39745 – *CDS – Information market*.

Figure 4.3: Legal basis



Intersecting decision type with legal basis in *Figure* 4.4, we see that Article 101 cases were slightly more likely to result in Article 7 decisions (32 cases, i.e., 62%), compared to Article 102 cases (24 cases, i.e., 47%).

Figure 4.4: Decision type by legal basis (TFEU Article)

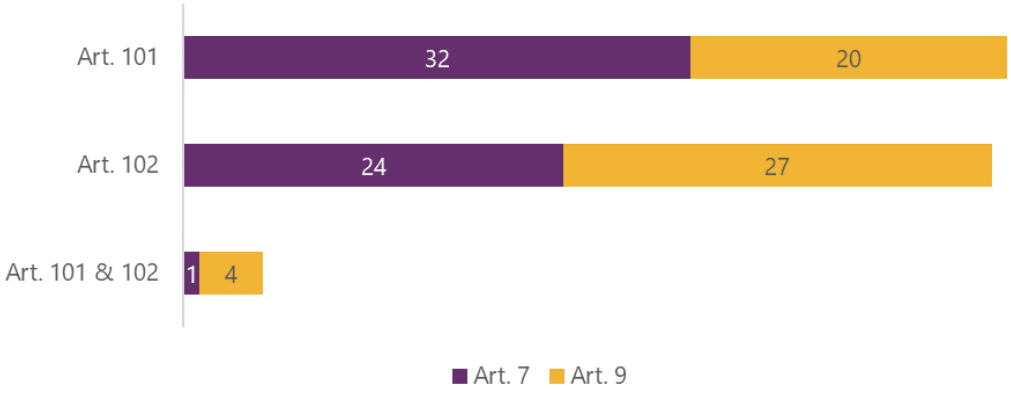
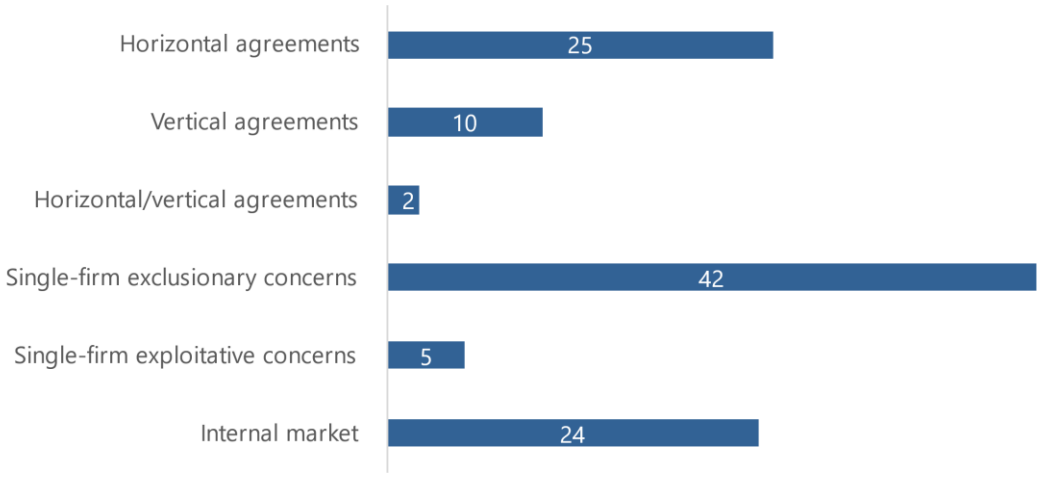


Figure 4.5 illustrates the distribution of first-level main competition concerns. In around four out of ten cases under consideration the main competition concern is about single-firm exclusionary behaviour. Some of the second-level competition concerns that fall into this first-level category include exclusive dealing, margin squeeze, and tying. The second and third most common first-level concerns are related to horizontal agreements and the internal market, respectively. The category of horizontal agreements includes second-level concerns such as non-compete clauses and pay-for-delay, whereas the latter includes geo-blocking and more traditional practices. A relatively low share of cases in our universe are related to vertical agreements and exploitative concerns, which include second-level categories such as resale price maintenance and excessive prices, respectively.

Figure 4.5: Competition concerns



We now turn to investigating the different economic activities interested by the decisions in our dataset. The economic activities were categorised according to NACE (rev.2) level 1 codes.[181] The data on economic activity are taken from the COMP Case Search website. For twelve cases, COMP Case Search reports multiple economic activities corresponding to different level-1 economic activities. To select the relevant level-1 economic activity, we analysed competition concerns, remedies and relevant markets on a case-by-case basis. [182] The most common economic activities in our dataset are *"information and communication"*, *"manufacturing"*, and *"electricity, gas, steam and air conditioning supply"*, where manufacturing comprises a broad range of different industries.[183] The other two most common economic activities, *"information and communication"* and *"electricity, gas, steam and air conditioning supply"* may tend to be more concentrated and thus attract higher antitrust scrutiny.

Regarding the least represented economic activities, one can see that there are seven economic activities with a single case each. Moreover, it should be noted that the economic activities in Figure 4.6 are not an exhaustive list of NACE level-1 economic activities. There are the economic activities that have not witnessed EU (non-cartel) antitrust enforcement over the last twenty years and are thus not represented in our dataset of 108 cases. These activities are "*agriculture, forestry and fishing*", "*construction*", "*accommodation and food service activities*", "*real estate activities*", "*education*", "*activities of households as employers; undifferentiated goods and services producing activities of households for own use*", and "*activities of extraterritorial organisations and bodies*".

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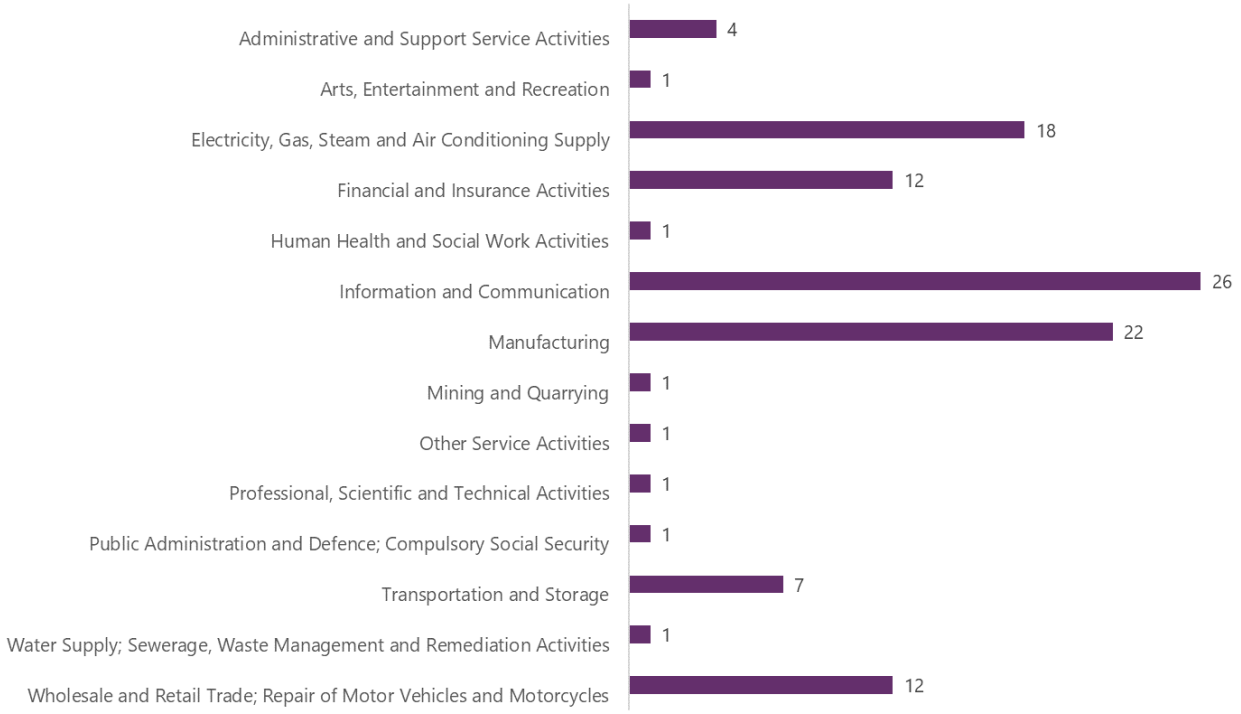
181 NACE stands for "*Nomenclature statistique des Activités économiques dans la Communauté Européenne*", in English "*Statistical Classification of Economic Activities in the European Community*". Level 1 refers to the broadest classification available within NACE.

182 The list of cases with economic activities belonging to different level 1 NACE codes (economic sector chosen for classification in parenthesis): AT.39140 – *DaimlerChrysler - Access to technical information* (Maintenance and repair of motor vehicles), AT.39141 – *Fiat – Access to technical information* (Maintenance and repair of motor vehicles), AT.39142 – *Toyota Motor Europe – Access to technical information* (Maintenance and repair of motor vehicles), AT.39143 – *Opel – Access to technical information* (Maintenance and repair of motor vehicles), AT.39226 – *Lundbeck* (Manufacture of basic pharmaceutical products), AT.39685 – *Fentanyl* (Manufacture of basic pharmaceutical products), AT.39731 – *Deutsche Bahn II* (Distribution of electricity), AT.40432 – *Character merchandise* (Leasing of intellectual property and similar products, except copyrighted works), AT.40433 – *Film merchandise* (Leasing of intellectual property and similar products, except copyrighted works), AT.40436 – *Ancillary Sports Merchandise* (Leasing of intellectual property and similar products, except copyrighted works), AT.40462 – *Amazon Marketplace* (Data processing, hosting and related activities; web portals), AT.40528 – *Melia (Holiday Pricing*) (Tour operator activities), AT.40703 – *Amazon – Buy Box* (Data processing, hosting and related activities; web portals).

183 https://ec.europa.eu/eurostat/statistics-xplained/index.php?title=Businesses_in_the_manufacturing_sector. For example, many cases related to pharmaceuticals, such as AT.39226 – *Lundbeck*, AT.39685 – *Fentanyl*, and AT.37507 – *Generics/Astra Zeneca* are captured under this category.

Figure 4.6: Economic activities



In preparation for the case selection, we also collected information as to whether the decision had undergone or was undergoing judicial review.[184]

In prohibition decisions an infringement is found and – if present – remedies are imposed by the Commission, whereas in commitments decisions no infringement is found and remedies are proposed by the concerned undertakings. On this basis, we would expect Article 7 decisions to be appealed more often than Article 9 decisions. This expectation is indeed confirmed by our universe of cases. Within prohibition decisions, the majority of cases have been or were (at the time of writing) subject to judicial review. For commitments decisions instead, only four cases ever went through judicial review. [185] In these cases, the applicants claimed, for example, the excessive nature of commitments that were made binding on them (AT.38381 – *ALROSA + DBCAG (part of de Beers group) + City and West East (part of de Beers group)*) or the violation of the principle of proportionality (AT.40023 – *Cross-border access to pay-TV*).

184 The status in Figures 4.7 and 4.8 are as of 31 October 2023.

185 These cases are AT.38381 – *ALROSA + DBCAG (part of de Beers group) + City and West East (part of de Beers group)*; AT.39654 – *Reuters Instrument Codes*; AT.39816 – *Upstream gas supplies in Central and Eastern Europe*; AT.40023 – *Cross-border access to pay-TV.*

Figure 4.7: Judicial review

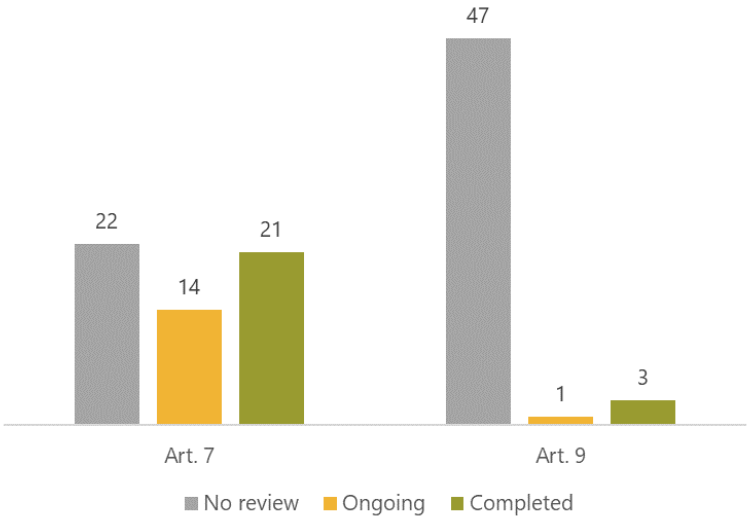
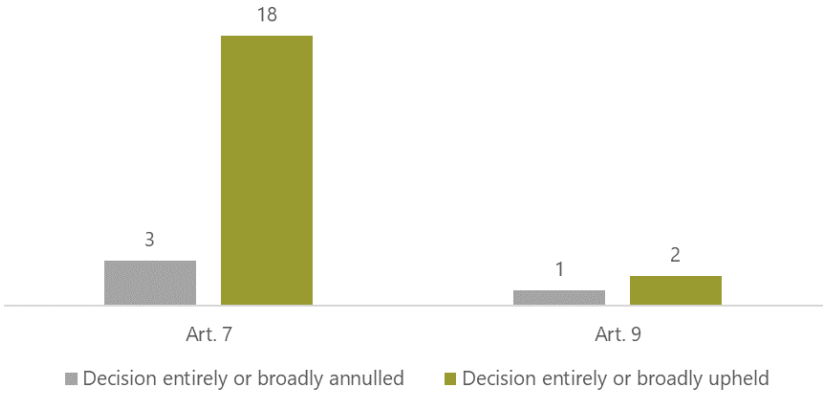


Figure 4.8: Outcome of judicial review



Focusing on the cases for which the judicial review was completed at the time of writing, in the majority of cases the decision was entirely or broadly upheld. The only three prohibition decisions that were entirely or broadly annulled are for cases AT.38698 – *CISAC Agreement*, AT.40220 – *Qualcomm (exclusivity payments)* and AT.39849 – *BEH Gas.* For Article 9 decisions, this only happened *in* AT.40023 – *Cross-border access to pay-TV*.

4.2.2 Analysis of remedies

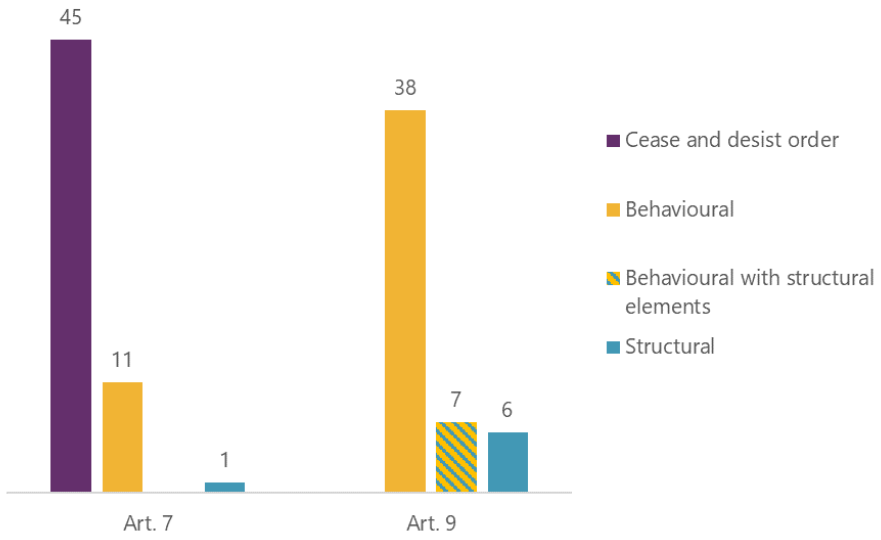
In this section, we set the focus on remedies and identify relationships between remedies and other case characteristics. Unless otherwise stated, our unit of observation continues to be the case and, in each case, we concentrate on the main remedy imposed in that case.

Figure 4.9, we plot the frequency of cease-and-desist orders, behavioural remedies, behavioural remedies with structural elements, and structural remedies across Article 7 and Article 9 decisions. For the vast majority of Article 7 decisions only a cease-and-desist order was issued. There are only twelve (out of 57) Article 7 decisions in which the Commission imposed a positive remedy going beyond a cease-and-desist

order, with eleven of them being behavioural remedies and one being a structural remedy.[186] We incidentally recall that in order to impose a structural remedy, Article 7 requires that no equally effective behavioural remedies are available or that they would be more burdensome for the concerned undertaking than the structural one. This is not the case for Article 9 decisions, which may in part – together with a milder application of the proportionality principle – explain the larger presence of structural remedies in Article 9 decisions. For commitments decisions, we observe that nonetheless behavioural remedies are considerably more frequent than structural remedies. There are 38 behavioural and only six structural remedies out of the 51 total Article 9 cases.

While in prohibition decisions there are no cases where behavioural remedies with structural elements are employed, in commitments decisions we observe seven such cases. These seven cases are the three airline alliance cases featuring slot remedies, three gas/electricity network cases and case AT.39678/AT.39731 – *Deutsche Bahn I/II*.[187]

Figure 4.9: Remedy type and decision type



In Figure 4.10 and Figure 4.11, we break down the type of remedies imposed in, respectively, Article 7 and 9 decisions over the terms of the different Competition Commissioners since the entry into force of Regulation 1/2003. Looking at Figure 4.10, we notice a peak number of Article 7 decisions during Mrs Vestager's first term in office and a relatively stable proportion of simple cease-and-desist orders and positive remedies over the different Commissioners' terms.

186 The structural remedy was imposed in case AT.39759 – *ARA foreclosure*. The competition concern was ARA's exclusionary conduct (refusal to provide access), preventing its competitors from accessing essential infrastructure thereby hindering their entry or expansion in the market. The associated remedy was divestiture of assets. Contrary to the general practice of Art. 7 cases, ARA offered the remedy to the Commission, which granted ARA a fine reduction for its proposal.

187 The airline cases are AT.39964 – *AF-KL/DL/AZ*, AT.39596 – *BA/AA/IB*, and AT.39595 – *Continental/United/Lufthansa/Air Canada*. The gas/electricity network cases are AT.39317 – *E.On gas foreclosure*, AT.39316 – *GDF foreclosure* and AT.39351 – *Swedish Interconnectors*.

Figure 4.10: Evolution of remedy type in Article 7 decisions

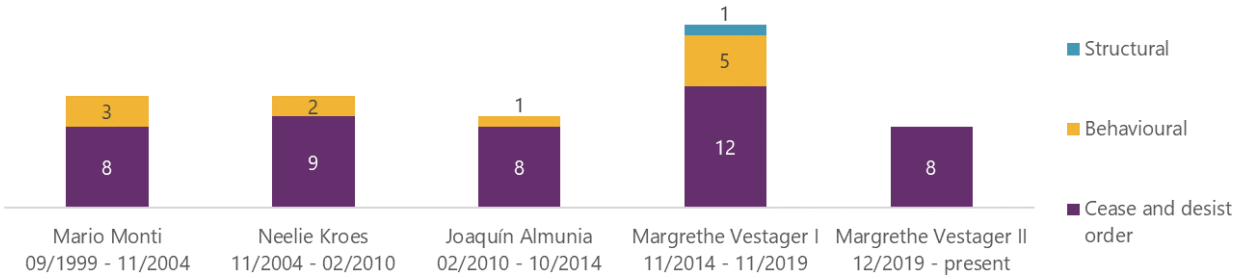
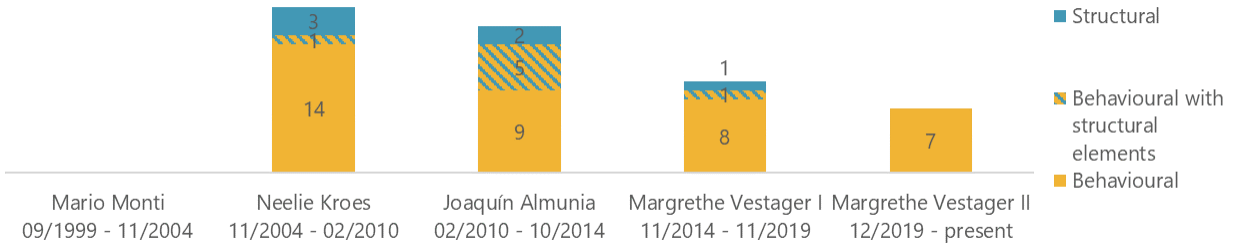


Figure 4.11: Evolution of remedy type in Article 9 decisions

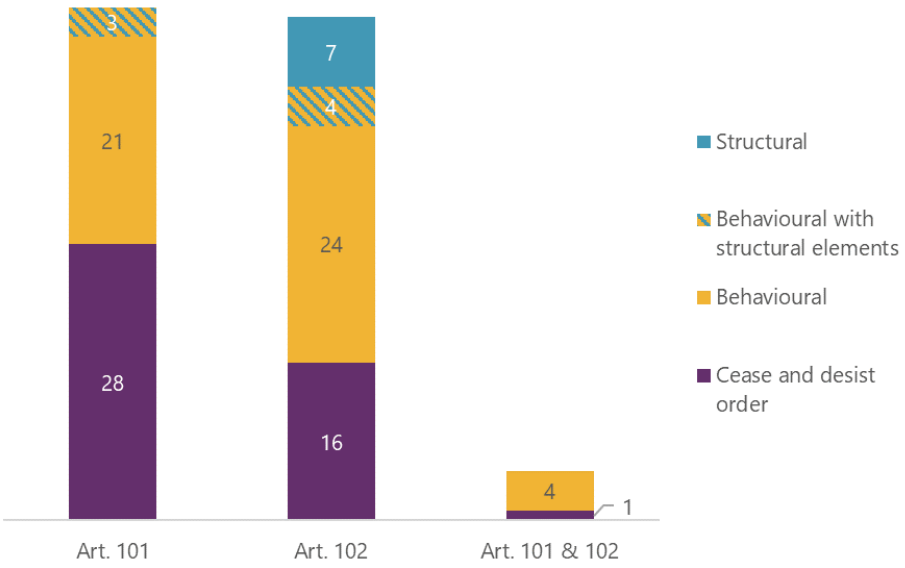


Turning to Article 9 decisions, Figure 4.11 shows an overall decline in the number of Article 9 decisions. It also reveals a decline in the share of structural remedies, accounted primarily by the large number of cases in energy markets that were witnessed in the earlier half of the observation period and resulted in structural remedies.

Next, we examine the relationship between remedies and the legal basis. Focusing first on the overall distribution of legal basis, in Figure 4.12 we observe an almost perfect split between Article 101 and Article 102 cases, with 52 pure Article 101 cases and 51 pure Article 102 cases present in our dataset. For five cases the proceedings are related to practices (potentially) in violation of both articles. Moving to the combined distribution of legal basis and remedy type, Figure 4.12 shows that cease-and-desist orders are the most frequent remedy type in Article 101 cases, while in Article 102 cases this position is occupied by behavioural remedies.

We also observe that all structural remedies, and the majority of behavioural remedies with structural elements, were imposed in Article 102 cases. This is of course in line with expectations, according to which no structural remedy may be applicable or required to resolve a competition problem related to an inter-firm agreement, whereas a structural remedy or a behavioural remedy with structural elements may be required to resolve a competition problem related to the abusive behaviour of a single dominant firm.

Figure 4.12: Remedy type and legal basis



After this general overview, we move to a more detailed analysis of second-level remedies by decision type.

Starting from Article 7, Figure 4.13 reports the distribution of the twelve remedies imposed in Article 7 decisions by the second-level remedy type. A wide range of, in particular, behavioural remedy types seem to exist. This is a pattern confirmed by the fact that the most prevalent second-level remedy type is the residual type of an "obligation to engage/not to engage in certain behaviour". This category incorporates different behavioural obligations that cannot be easily classified into one of our main categories of behavioural remedies. The three remedies falling in this category are indeed of a very disparate nature. In particular, the remedy in AT.37980 – *Souris Bleue/TOPPS + Nintendo* concerns a compliance program on parallel trade, the one in AT.39740 – *Google Search (Shopping)* concerns position and display of own and rival shopping services, and the one in AT.40134 – *AB InBev Beer Trade Restrictions* concerns languages on product labels.

Similarly, Figure 4.14 shows the distribution of cease-and-desist orders by second-level type. In the 45 cease-and-desist orders that were issued (without counting all Article 7 cases that impose a positive remedy in addition to the cease-and-desist order), only seven are basic orders, while the remaining 38 are "like object or effect" orders.

Figure 4.13: Second-level classification of Article 7 remedies

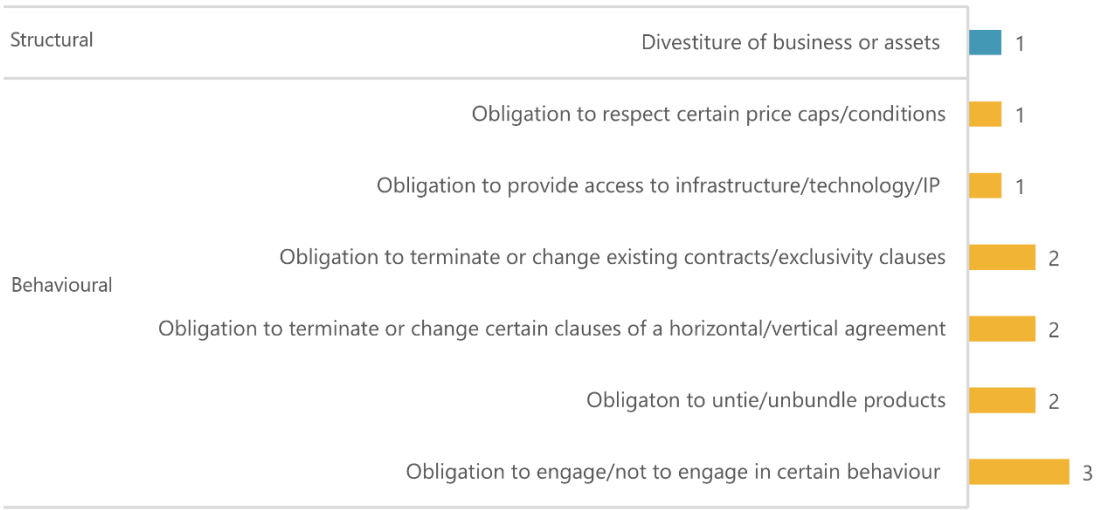


Figure 4.14: Second-level classification of Article 7 cease-and-desist orders

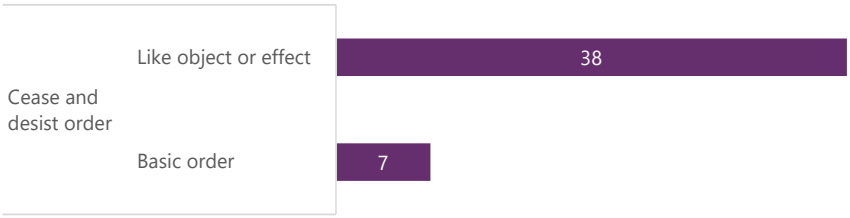
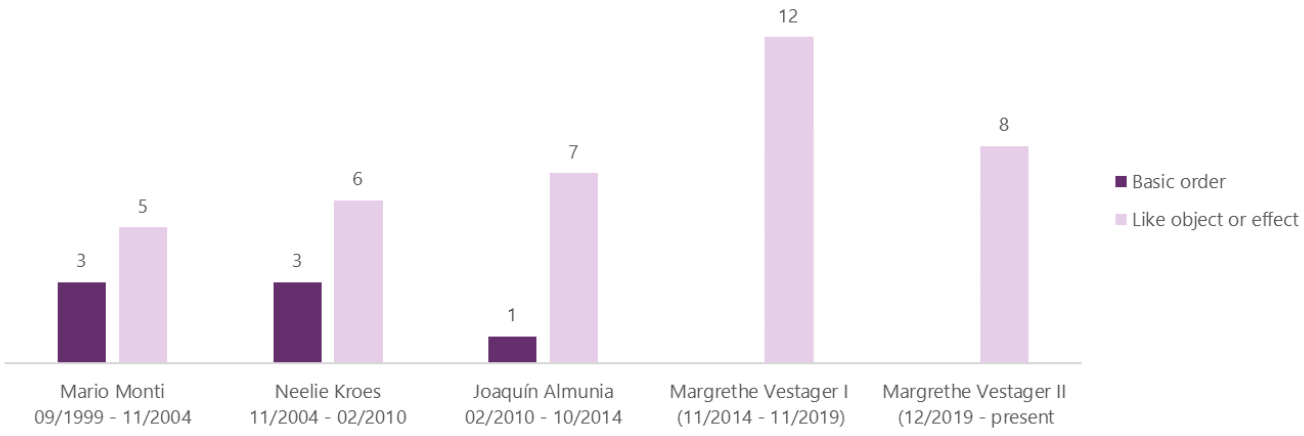


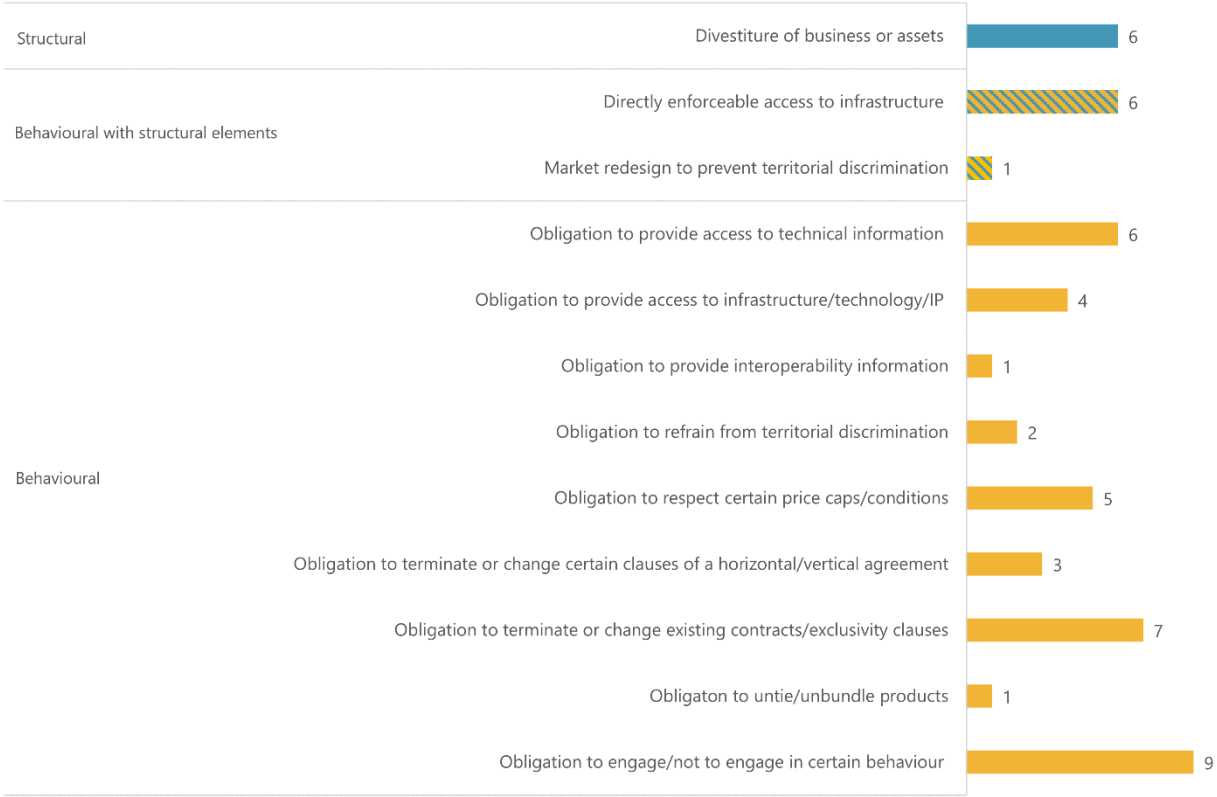
Figure 4.15 shows the evolution of the second-level typology of cease-and-desist orders. As the figure illustrates, the proportion of basic orders among all cease-and-desist orders has diminished over time. There were no basic orders issued since Margrethe Vestager's first term as the Commissioner. The last basic order that we observe in our dataset dates back to 2013 and relates to case AT.39839 – *Telefónica and Portugal Telecom*, which was undergoing judicial review at the time of writing.

Figure 4.15: Evolution of second-level classification of simple cease-and-desist orders



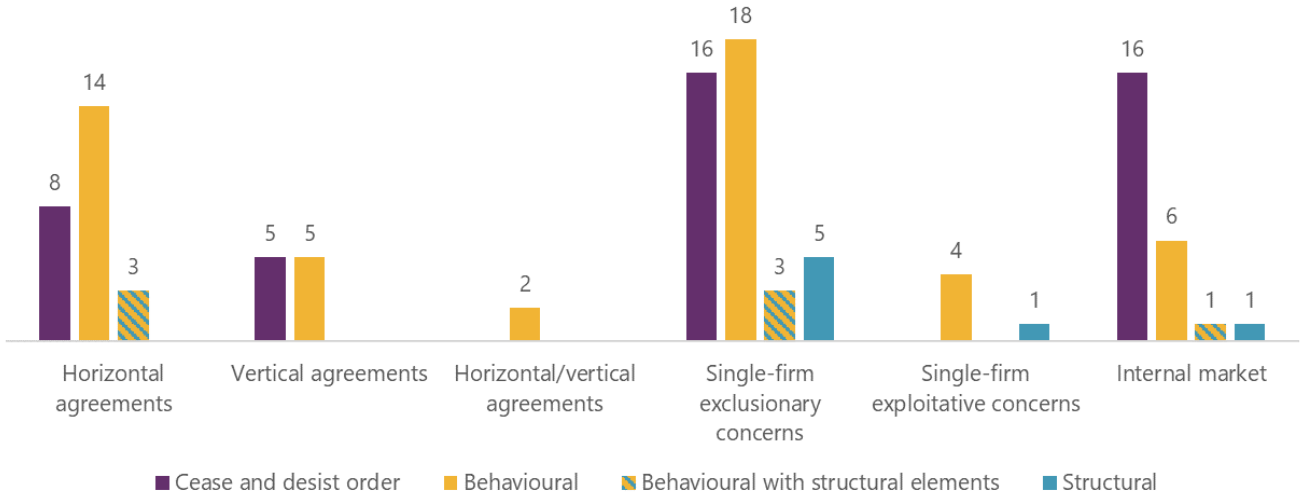
Moving to Article 9 decisions, we observe from Figure 4.16 a wider variety of second-level remedy types in Article 9 decisions than in Article 7 decisions. Among structural remedies, the only remedy type is the "*divestiture of business or assets*". For behavioural remedies with structural elements we mostly observe the "*directly enforceable access to infrastructure*" remedy, and in only one case (AT.39351 – Swedish Interconnectors) the "*market redesign to prevent territorial discrimination*". As far as behavioural remedies are concerned, besides the residual category of an "*obligation to engage/not to engage in certain behaviour*", most remedies fall into the category of an "*obligation to terminate or change existing contracts/exclusivity clauses*". These are followed by "*obligation to provide access to technical information*" and "*obligation to respect certain price caps/conditions*" remedies. The least represented remedies among Article 9 decisions are "*interoperability*" and "*obligation to untie/unbundle products*" remedies with only a single observation each. The cases in which these remedies are imposed are AT.39654 – *Reuters Instrument Codes* and AT.39230 – *Rio Tinto Alcan*, respectively.

Figure 4.16: Second-level classification of Article 9 remedies



Having analysed the presence of remedies in our universe of cases, we turn to inspecting the relationship between remedies and competition concerns. Focusing on Figure 4.17, which displays the relation between competition concern and first-level remedy type, simple cease-and-desist orders and purely behavioural remedies seem to be the preferred instrument to address both horizontal/vertical agreements and single-firm exclusionary concerns. Cease-and-desist orders are also frequently used to address internal market concerns, whereas in our universe of cases no cease-and-desist order was ever issued in case of single-firm exploitative concerns. As noted already above, no structural remedies were imposed in the cases on horizontal or vertical agreements.

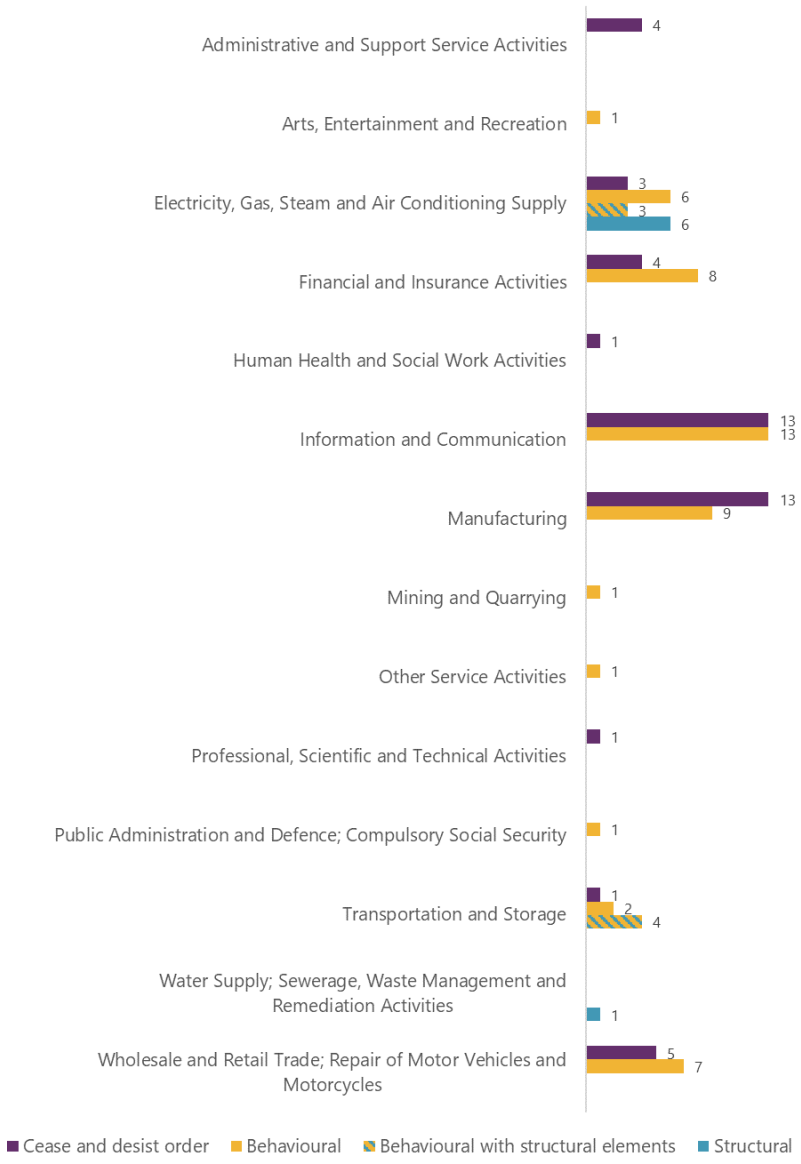
Figure 4.17: Remedy type and competition concerns



With respect to the relationship between remedy type and economic activity, Figure 4.18 reveals that the imposition of structural remedies is concentrated only in two industrial sectors: *"electricity, gas, steam and air conditioning supply"* and *"water supply, sewerage, waste management and remediation activities"*. Similarly, behavioural remedies with structural elements are concentrated exclusively in two sectors: *"electricity, gas, steam and air conditioning supply"* and *"transportation and storage"*. Consistent with the literature, [188] these tend to be industries where economies of scale play a crucial role and where access to a network infrastructure is an important condition for effective competition.

188 See for instance Shelanski, H. A., and Sidak, J. G., *Antitrust Divestiture in Network Industries*, The University of Chicago Law Review, 68(1), 2001, p. 1–99

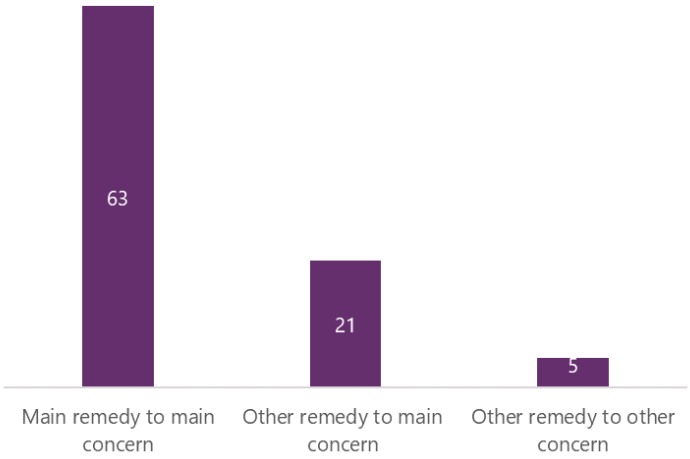
Figure 4.18: Remedies and economic activities



Our analysis so far has concentrated on the main remedy that with a decision has been imposed or accepted to resolve the main competition concern that was identified. It turns out that there are a number of cases in which more than one remedy was imposed or accepted, either to address the same competition concern, or because more than one competition concern was identified in the first place. Figure 4.19 shows that, in addition to the 63 main remedies on which we have concentrated so far, there are 21 additional remedies that were imposed or accepted as part of the solution for the main competition concern. There are finally five additional remedies that were imposed or accepted as a solution for an additional competition concern. Examples of cases with multiple remedies targeting the same competition concern include AT.39315 – *ENI* and AT.39678/AT.39731 – *Deutsche Bahn I/II*. Examples of cases with multiple remedies targeting different concerns include AT.39316 – *GDF foreclosure*, AT.37792 – *Microsoft I* and AT.38173 – *The Football Association Premier League Limited*. This pattern highlights an important difference between antitrust and merger cases, and the resulting remedies. Whereas a single merger case may affect different relevant markets, for each of which a remedy may need to be found, antitrust cases tend to concentrate on a single competition concern.

This substantive difference in turn explains a methodological difference between this Study and the Commission's Merger Remedies Study of 2005. Whereas in the Merger Remedies Study there is a distinction between the number of cases and the number of remedies analysed, in our Study the two numbers – unless otherwise noted – coincide.

Figure 4.19: Remedies multiplicity for the same or different competition concerns[189]



4.2.3 Analysis of modalities and flanking measures

As remedies are often accompanied by modalities and flanking measures to ensure their correct implementation and effectiveness, we now turn to investigate them. Specifically, we examine the relationship between remedies and the decision to appoint a monitoring/divestiture trustee as well as the duration of the remedies.

Figure 4.20 seeks to identify a possible association between the type of remedy imposed in Article 9 cases (presented at the first-level typology) and the appointment of a monitoring trustee ("Yes" indicates cases in which a monitoring trustee was appointed).

In about half of the Article 9 decisions in which behavioural remedies were imposed a monitoring trustee was appointed. In six out of seven Article 9 cases with behavioural remedies with structural elements a monitoring/divestiture trustee has been appointed. All structural remedies imposed in Article 9 decisions are accompanied by a monitoring/divestiture trustee. This includes case AT.39759 – *ARA Foreclosure*, which features structural remedies and – as we will see below – was resolved through the cooperation procedure. This is in sharp contrast with Article 7 decisions. Notably, case AT.37792 – *Microsoft* is the only Article 7 case in which a monitoring trustee was ever appointed. [190]

189 In this figure the unit of observation is the remedy rather than of the case, because instead of concentrating on the main remedy for the main competition concern (in which case the number of remedies coincide with the number of cases) here we consider all remedies, including additional remedies for the main competition concern and additional remedies for additional competition concerns.

190 See the judgment of the Grand Chamber of the Court of First Instance of 17 September 2007, Microsoft v *Commission*, T-201/04, ECLI:EU:T:2007:289, after which the Commission did not appoint a monitoring/divestiture trustee in Art. 7 decisions.

Figure 4.20: Appointment of a monitoring/divestiture trustee in Article 9 decisions by remedy type

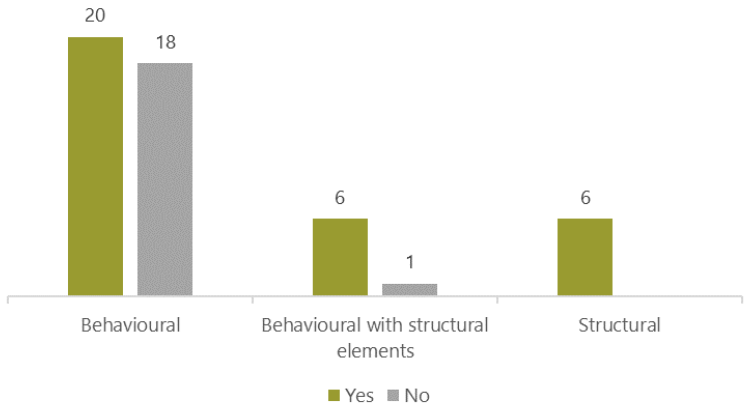


Figure 4.21 depicts the number of Article 9 cases with and without the appointment of a monitoring/divestiture trustee, over time. While in Neelie Kroes' term the majority of Article 9 decision did not appoint a trustee, the appointment of a trustee seems to have become a standard practice with time. Among the 17 Article 9 decisions adopted in Margrethe Vestager's two terms as the Commissioner so far, only in two cases a monitoring/divestiture was not appointed (AT.39850 – *Container Shipping* and, as we will see in one of our case studies below, AT.40608 – *Broadcom*).

Figure 4.21: Evolution of monitoring/divestiture trustee appointment in Article 9 decisions

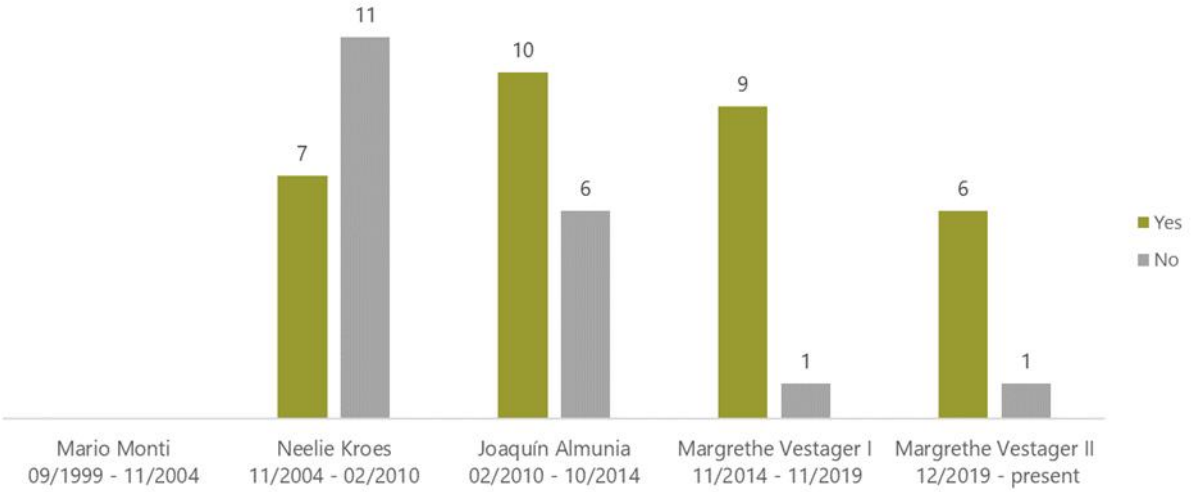
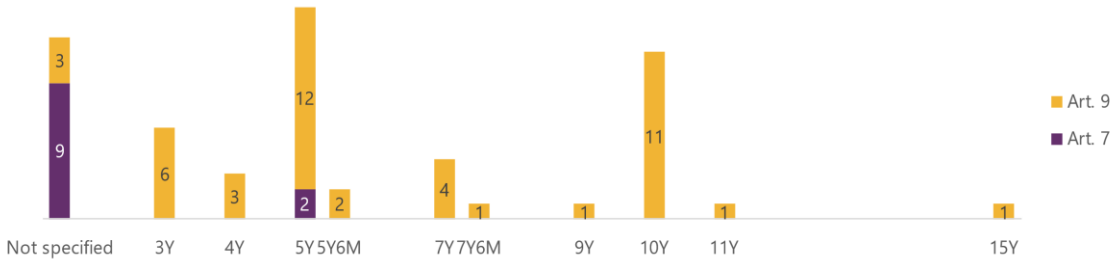


Figure 4.22 reports the duration of behavioural remedies. As a first observation, we notice that when the remedy has a duration, it is most frequently 5 or 10 years. Moreover, we point out that for twelve cases, the remedy duration is indefinite. In six of the nine Article 7 cases with no duration, the Commission imposed a deadline for implementing the remedy. In two of the three Article 9 cases the remedy imposed was to terminate or change certain clauses of an agreement, so it seems reasonable that no duration was specified. The other Article 9 case in which the remedy has an indefinite duration is AT.38381 – *ALROSA + DBCAG (part of de Beers group) + City and West East (part of de Beers group)*. Interestingly, in ALROSA's appeal to the General Court, one of the (unsuccessful) pleas in law was that the *"infringement by the contested decision of*

Art. 9 of Regulation No 1/2003, […] does not allow commitments to which an undertaking concerned has not voluntarily subscribed to be made binding on the undertaking, a fortiori for an indefinite period".[191]

Figure 4.22: Remedy duration (for pure behavioural remedies and behavioural remedies with structural elements)



Note: "Y" indicates years and "M" indicates months.

4.2.4 Selection criteria

To select the twelve cases to be analysed in the ex post evaluation, we first applied some exclusion criteria to the pool of relevant cases, establishing a list of "eligible cases". We then ranked them according to two general measures: (i) importance of the case and (ii) importance of the remedy. In a final step, we performed a qualitative assessment to ensure coverage along multiple dimensions and namely the affected industry, the type of competition concerns, the type of remedies and the decision date. These allowed us to select the most significant twelve antitrust remedy cases of the last 20 years, while at the same time cover different facets of the population.

The selection began with identifying the eligible cases in the dataset that we constructed. After excluding the decisions that did not impose any remedy (above and beyond a cease-and-desist order), we defined as "eligible" the cases satisfying the following criteria:

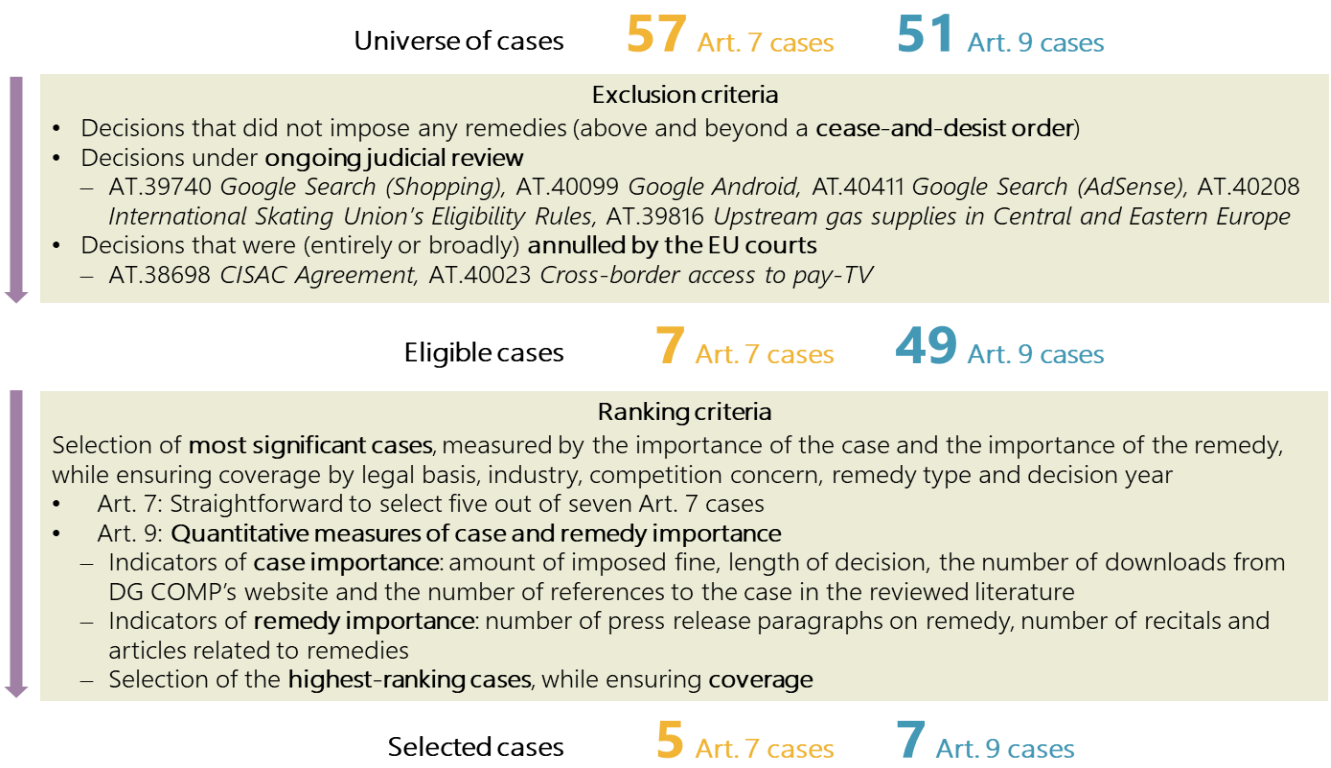
i) No ongoing judicial review at the time of the selection;
ii) Decisions not already annulled (either entirely or broadly).

After applying these criteria there remained seven Article 7 cases and 49 Article 9 cases that were eligible. In the second step we ranked the eligible cases according to multiple metrics of case and remedy importance. Because a fixed amount of Article 7 and Article 9 cases had to be selected for the ex post evaluation (five and seven cases, respectively), the ranking of the cases were undertaken separately for Article 7 and 9 cases.

The process and its outcome are documented in the diagram in Figure 4.23.

191 Judgement of the Court (Grand Chamber) of 29 June 20110, *European Commission* v *Alrosa Company Ltd*, C-441/07 P, ECLI:EU:C:2010:377.

Figure 4.23: Case selection process



For the seven eligible Article 7 cases, to assess the importance of the case we used indicators such as the amount of the fine imposed and the total length of the decision. Similarly, to establish the importance of the remedy in the case we used measures encompassing the number of paragraphs concerning remedies in the decision and in the press release. Considering that five Article 7 cases had to be selected and only seven Article 7 cases were eligible, the selection process was straightforward.

The selection of seven Article 9 cases was more complex, since 49 cases were eligible. To this end, we extended the quantitative indicators of case and remedy importance. Since no fine is imposed on the addressees of commitments decisions, to assess the case relevance we collected additional information on the number of downloads and views of the main decision on the COMP search website, and we included indicators on the relevance of the case in the literature.[192]

After ranking the cases according to an amalgam of these quantitative measures, we performed a qualitative assessment of the cases to ensure coverage and variety in terms of legal basis, affected industries, type of competition concerns, type of remedies and year of the decision. This procedure allowed us to exclude cases that, even though they were particularly important from the quantitative assessment, were too similar to other cases selected by our ranking exercise. For instance, cases AT.39596 – *BA/AA/IB* and AT.39596 – *AF – KL/DL/AZ* both resulted to be particularly relevant (also in light of decision length), but given the similarity in terms of economic activity, type of competition concerns and remedies, we only selected the one with the highest score (i.e., AT. 39596 – *BA/AA/IB*).

192 To build such indicators we considered all the publications included in the literature review, as well as the number of references in Whish, R., and Bailey, D., *Competition Law (9th Edition)*, Oxford University Press, Oxford, 2021

Overall, this selection methodology allowed us to choose the most significant cases while at the same time having a sample of cases that is balanced along the dimensions listed above. We find this very valuable. On the one hand, it is from the most significant cases that we expect to learn the most about remedy implementation and effectiveness. On the other hand, we would like our lessons learned to reflect the last 20 years of antitrust enforcement by the Commission as a whole, transcending specific industries, forms of anticompetitive behaviour, shapes of remedy and enforcement eras.

4.2.5 Results

Combining the results of our analysis about remedy and case relevance, we chose the following five Article 7 cases and seven Article 9 cases. Table 4.5 and

Table 4.6 report respectively the list of selected Article 7 and Article 9 cases together with some characteristics of the case.

Table 4.5: List of selected Article 7 cases for ex post evaluation

No-	Case	Legal basis	Year	Industry	Competition concern	Remedy
1	AT.37792 *Microsoft I*	102	2004	Manufacture of computers and peripheral equipment	Single-firm exclusionary concerns (tying; refusal to supply)	Behavioural. Obligation to untie/unbundle products; Access to technical information
2	AT.34579 *Mastercard I*	101	2007	Financial services	Horizontal agreements (multilateral interchange fees)	Behavioural. Obligation to respect certain price caps/conditions
3	AT.39585 *Motorola GPRS essential patents*	102	2014	Computer programming and related activities	Single-firm exclusionary concerns (other)	Behavioural. Obligation to terminate or change existing contracts/exclusivity clauses
4	AT.39759 *ARA foreclosure*	102	2016	Waste collection	Single-firm exclusionary concerns (refusal to supply)	Structural. Divestiture of business or assets [household collection infrastructure]
5	AT.40134 *AB InBev Beer Trade Restrictions*	102	2019	Wholesale of food, beverages and tobacco	Concerns about internal market (other)	Behavioural. Obligation to engage/not to engage in certain behaviour [languages on product label]

Table 4.6: List of selected Article 9 cases for the ex post assessment

No	Case	Legal basis	Year	Industry	Competition concern	Remedy
1	AT.38636 *Rambus*	102	2009	Manufacture of computers and peripheral equipment	Single-firm exploitative concerns (other)	Behavioural. Obligation to respect certain price caps/conditions
2	AT.39315 *ENI*	102	2010	Distribution of gaseous fuels through mains; Trade of gas through mains	Single-firm exclusionary concerns (other)	Structural. Divestiture of business or assets [gas transmission]; Behavioural. Access to infrastructure [gas transmission, through release of gas transport contracts]
3	AT.39596 *BA/AA/IB*	101	2010	Air transport; Passenger air transport	Horizontal agreements	Behavioural with structural elements. Access to infrastructure [airport slots]
4	AT.39847 *E-books*	101	2012	Book publishing	Horizontal and vertical agreements	Behavioural. Obligation to terminate or change existing contracts/exclusivity clauses
5	AT.39678/ AT.39731 *Deutsche Bahn I/II*	102	2013	Distribution of electricity; Freight rail transport	Single-firm exclusionary concerns (margin squeeze)	Behavioural with structural elements. Access to infrastructure (railway traction current network); Behavioural. Obligation to engage/not to engage in certain behaviour [One-time payment]
6	AT.40608 *Broadcom*	102	2020	Manufacture of communication equipment	Single-firm exclusionary concerns (exclusive dealing)	Behavioural. Obligation to terminate or change existing contracts/exclusivity clauses; Behavioural. Obligation to untie/unbundle products
7	AT.40394 *Aspen*	102	2021	Manufacture of pharmaceutical preparations	Single-firm exploitative concerns (excessive prices)	Behavioural. Obligation to respect certain price caps/conditions; Behavioural. Obligation to engage/not to engage in certain behaviour [Transitory Rebate]

4.2.6 Descriptive statistics on the twelve selected cases

The following figures visualise important characteristics of the twelve cases selected for the ex post evaluation. In terms of the decision type, as illustrated in Figure 4.24, the sample consists of seven Article 9 cases and five Article 7 cases. As it can be seen in Figure 4.25, a quarter of the twelve cases were based on Article 101, while the remaining three quarters were based on Article 102 of the TFEU.

Figure 4.24: Selected cases by decision type

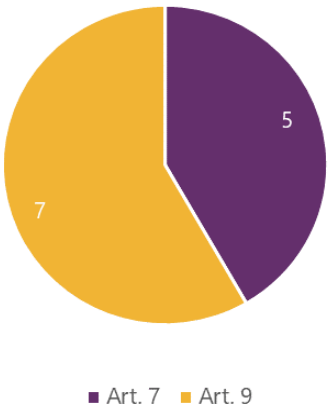


Figure 4.25: Selected cases by legal basis

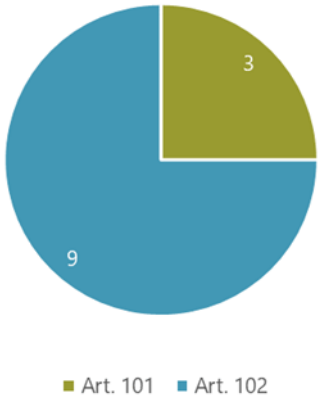
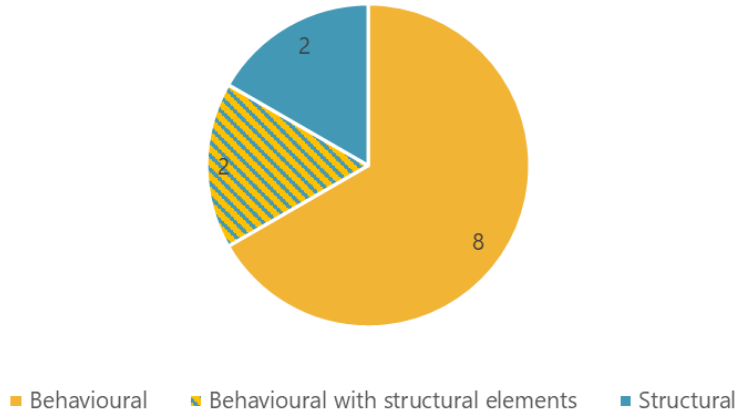


Figure 4.26 illustrates the types of remedies imposed in the sample of the twelve cases. In eight of the cases the remedies were of a purely behavioural nature. In two out of the remaining four cases the remedies were structural, and in the last two cases the remedies were behavioural with structural elements.

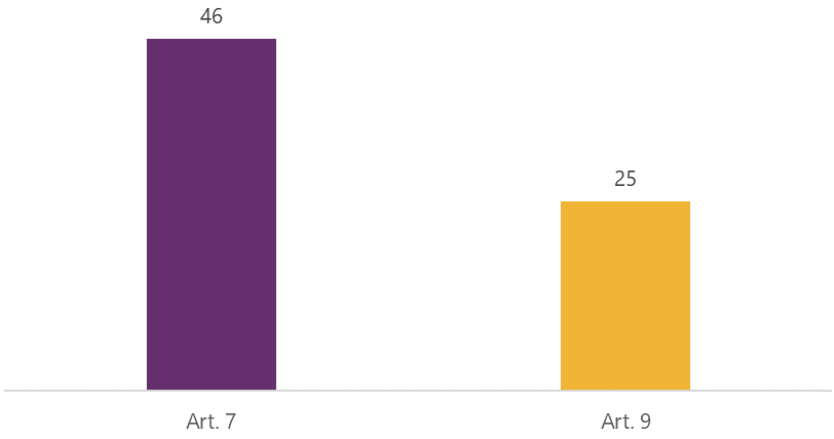
Figure 4.26: Selected cases by remedy type



The selected twelve cases thus cover different competition concerns and remedy types, in proportions that are broadly in line with the overall population of relevant cases.

Figure 4.27 shows the average duration of proceedings in months (measured as the time between opening of formal proceedings and decision date). In the seven selected Article 9 cases the proceedings took on average 2 years and 1 month, while in the five selected Article 7 cases the average duration was considerably longer, namely 3 years and 10 months.

Figure 4.27: Average duration of proceedings (in months) by decision type



5. Challenges and best practices – Insights from the literature and expert interviews

5.1 Introduction

In this section we discuss the main challenges faced by the Commission in designing, implementing and ensuring effectiveness of remedies, as emerging from the relevant literature and the expert interviews we conducted as part of this Study.[193] We then proceed to summarise the best practices that the same sources have identified.

It is acknowledged in the literature that it is challenging to design the correct package of remedies in enforcing competition law and that one risks in particular two types of errors: under-fixing the problem or over-fixing it. As Sullivan explains, *"[i]f the remedy is overbroad it may create a disincentive for vigorous competition; if it is underinclusive, it will not be effective in deterring the prohibited conduct and in advancing competition in the market"*. The fundamental objective in remedy design is to remove the competition concern. To this end, the three fundamental challenges that the Commission faces in designing antitrust remedies are:

- Identification of the competition problem and remedy objective;
- Identification of the most appropriate legal instrument: infringement or commitments decision; and
- Identification of the type of remedy: structural or behavioural remedy or, in case of an infringement decision, a simple order to cease-and-desist the problematic behaviour.

5.2 Challenge 1: Alignment of competition issues and remedy objective

Remedy design by the Commission starts with the need to identifying and articulating the competition problem and the specific aim of the remedy to be adopted. Commentators have acknowledged that remedies may have multiple aims, a fact which introduces clear potential for confusion on the extent to which a given aim should predominate in the construction of a remedy.[194] "*Clear thinking*" by the antitrust authority is thus required. In the absence of clear objectives, the authorities risk creating remedies that do not achieve any of the objectives and may in fact also chill off pro-competitive behaviour or destroy its effects.[195]

The concept of remedies gains significance when considering their ultimate objectives. Remedies are de facto designed to establish or re-establish a specific scenario by (i) halting anticompetitive practices, (ii) preventing future infringements, (iii) mitigating the effects of the violation or all of these combined.[196] It has been emphasised in the literature that the use of the adverb "*effectively*" ensures that the violation must cease

193 Grimaldi took the lead in the preparation of this section.
194 Weber Waller S., *The Past, Present, and Future of Monopolization Remedies*, 76(1), Antitrust Law Journal 11, 12, 2009.
195 Melamed A.D., *Afterword: The Purposes of Antitrust Remedies*, 76(1) Antitrust Law Journal 359, 368, 2009.
196 See also Chapter 2.1.1.2.

"*in all its manifestations*": accordingly, the term '"*effectively*"' means "*fully*", not "*essentially*" or "*practically*", and antitrust remedies must be effective in both the short run and the long run.[197]

The traditional approach to antitrust remedies design is to tie the remedy closely to the antitrust infringement that has led to the need for a remedy.[198] There is no real controversy with such an approach: *"[c]ourts and antitrust enforcers have long agreed that once a competitive harm is identified, any remedy must be directly related to that identified harm"*.[199] In effect, this approach ensures that, as Werden (2009) mandates, antitrust remedies arise *"organically out of the theory of the case"*.[200] Also it has been argued that the mere violation of competition law should not introduce the possibility of a total restructuring of a market.[201]

The literature has further analysed the notion of remedies, stating that remedies ideally should not only cease the infringement narrowly but also restore competition to its hypothetical trajectory had there been no anticompetitive behaviour.[202] Remedies "*necessary to bring the infringement effectively to an end*", thus, should be aimed at prohibiting or requiring certain conduct in order to eradicate both the illegal conduct of an undertaking and its effects in the marketplace.[203] Thus, an effective remedy has been interpreted as one that would place competitors in the position they would have been in if the infringement did not occur (restorative aim).[204] However, concerns about the practicality of the restorative remedies' approach arise due to the challenges of determining counterfactual outcomes and the necessity of limiting antitrust intervention to the firms directly involved in or suspected of violating competition laws.[205]

The debate over preventive and restorative aims of remedies in competition cases, present in the literature, is also reflected in the interviews conducted during the Study, where some experts tended to argue for remedies to aim not only at eliminating the anticompetitive conduct in question but also at removing the impact the conduct may have already had on the market. Literature and interviewees in favour of this approach to remedy design are aware that the approach requires the construction of a counterfactual and would thus be an extremely challenging endeavour for the authorities. However, they are of the opinion that the restoration of competition can serve at least as a theoretical standard that the remedy design should aspire to in practice.[206] In addition, while the gap between preventive and restorative aims may be substantial in exclusionary cases, and there is a challenge of establishing the relevant counterfactual scenario, in exploitative cases the exercise may be more straightforward.

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197 Ritter C., *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, 7(9) Journal of European Competition Law & Practice 587, 588, 2016, citing in support Maier-Rigaud F., *Behavioural Versus Structural Remedies in EU Competition Law*, 2014 and Lowe P., Marquis M. and Monti G., *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, Oxford, 2016, p. 207.

198 Barnett T., *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, 76(1) Antitrust Law Journal, 2009 pp. 31-36.

199 Ohlhausen M. and Taladay J., *Are Competition Officials Abandoning Competition Principles?"* 13(7) Journal of European Competition Law & Practice 463, 469, 2022.

200 Werden G., *Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process*, 76(1) Antitrust Law Journal 65, 65, 2009.

201 Barnett T., *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, 76(1) Antitrust Law Journal, 2009 p. 176.

202 Helllstrom P., Maier-Rigaud F. and Wenzel Bulst F., *Remedies in European Antitrust Law*, 76(1) Antitrust Law Journal 43, 48, 2009.

203 Turner V., *Regulation 2: Remedies in Antitrust Cases under EU Competition Law*, 11(8) Journal of European Competition Law & Practice 430, 432, 2020.

204 See Turner V., *Regulation 2: Remedies in Antitrust Cases under EU Competition Law*, 11(8) Journal of European Competition Law & Practice 431, 2020 Ritter C., *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, 7(9) Journal of European Competition Law & Practice 587, 588, 2016

205 The "*new competition tool*" proposed by the Commission would have attempted to address the latter limitation. See Crawford S., Rey P. and Schnitzer M., *An Economic Evaluation of the EC's Proposed "New Competition Tool"*, 2020.

206 Ritter C., *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, 7(9) Journal of European Competition Law & Practice 587, 589, 2016

In an interview with a US antitrust authority (FTC), it was emphasized that remedies in their country should go beyond merely halting anticompetitive behaviour. They should also aim to rectify the adverse effects caused by such behaviour on the market. The FTC is increasingly prioritizing strategies to address these wrongs and ensure that wrongdoers do not continue to benefit from their anticompetitive actions. For instance, in cases where anticompetitive conduct has hindered market entry or competition, particularly in patent-related matters, the FTC may require patent licensing to facilitate and expedite market entry. This approach aims to restore the market to a state where healthy competition can thrive, counteracting the detrimental effects of anticompetitive behaviour.

Finally, in another jurisdictional comparison, Bostoen and van Wamel (2023)[207] observe that while Regulation 1/2003 does not explicitly recognise the restorative aim of antitrust remedies, the ECN+ Directive does.[208] According to recital 37, national competition authorities should have *"effective means to restore competition in the market by imposing structural and behavioural remedies"*.[209] It may be worth learning from the evolving best practice at national level and considering making the restorative aim of EU antitrust remedies explicit in future implementing regulations.

5.3 Challenge 2: Identification of the appropriate legal instrument and procedure

In designing the remedy, the Commission has the choice between completing an investigation with a view to issuing a prohibition decision under Article 7, eventually by the application of the cooperative procedure in non-cartel cases and/or entering into negotiations with an undertaking who has offered commitments to settle the case under Article 9.

With respect to the differences between Article 7 and Article 9 decisions, the Table 5.7 below summarises the key advantages and disadvantages of commitments and prohibition decisions highlighted by authors. According to the literature review, these pros and cons are considered and balanced by the Commission and the undertaking(s) concerned, when deciding the outcome of an investigation procedure.

207 Bostoen F. and van Walen D., *Antitrust Remedies: From Caution to Creativity*, Journal of European Competition Law & Practice 2023, Vol. 14(8), 540-552 TILEC Discussion Paper No. 2023-19, 2023.
208 Official Journal of the European Union, *Directive (EU) 2019/1 of the European Parliament and the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*, 2018.
209 Ibid., at recital 37.

Table 5.1: Advantages and disadvantages of prohibition (Article 7) and commitments (Article 9) decisions

Commitments decisions – Advantages	Prohibition decisions – Advantages
▪ Commitments allow the Commission to rapidly bring an infringement to an end.[210] ▪ Consequently, in appropriate cases, commitments may be a good option for fast moving and innovative markets, where speed of enforcement is crucial.[211] ▪ The use of commitments is efficient when there are clear breaches of EU law.[212] ▪ As undertakings offer commitments to the Commission, those undertakings are less likely to challenge a commitments decision in Court.[213]	▪ Prohibition decisions involve a formal finding of an infringement and therefore victims can base follow-on actions on prohibition decisions.[214] ▪ Prohibition decisions are better suited for cases where it is important for the Commission to set up a legal precedent.[215] ▪ Prohibition decisions have a stronger deterrent effect, especially if a fine is imposed.[216] ▪ Prohibition decisions have the benefits of clarification of the law, public censure, deterrence, disgorgement of illicit gains and facilitation of follow up action.[217] ▪ Prohibition decisions are better suited for cases which focus on past behaviour and where a change in the future behaviour is less relevant.[218]
▪ A decision is taken without a formal finding of an infringement. This limits the likelihood of follow-on damages actions, since potential claimants do not have the benefit of a pre-existing finding of an infringement.[219] ▪ Extensive use of commitments decisions can also lead to under-deterrence. First, by loosening the tie between infringements and remedies, the law will become less clear. In turn if borderline cases are not finally decided, harmful conduct may not be sufficiently deterred.[220]	▪ It is generally lengthier to take a prohibition decision than a commitments decision and therefore prohibitions may not be suited for fast moving markets.[221] ▪ Prohibition decisions are more likely to be challenged in court than commitments decisions, since commitments decisions involve the consent of the undertakings involved.[222]

210 Wils W., *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003*, World Competition, 29(3), 2006, pp. 345-366.
211 European Commission, *To commit or not to commit? Deciding between prohibition and commitments*, Competition policy brief, 2014, pp. 2-3.
212 Marden P., *The Emperor's Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law*, CPI Antitrust Chronicle, 2013, pp. 2-11.
213 Wathelet M., *Commitment Decisions and the Paucity of Precedent*, Journal of European Competition Law & Practice, Volume 6, 2015.
214 Alexiadis P. and others, *Competing Architectures for Regulatory and Competition Law Governance*, 2019. Robert Schuman Centre for Advanced Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=3911392.
215 European Commission, *To commit or not to commit? Deciding between prohibition and commitments*, Competition policy brief, 2014, pp. 1-2.
216 OECD, *The 2022 OECD Global Forum on Competition discussed the goals of competition policy*, Press release, 1 December 2022
217 Wils W., *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003*, World Competition, 29(3), 2006, pp. 345-366.
218 OECD, *The 2022 OECD Global Forum on Competition discussed the goals of competition policy*, Press release, 1 December 2022
219 Alexiadis P. and others, *Competing Architectures for Regulatory and Competition Law Governance*, 2019. Robert Schuman Centre for Advanced Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=3911392.
220 Hjelmeng E., Competition law remedies: Striving for coherence or finding new ways?, Common market law review, Volume 50, 2013.
221 European Commission, *To commit or not to commit? Deciding between prohibition and commitments*, Competition policy brief, 2014, pp. 2.
222 Wathelet M., *Commitment Decisions and the Paucity of Precedent*, Journal of European Competition Law & Practice, Volume 6, 2015.

5.3.1 Commitments decisions versus prohibition decisions

5.3.1.1 Challenges in designing commitments decisions

Article 9 offers a trade-off: instead of a formal declaration of breach and its associated penalties under an Article 7 decision, the undertakings concerned can provide adequate behavioural or structural commitments to resolve identified competition issues.

An expert, who was interviewed on the choice of the Commission between pursuing a prohibition decision or considering the option of a commitments decision, argued that while there is merit in commitments decisions in terms of shortening and simplifying the process because a full-fledged investigation is no longer needed, there is a concern that this may undermine the effectiveness of the enforcement. Indeed, the information on which the Commission bases its decision whether to accept the offered commitments by the undertaking concerned risks to be limited. So, although usually extensive market testing is implemented, sometimes the decision may not be sufficiently informed. In this latter scenario, it might be theoretically easier for a firm to submit a proposal that is not really effective, and the Commission might be tempted to accept it to ensure the closure of the case.

As further pointed out during interviews, undertakings may have an incentive to drag on commitments discussions with the Commission for as long as possible, to continue profiting from their possibly anticompetitive behaviour and unless there is an impending threat that the Commission will switch from pursuing commitments to pursuing a prohibition path. According to the interviews, the situation changes when interim measures have been taken that prevent already the firm from taking advantage from its possibly anticompetitive behaviour, leaving it with no interest in a time and resource consuming confrontation with the competition authority.

A procedural challenge indicated by interviewees is the asymmetry of information between the Commission and the undertaking(s) concerned. Although this asymmetry can be reduced via a market test, which may allow the Commission to achieve a more balanced remedy negotiation with the undertaking(s) concerned, in practice it was highlighted by interviewees that the market test itself can be weak due to a low response rate. Whereas a low response rate could illustrate that everything is fine in the market(s) and parties are not concerned, it could also signify that either (i) what the competition authority is doing has no value and significance and therefore the market test does not matter to the parties and/or (ii) that the competition authority has not been able to reach the right stakeholders. On the other hand, when there is a high rate of response, the competition authority can be hopeful that the identified stakeholders will provide valuable feedback for the design of effective commitments.

Finally, several interviewees considered making remedies future-proof a major challenge for behavioural remedies. Examples include new business models emerging in airlines or new products and technologies or successor products or technologies being designed during period of behavioural remedy (e.g., medical equipment, mobile telecommunications 2G/3G/4G).

5.3.1.2 Challenges in designing prohibition decisions

Literature notes that during the antitrust investigations, the Commission and legal practitioners may be more focused on documenting a case and preparing evidence of liability, instead of diverting resources to devise

appropriate remedies. By consequence, reflections on remedy design may often begin late and therefore, insufficient time may be dedicated to the remedy design phase.[223]

Behavioural remedies. Under Article 7 both behavioural and structural remedies can be used. However as discussed above, from a legal point of view, under Article 7 structural remedies are considered subsidiary to behavioural remedies. Several interviewees, though, noted that behavioural remedies are challenging to design and negotiate due to the asymmetry of information that may exist between the Commission and the undertaking(s) concerned. Regulation 1/2003 lacks a specific provision for market testing remedies under Article 7: the investigation being carried out by the Commission on its own and, after the SO is issued, detailing any proposed remedies, parties are granted an opportunity to defend themselves. An additional remedy design question is raised as to whether the Article 7 cease-and-desist order, which itself can be interpreted as a behavioural remedy, should be complemented by more prescriptive behavioural remedies. On the one hand, imposing prescriptive remedies requires the Commission to demonstrate their necessity. On the other hand, prescriptive remedies provide more certainty to the concerned undertaking with regards to what is acceptable behaviour and what is not, in turn simplifying the efforts to monitor compliance.

Scope of remedies. Another critical issue in designing Article 7 remedies concerns the definition of the scope of certain categories of remedies. When designing access and/or interoperability remedies, interviewees from the Commission noted that it is often difficult to find the fine line between proportionate versus sufficient access and/or interoperability. Namely, undertaking(s) may not want their competitors to benefit from efficiencies coming from better access and/or interoperability and therefore, the Commission must decide whether competitors should have ubiquitous or merely sufficient access to compete. As stressed by literature[224]when *"access remedies"* are designed too broadly, there is a risk of distorting markets, impairing competition and prohibiting perfectly legal and efficient conduct. Moreover, the design of overly intrusive *"interoperability remedies"* may affect the incentives of undertaking(s) to innovate. This is particularly the case if the Return on Investment ("ROI") on a developed product is limited by an obligation to license interoperability information on a royalty free basis.[225] On the other hand, if the Commission designs remedies which are too specific, this could raise the risk of circumvention.[226] Similarly, US DoJ is of the opinion that the issue of remedies design, or what a fix would be if the court finds a violation, is a challenging issue in tech monopolization cases.[227] Interviewees also noted that behavioural remedies are difficult to design in dynamic markets, where future evolutions of the pertinent market(s) may not be foreseeable. Finally, as raised by a competition law practitioner, behavioural remedies design may not take into account the business cycle(s) of the undertakings(s) concerned, including, inter-alia, geopolitical, energy and financial crises.

Cooperative aspects. A coercive approach to antitrust enforcement, exemplified by instances like the *Intel Corp.* v *Commission* case,[228] relies on strict enforcement measures when a defendant refuses to cooperate during investigations. While it can lead to formal findings of violations and substantial fines, the design of remedies comes with challenges compared to a cooperative approach, since without cooperation, obtaining evidence and understanding the full extent of the violation becomes more difficult.[229] On the other hand,

223 Leveque F., *The Controversial Choice of Remedies to Cope with the Anti-Competitive Behaviour of Microsoft*, Berkeley Program in Law and Economics Working Paper, 2022, p. 24.

224 Wright J., Antitrust Remedies, Journal of Law 423, Peer-reviewed journal, 2011, p. 426.

225 Hoehn T., Menezes J., and Young A., *Big Tech Remedies - Recent Antitrust Case Law and Legislative Developments*", 44(2) European Competition Law Review 47, 48, 2023.

226 Italianer A., *Legal Certainty, Proportionality, Effectiveness: The Commission's Practice on Remedies*, SPEECH/12/07, 2012, p. 9.

227 Guarnera D., U.S. DoJ Antitrust Division's civil conduct task force, at the Panel discussion at the American Bar Association's spring antitrust meeting in Washington, D.C., April 2024. Available at: https://www.law360.com/agencies/u-s-department-of-justice.

228 Judgment of the Court of Justice of 6 September 2017, *Intel Corp.* v *Commission*, Case C-413/14 P, ECLI:EU:C:2017:632.

229 Dunne N, *From Coercion to Cooperation: Settlement within EU Competition Law*, LSE Law, Society and Economy Working Papers 14/2019, London School of Economics and Political Science Law Department, 2019.

authors note that designing remedies in Article 7 decisions with the recourse to cooperative mechanisms poses also a challenge due to the complex interplay between the level of cooperation required from defendants and the potential outcomes for both defendants and the Commission.[230] [231] Settlement activity by the Commission underscores this challenge, particularly in determining the threshold of cooperation necessary for defendants to reap the benefits of settlement.

5.3.1.3 Cooperative mechanisms

Commentators have observed the evolution of EU antitrust enforcement practice towards a more cooperative approach in the design of remedies, emphasizing the increasing use of settlement mechanisms by the European Commission, at least until the appointment of Commissioner Vestager in November 2014.[232] This shift, termed the *"transactionalisation"* of competition law, represents a departure from traditional coercion towards cooperation between the Commission and the concerned undertaking. It has been observed that in practice the distinction between the two contrasting narratives regarding antitrust enforcement is blurred. Under Article 7, characterised by the Commission's coercive power and resulting in punitive sanctions, the Commission's evolving practice allows for significant cooperation within the infringement procedure. Under Article 9, viewed as a form of co-regulation or private bargaining, based on the undertaking's cooperation and leading to prospective market change rather than past liability, recent case law suggests that settlements may have broader legal implications beyond mere private bargains. Settlement thus exists as a gradation within current EU level enforcement practice, presenting a range of options for defendants (and, indeed, the Commission) which are more or less coercive or cooperative in nature.[233] And settlements (here below "cooperative mechanisms") are defined as "*any form of cooperation by defendant undertakings in the course of enforcement action by the Commission under Articles 101 or 102 TFEU pursuant to the Regulation which goes beyond the undertaking's baseline legal obligations to cooperate"*.[234] [235]

The prevailing feature among all the cooperative mechanisms is that the undertaking willingly accepts certain disadvantages that could otherwise be evaded, in return for some benefit regarding the outcome of the administrative process. Consequently, while the authority granted to the Commission under Regulation 1/2003 predominantly aligns with a framework of law enforcement, the growing adoption of settlement mechanisms within its enforcement endeavours could steer present practices towards a more contractual or *"private bargain"* approach.[236] The undertakings and the Commission opt for cooperative mechanisms for several reasons. They offer a quicker and less resource-intensive resolution compared to adversarial proceedings, reducing the likelihood of further challenges before the Court of Justice. Defendants typically receive benefits such as reduced fines, increased certainty, reputation management and protection from future damages claims. The Commission benefits from nuanced remedies and decreased challenges to its decisions. However, cooperative mechanisms carry risks, such as potential unfairness or inconsistency with the development of EU competition law.[237] Despite these concerns, the trend towards greater cooperation

230 See paragraph 5.3.1.2 below.
231 The Commission's practice rewards cooperative defendants across four dimensions: providing self-incriminatory evidence, admitting liability, accepting punitive fines and implementing remedies to address competition issues.
232 See the statistical analysis in Section 4.
233 Ibid, 192.
234 Ibid, 192.
235 Under Article 18 of Regulation 1/2003, the Commission is authorized to demand that undertakings furnish *"all requisite information"* during antitrust inquiries. Similarly, Article 20 mandates that undertakings *"submit"* to dawn raids conducted by the Commission.
236 Ibid., 192.
237 Ibid., 192.

in EU competition enforcement is seen as beneficial overall, with cooperative mechanisms viewed as a valuable tool rather than a problem.

5.4 Challenge 3: Choice of remedy type

Another main challenge for the Commission when designing a remedy, is the choice over the type of remedy which should be adopted or accepted. Here the range of options cover (i) cease-and-desist orders under Article 7, (ii) pure behavioural remedies or behavioural remedies with structural elements and (iii) structural remedies.

5.4.1 Principle of proportionality

For the purposes of choosing antitrust remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end, the Commission should undertake a cost-benefit analysis with a view to avoiding remedies that are disproportionate and impose higher cost than necessary or in the extreme no net benefit. The concept of proportionality is an established legal principle in EU competition law which ensures appropriateness and necessity of imposed remedies with respect to (i) the extent and scale of harm to consumers or competitor and (ii) the type of violation. This involves balancing the extent to which the remedy achieves effective deterrence with the extent to which the remedy hinders competitive growth.[238]

5.4.2 Behavioural versus structural remedies

There is an extensive literature on the relative advantages of adopting a behavioural remedy or a structural remedy. When designing antitrust remedies, the Commission mostly rely on behavioural remedies to resolve competitive concerns. This is because in antitrust, remedies need to address specific conduct(s) of the undertaking(s) in the market so antitrust investigations concern infringements which are behavioural in nature. However, some authors are of the opinion that where behavioural issues are reinforced by structural problems, inherent in a particular sector, structural remedies may be the only effective tool to resolve the concerns.[239] Behavioural remedies with structural elements can also be utilized. These are notably more flexible in their application and less intrusive on in their effects on property rights.[240]

Behavioural remedies have the advantage of inherent flexibility in that they can often be tailor-made for specific undertakings and market realities in order to achieve a desired outcome.[241] This aspect of behavioural remedies can be contrasted with divestitures, "*which often cannot be so meticulously moulded to fit the contours of each situation and which therefore tend to have more of a blunt effect on firms and markets*".[242] A behavioural remedy can be a successful response to a competition problem when it responds to a genuine need of a given market and when it necessitates a minimal degree of supervision by the competition authority.[243] It has been emphasised in the literature that behavioural remedies are usually the

238 Werden G., *Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process*, 76(1) Antitrust Law Journal 65, 65; 2009.
239 Alexiadis P. and Sependa E., *Structural Remedies under European Union Antitrust Rules*, Peer-reviewed journal, 2013, pp. 23-24.
240 Ibid.
241 UNCTAD, *Appropriate Sanctions and Remedies*, TD/RBP/CONF.7/5, 10, 2010.
242 *I*bid.
243 Page W., *Optimal Antitrust Remedies: A Synthesis*, in Blair R. and Sokol D. D., *The Oxford Handbook of International Antitrust Economics: Volume 1*, Oxford University Press, 2015, p. 272.

preferred option to structural remedies when the infringing undertaking has achieved its dominant position through legitimate commercial conduct.[244] Behavioural remedies take account of the fact that *"[n]ot every corporate structure can be easily carved up in a prudent fashion*",[245] and they avoid the difficult challenges in creating an optimal structural remedy in practice.[246] Nonetheless, behavioural remedies have clear drawbacks of their own and do not have a very solid reputation in the literature on antitrust enforcement.[247]

Some authors are of the opinion that whilst behavioural remedies are typically considered less invasive than structural ones, they do not necessarily alter the incentives of the firm, requiring that the competition authority continuously monitor compliance. As a result, they may simply "*provide the battlefield for the next war*", morphing into "*an ongoing source of friction*" between the undertaking concerned and the competition authority, draining on a jurisdiction's antitrust enforcement resources.[248]

Nevertheless, some commentators argued that behavioural remedies only address the symptoms of the competition problem, rather than the cause.[249] Behavioural remedies do not change the structure of the market, or the incentives of undertakings; therefore, the competition problem is likely to persist when the remedies expire.

These reservations about the relative effectiveness of behavioural remedies manifest themselves also in the interviews conducted for this Study. For example, in one interview with an overseas jurisdiction the view was expressed that they were agnostic regarding type of remedy preferring to choose whatever remedy works best in the circumstances. The view is that behavioural remedies are not necessarily less intrusive than structural ones if they create an oversight of a business lasting 20 years.

Several interviewees noted that behavioural remedies are challenging to design and negotiate due to the asymmetry of information that may exist between the Commission and the undertaking(s) concerned.

Furthermore, with respect to the design of appropriate remedies in the Tech sector, certain markets may evolve so rapidly that it may be difficult to design a remedy to undo the anticompetitive consequences of a behaviour that occurred a long time in the past.[250] Some interviewees also noted that behavioural remedies are difficult to design in dynamic markets, where future evolutions of the pertinent market(s) may not be foreseeable.

The present study highlighted that structural remedies have been applied only in a few cases.

Nevertheless, the literature suggests that, whilst one needs to be careful not to impose remedies that ultimately prohibit or undermine competition on the merits, *"one should not ignore the importance of structural remedies and one should be prepared to consider targeted structural remedies in appropriate circumstances".*[251] An academic economics expert argued that structural remedies (e.g., divestitures) were not necessarily more intrusive or difficult to design and provided examples for effective/ineffective remedies in both categories. The view expressed in articles and expert interviews about the feasibility of structural remedies outside merger control was shared by another expert with experience in antitrust, merger and

244 Ibid., 271.
245 Wang W., *Structural Remedies in EU Antitrust and Merger Control,* 34(4) World Competition 571, 580, 2011.
246 See Epstein R., *Monopolization Follies: The Dangers of Structural Remedies Under Section 2 of the Sherman Act*, 76(1) Antitrust Law Journal 205, 2009.
247 Kovacic W., *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31(4) Connecticut Law Review 1285, 1292, 1999.
248 Cavanagh E., *Antitrust Remedies Revisited*, 84(1) Oregon Law Review 147, 188, 2005.
249 Von Rosenberg H., *Unbundling through the Back Door…. The Case of Network Divestiture as a Remedy in the Energy Sector,* European Competition Law Review, Peer Reviewed Journal, 2009, p. 6.
250 Hellstrom P., Maier-Rigaud F. and Bulst F. W., *Remedies in European Antitrust Law*, 76(1) Antitrust Law Journal, 2009.
251 See Werden G., *Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process*, 76(1) Antitrust Law Journal 65, 70, 2009.

State aid cases and membership of a national competition authority. Admittedly carving-out assets and/or putting together comprehensive standalone businesses is a challenge recognised by the Commission in its Merger Remedies Study 2005 and in various remedies guidelines.[252] However, various practical advantages of imposing structural antitrust remedies were emphasised. Structural remedies confine themselves to the one-off reallocation of resources, leaving it to market dynamics, and the incentives they create, to complete the solution of an antitrust problem in an efficient manner, instead of prescribing to firms how to behave on an ongoing basis.[253] Structural remedies can be easier to implement and monitor than behavioural ones, [254] and moreover do not usually take up the competition authority's resources once implemented.[255] They may also provide more legal certainty for undertakings.[256]

Kwoka and Valletti (2021) claim that, although room for improvement exists regarding practice, the empirical record suggests that divestitures have been successful: *"[d]espite variation in experiences, most breakups seem to result in structurally more competitive markets and stronger competition*".[257] They further argue that the difficulties of designing and implementing structural remedies were overstated. For example, firms regularly spin out businesses for non-regulatory strategic reasons.[258] A general point made in more than one expert interview regarding the design of antitrust remedies is the comparison between antitrust remedies and merger remedies. In mergers, the anticompetitive incentive as well as the ability to successfully act on the incentive are created by a structural change that is about to happen (proposed merger), which makes a structural remedy (outright prohibition or divestiture of overlapping businesses) the most appropriate remedy. The situation is less clear-cut in antitrust enforcement where the anticompetitive incentives and abilities may come from a structure that has organically grown over time.

5.4.3 Article 8 interim measures

Reverting to the fact that interim measures are seldom utilised by the Commission in antitrust proceedings, the main challenges to their implementation in antitrust cases concern (i) the requisite standard of proof, (ii) procedural issues and (iii) case law.

First, the standard of proof for interim measures in Commission proceedings is much higher than in countries like France and Belgium, where they are more frequently used. As noted by several interviewees, the standard of proof of a "serious and irreparable harm to competition" is too high. Consequently, this makes it particularly difficult to use interim measures in fast moving sectors such as technology and energy, where there are constant developments and negotiations of business terms. In other jurisdictions where interim measures are habitually used in antitrust proceedings, a lower standard of proof is required.

In France, the lower and broader standard of proof for imposing an interim measure in antitrust proceedings simply requires that "the infringement may cause harm to the sector or undertakings concerned". In Belgium,

252 See, e.g., Official Journal of the European Union, *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101/07, 2014.
253 Maier-Rigaud F., *Behavioural Versus Structural Remedies in EU Competition Law*, in Lowe P., Marquis M. and Monti G., *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, Oxford, 2016, 211.
254 Werden G., *Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process*", 76(1) Antitrust Law Journal 65, 70, 2009 citing in support Sullivan L., *Handbook of the Law of Antitrust*, 1977, p. 146.
255 Motta M., Polo M. and Vasconcelos H., *Merger Remedies in the European Union: An Overview*, 2003 in Lévêque F. and Shelanski H., *Merger Remedies in American and European Union Competition Law*, Edward Elgar, 2003, p. 111.
256 Hoehn T., Menezes J., and Young A., *Big Tech Remedies - Recent Antitrust Case Law and Legislative Developments*", 44(2) European Competition Law Review 47, 48, 2023.
257 Kwoka J. and Valletti T., *Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms*, 30(5) Industrial and Corporate Change 1286, 1299, 2021.
258 Ibid.

the light legal standard for interim measures is that "it would not be manifestly unreasonable to think that there might be an infringement".

Second, the procedure for interim measures in the Commission is considered burdensome as it follows the exact same procedure as for prohibition decisions. Similarly to the Commission, in Germany interim measures are rarely used, because in Germany it is more burdensome to obtain an interim order than a prohibition decision.

Third, case law at EU level does not facilitate the adoption of interim measures. The conduct of the Court of Justice of the European Union ("**CJEU**") versus that of courts in jurisdictions such as France, which are more friendly to interim measures, explain the limited uptake of interim measures by the Commission.

Several interviewees including a law practitioner and a Commission case manager cited the judgment of the General Court in the *IMS Health GmbH & Co. OHG* v *NDC Health GmbH & Co. KG* case as a disincentive for undertakings to apply for interim measures, as the General Court suspended the interim measure in question.[259] A case manager from the Commission also pointed out that as a result of the decision, the Commission now fears that the bar of "serious and irreparable harm to competition" is too high or impossible to prove.

5.5 Implementation challenges

5.5.1 Challenges related to the implementation of Article 7 and Article 9 decisions

As noted in literature (Vidal *et al*., 2020), the quality and effectiveness of EU competition law enforcement does not only depend on thorough investigations and adequate fines, but also on the correct implementation of the Commission's decisions. The interviews suggested several challenges with respect to the implementation of remedies.

5.5.1.1 Commitments

With respect to the implementation of commitments decisions, several challenges were pointed out during interviews. Other major challenges include: (i) the cost of monitoring, (ii) potential litigation on the commitments themselves and (iii) encountering new forms of behaviour which are not caught by the commitments. This may mean that a monitoring trustee and the relevant authority must spend time and resources to monitor commitments which are no longer effective. Also, in the implementation and monitoring of remedies, prior to the adoption of a decision, parties are highly motivated to find an effective remedy. However, once the decision is adopted, this dynamic changes and the implementation and monitoring of the remedy becomes a regulatory burden for undertaking(s). Therefore, the case team at the Commission may be left alone with the burdensome task of monitoring, often without much input from the undertaking(s) concerned or the different actors (compared to the design phase, where all actors have a keen interest to influence the design of the remedy).

5.5.1.2 Behavioural remedies

Behavioural remedies may take up a lot of resources and time to monitor.

259 Judgment of the Court of Justice of 29 April 2004, *IMS Health GmbH & Co. OHG* v *NDC Health GmbH & Co. KG*, Case C-418/01.

Notably, behavioural remedies which are carried out over long periods (typically several years) have additional challenges in their implementation and monitoring, since the case team, due to limited resources and pressure to work on other cases, may not be able to spend much time monitoring the remedy. In such cases a monitoring trustee may play an important role. Interviewees from the Commission also corroborated the view that behavioural remedies take up a lot of resources and time to monitor. Additionally, the monitoring of long-term behavioural remedies becomes more difficult with the lapse of time, as the case handlers who have dealt with the case, will begin to leave the relevant unit. Therefore, monitoring trustees are generally seen as useful by interviewed enforcement officials. Despite being costly to monitor, behavioural remedies may not always guarantee a good outcome. The standard approach to competition problems in the tech (and increasingly other sectors) has been to impose behavioural remedies.[260]

5.5.1.3 Structural remedies

According to the literature, structural remedies can be easier for the authorities to administer and may be easier too for the infringing undertaking to implement.[261]

Moreover, although they can be difficult to design, structural remedies are easier to monitor than behavioural ones; indeed, usually either it is not necessary to monitor the former type of remedy or it is but just for a limited and short period.[262]

Structural remedies, then, often have a clear advantage, in that they do not usually take up the competition authority's resources once implemented.[263] Importantly, unlike behavioural remedies, structural remedies may be capable of dealing with the antitrust problem almost immediately.

They may also provide more legal certainty for undertakings.[264]

As noted by several experienced case handlers from the Commission, finding a suitable buyer in the case of divestiture may be a complicated and time-consuming activity.

5.5.1.4 Interoperability and access remedies

A challenge identified in literature is the risk of circumvention with respect to the implementation of interoperability remedies. In particular, the undertaking(s) subject to an interoperability remedy may grant interoperability to competitors but may subsequently circumvent it by introducing a new generation of products or discontinue existing products.[265] Also access remedies raise efficiency and innovation concerns. Specifically, by forcing a firm to share the benefits of its investments and relieving rivals of the incentive to develop comparable assets of their own, access remedies can reduce the competitiveness of an industry. An

260 Kwoka J. and Valletti T., *Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms*, 30(5) Industrial and Corporate Change 1286, 1299, 2021.
261 Werden G., *Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process*, 76(1) Antitrust Law Journal 65, 70, 2009 citing in support Sullivan L., *Handbook of the Law of Antitrust*, 1977, p. 146.
262 Bostoen F. and van Wamel D., *Antitrust Remedies: From Caution to Creativity*, 14(8) Journal of European Competition Law & Practice 540, 550, 2023.
263 Motta M., Polo M. and Vasconcelos H., *Merger Remedies in the European Union: An Overview*, 2003 in Lévêque F. and Shelanski H., *Merger Remedies in American and European Union Competition Law*, Edward Elgar, 2003, p. 111.
264 Hoehn T., Menezes J., and Young A., *Big Tech Remedies - Recent Antitrust Case Law and Legislative Developments*", 44(2) European Competition Law Review 47, 48, 2023.
265 Ibid.

access remedy that is too broad risks distorting markets, impairing competition, and prohibiting perfectly legal and efficient conduct.[266]

An antitrust remedies expert consulted suggested that the implementation of complex access remedies can be a major challenge for all parties, the undertakings concerned, third parties - whether rivals or consumers - and competition agencies themselves. The challenge includes a) the administrative burden on undertakings as well as monitoring trustees and competition agencies - to the extent that they seek to ensure compliance with remedies themselves, b) technical resource requirements and scarce expertise and c) above all the need to interpret ill-defined remedies or remedies that are defined in general conceptual terms but require considerable efforts to become operational and meaningful. In such cases the Commission is called upon to provide guidance which, if not forthcoming, can result in uncertainty and disputes between affected parties and major litigation this delaying the remedies taking effect and generally undermining the effectiveness of remedies. Examples are complex interoperability remedies in Big Tech cases starting with the 2004 AT.37792 – *Microsoft I* decision, airport slot remedies, network capacity remedies in mobile telecoms and the energy sector, etc.

5.5.1.5 Monitoring trustees

By staying close to the business, monitoring trustees can oversee compliance efforts directly and advice and alert the Commission. Monitoring trustees can engage also with third parties and beneficiaries of access remedies more generally and act as initial contact. One observation made by interviewees was that third parties who were complainants in an antitrust case and who knew the case team tended to use their contact to complain fitfully to the Commission about non-compliance. In this case, the monitoring trustee investigates on behalf of Commission and reports to the Commission before a decision is made to open a non-compliance investigation. On the upside, having a monitoring trustee for a longer period in place for up to 10 years guarantees continuity and delivers more consistency.

5.6 Challenges in remedy effectiveness

Ensuring the effectiveness of a remedy is central to the enforcement of antitrust law. This involves both getting the design of remedies right and ensuring their implementation.

5.6.1 Challenges related to the length of Article 7 and Article 9 procedures

With respect to the challenges regarding the effectiveness of Article 7 prohibition decisions, Commission officials and practitioners agreed that infringement procedures can be lengthy.

Consequently, prohibition decisions may not be appropriate in fast changing markets, or where the practice is relatively new, and the antitrust authority wants to resolve it fast.

With respect to challenges regarding the effectiveness of Article 9 commitments decisions, the pertinent negotiations may also be lengthy, but nonetheless an agreement with the Commission is not guaranteed. The effectiveness of commitments decisions is also hindered as the process for their adoption lies largely in the hands of the undertaking(s) concerned, which may have the incentive to prolong the negotiation process for as long as possible, to continue profiting from their anticompetitive behaviour. A further challenge to the

266 Wright J., Antitrust Remedies, Journal of Law 423, Peer-reviewed journal, 2011, p. 433.

effectiveness of Article 9 commitments decisions, as noted by practitioners is that commitments decisions do not entail the acceptance of the alleged infringement and a sanction following the establishment of an infringement, such as a fine. The deterrent effect of the decision on future behaviour is therefore reduced, both in terms of public enforcement and in terms of private enforcement. Victims of an alleged antitrust infringement cannot file for follow on actions for damages pursuant to the Damages Directive, as they would have been able to do by relying upon Article 7 prohibition decisions.

5.6.2 Challenges related to the type of remedy chosen

An obstacle with regards to the effectiveness of behavioural remedies – which may be imposed both under Articles 7 and 9 – is that they do not modify the incentives of the undertaking(s) to engage in anticompetitive behaviour. Rather, behavioural remedies merely suppress the behaviour of undertaking(s) in a regulatory way.[267] Experienced case handlers from the Commission highlight that, when a behavioural remedy ceases to be enforced before market conditions naturally evolve to mitigate the original concerns, the underlying problem remains unresolved. This suggests that the remedy's effectiveness is contingent upon its continued enforcement until the market dynamics sufficiently address the initial anticompetitive behaviour. Moreover, behavioural remedies operate in a constantly changing environment, thereby necessitating constant revision and adaptation.[268]

On the other hand, structural remedies effectively change the incentives of undertakings and have reduced circumvention possibilities.[269] Nonetheless, structural remedies can be compromised in their effectiveness because of inter alia (i) an insufficiently defined scope, (ii) the omission of key assets from the divestiture package and (iii) not enough importance given to the ability of the undertaking(s) to restore competition.[270] Moreover, the effectiveness of a divestiture (structural remedy) depends upon many factors, such as human resources and/or customer relationships.[271]

5.6.3 Coercive versus cooperative approach

A coercive approach to antitrust enforcement comes with its own set of challenges concerning the effectiveness of the decision compared to a cooperative approach. The lack of cooperation may result in heightened legal scrutiny during appeals, as seen in the Intel case. Without the defendant's input or cooperation, the Commission's procedures and substantive assessments face intense judicial review. This can result in criticisms of the Commission's approach and can potentially undermine the enforcement action taken.[272]

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267 Maier-Rigaud F. and Lowe P., *Quo Vadis Antitrust Remedies*, in Hawk B., *Annual Proceedings of the Fordham Competition Law Institute*, New York, 2008, p. 606.
268 Maier-Rigaud F. and Lowe P., *Quo Vadis Antitrust Remedies*, in Hawk B., *Annual Proceedings of the Fordham Competition Law Institute*, New York, 2008, p. 608.
269 Maier-Rigaud F. and Lowe P., *Quo Vadis Antitrust Remedies*, in Hawk B., *Annual Proceedings of the Fordham Competition Law Institute*, New York, 2008, p. 604.
270 Papandropoulos P. and Tajana A., *The Merger Remedies Study - In Divestiture We Trust?*, 27(8) European Competition Law Review 443, 448, 2006.
271 Wang W, *Structural Remedies in EU Antitrust and Merger Control*, World Competition and Economics Review, 2011, pp. 571-576.
272 Ibid., 181.

5.7 Insights from the literature and the expert interviews

5.7.1 General considerations for antitrust remedies

As discussed above, the first step in the remedial stage, whether preparing an Article 7 prohibition decision or an Article 9 commitments decision, is to articulate the specific aim of the remedy to be adopted.[273]

Commentators have argued that as a best practice the remedial stage should be informed by three distinct goals: (a) those underpinning EU competition law itself; (b) those underpinning the enforcement of EU competition law; and (c) "*the specific objectives to be pursued by the remedy vis-a-vis the infringement*" (which depend for the most part on the facts of a case, the market in question, and the infringement in question).[274]

In confining itself to these goals, the Commission can engender coherence and legal certainty in its enforcement practice on remedies.[275] A veritable mix of factors needs to be considered by the authorities in determining the specifics of the correct remedy: the type of infringement at issue; the market concerned; the specific aims to be achieved by the remedy;[276] as well as the resiliency of the marketplace; enforcement costs; an undertaking's previous compliance record; and the strength of the case against the undertaking.[277] When designing a remedy for an antitrust violation, authors also are of the opinion that it is crucial to consider not only the negative aspects of the violation but also any potential beneficial or efficiency-enhancing aspects associated with the undertaking's actions. This consideration is important for ensuring respect for the concept of proportionality in antitrust enforcement.[278]

According to insights from expert and Commission case handlers interviewed, the specific decision whether to pursue a prohibition decision or a commitments decision in antitrust enforcement should involve balancing the benefits of clear-cut legal outcomes and deterrence with the advantages of early case closure. Prohibition decisions provide clarity, set precedents, and deter future anticompetitive behaviour through penalties. In contrast, commitments decisions allow for quicker resolution, reducing resource burden and disruption. Factors such as severity of behaviour, evidence strength and parties' willingness to cooperate must influence this decision, alongside legal framework and case precedents. Achieving a balance between these factors ensures effective antitrust enforcement while minimizing unnecessary delays and costs. This approach yields significant savings in Commission resources and facilitates the resolution of antitrust disputes through remedies that not only restore competition but also deliver benefits to consumers, suppliers, rivals and innovators.

Furthermore, as we have seen above, the design of an appropriate remedy requires a cost-benefit analysis which contemplates the relative advantages and disadvantages of the potential behavioural remedies and structural remedies. For example, structural remedies should be preferred in cases where there is a risk of repetition of infringements and especially in complicated corporate settings whereas behavioural remedies have the advantage of inherent flexibility in that they can often be tailor-made for specific undertakings and

273 Kovacic W., *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31(4) Connecticut Law Review 1285, 1999, p. 310.
274 Vasconcelos R. L., *The Adoption of Remedies under Regulation 1/2003: Between Success and Coherence*, 5(2) Market and Competition Law Review 147, 2021, p. 150.
275 Ibid.
276 Vasconcelos R. L., *The Adoption of Remedies under Regulation 1/2003: Between Success and Coherence*, 5(2) Market and Competition Law Review 147, 2021, p. 165.
277 Cavanagh E., *Antitrust Remedies Revisited*, 84(1) Oregon Law Review 147, 2005, pp 203-204.
278 Kovacic W., *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31(4) Connecticut Law Review 1285, 1313, 1999.

market realities in order to achieve a desired outcome.[279] More generally, the distinction between behavioural and structural remedies are unclear and blurred. In the following section, we elaborate further on best practices with respect to the design and implementation of remedies with respect to Article 7 infringement and Article 9 commitments decisions.

5.7.2 Insights related to the design of Article 7 decisions

As discussed above, a general principle, with respect to the best practices for designing Article 7 decisions, the Commission should design remedies which (i) are linked to the nature of the problem, (ii) which shall be effective in alleviating the competition concern and (iii) whose implementation and enforcement costs are not greater than the benefits expected from their implementation and enforcement.[280]

Behavioural versus structural remedies. The requirement under Article 7 of Regulation 1/2003 that structural remedies should only be imposed when no behavioural remedy would resolve the issue with the same effectiveness is considered by several commentators and experts interviewed in this Study to be an excessive hurdle as it is challenging to demonstrate the absence of alternative remedies. As a best practice, it has been argued that the Commission should consider lowering the hurdle to impose structural remedies, along the lines of the US, where the subsidiarity of structural remedies does not exist. In this regard, following interviews with case handlers from the Commission, structural remedies are recommended in cases where the structure itself of the concerned undertaking makes the risk that the behaviour will be repeated high. The first and only case in which structural remedies have been imposed through an Article 7 decision is case AT.39759 – *ARA foreclosure.*[281]

Bifurcation of infringement and remedies decision. With reference to the design of complex remedies in antitrust investigations, particularly for Big Tech cases, an interesting suggestion comes from the DoJ.[282] They are of the opinion that in antitrust cases there may benefit from the separation of the remedies decision from the infringement decision establishing liability. Although, they also warn that while this approach can be beneficial, it should be decided on a case-by-case basis.

According to a European remedies expert interviewed, adopting this bifurcation practice in the EU, similar to the approach in the United States, could lead to more effective and targeted antitrust enforcement, particularly in complex cases involving Big Tech. One major advantage of this bifurcation is that once infringement based on a well-defined theory of harm is confirmed, it becomes easier to define targeted remedies that address specific issues within the industry context, using market evidence from the investigation. This alignment between remedies and the theory of harm ensures that the remedies are more precise and effective. Additionally, separating the remedies decision from the liability decision allows the involved parties to focus solely on the remedies after liability is established, facilitating market testing, including experimental testing of demand-side remedies. This can ensure the remedies are fit for purpose and increase cooperation between the infringing party and the Commission. A well-reasoned, fully market-tested and clear remedies decision is more likely to be actionable and verifiable. As the remedy expert cited out there is already a precedent in European competition law enforcement where the EUMR distinguishes for the review of completed mergers between a prohibition decision in Article 8(3) and a restorative

279 UNCTAD, *Appropriate Sanctions and Remedies*, TD/RBP/CONF.7/5, 10, 2010.
280 Larouche P., *Legal Issues Concerning Remedies in Network Industries' Remedies in Network Industries: EC Competition Law vs. Sector-Specific Regulation*, Peer Reviewed Journal, 2004, p. 4-7.
281 Structural remedies had been previoulsy made binding on the concenrned undertakings through Article 9 decisions, starting with case AT.393888 – *E.ON*.
282 Ibid, 191.

measures decision in Article 8(4), and where in practice the two decisions do not typically coincide (e.g., *M.784 – Kesko/Tuko*, *Illumina/Grail*).

Drawbacks of this approach, though, as pointed out by the expert interviewed, are that it could prolong investigations and require significant additional resources to draft two separate decisions, which could be burdensome for both the Commission and the involved parties. Therefore, bifurcation should be reserved for particularly complex cases where the benefits outweigh the additional costs.

As the current practice of including remedies in an Article 7 infringement decision is not mandated by Regulation 1/2003, bifurcation could theoretically be introduced without changes to secondary legislation. However, incorporating this option in a future revision of Regulation 1/2003 would allow for specifying conditions for bifurcation and setting timelines for issuing a separate remedy decision (e.g., 6-9 months).

5.7.3 Insights related to the design of Article 9 decisions

Market test. Interviewees, and especially practitioners suggest that the Commission should be more transparent with regards to the information given to market participants and the feedback provided to undertakings. Also, it is pointed out that the Commission should be careful when improving the process of market testing, to avoid the process becoming overly bureaucratic and possibly inadequate to deal with the speed necessary for intervention in fast moving markets. Various interviewees stressed the importance of recruiting technical experts when conducting the market test and when designing remedies, especially in the Tech sector. Technical experts would be able to provide more context and a better understanding of what is occurring in the business and in the sector, rather than the mere reliance on the views of the Commission, the parties and competitors.

Interim measures. Despite limited recourse by the Commission up to present, case handlers of the Commission noted that interim measures would be a useful tool ahead of the adoption of a commitments decision. In particular, interim measures would stop the undertaking(s) concerned from profiting from an alleged anticompetitive infringement, thereby incentivising them to discuss potential remedies with the Commission. The adoption of interim measures by the Commission would be particularly suitable ahead of a commitments decision in fast moving digital markets. These markets are characterised by network effects, where unless there is a swift intervention, there could be a serious and irreversible impact on competition.[283]

Remedies in the tech sector. With respect to remedies in the tech sector, it is recommended that the remedies are tailored to foresee technological changes. An interesting suggestion was made in one interview with a practitioner that independent advisors to the Commission can help to overcome information asymmetries in designing remedies (including monitoring interim measures) as happens sometimes in complex merger cases with upfront or fix-it first remedies.

5.7.4 Insights related to the implementation of remedies

The literature emphasises a number of crucial points in ensuring the proper implementation of any chosen antitrust remedies. These points include the following:

283 Mantzari D., *Interim Measures in EU Competition Cases: Origins, Evolution and Implications for Digital Markets, Mantzari, Despoina, Interim Measures in EU Competition Cases: Origins, Evolution and Implications for Digital Markets (February 23, 2020). Available at SSRN: https://ssrn.com/abstract=3544877 or http://dx.doi.org/10.2139/ssrn.3544877,* 2020, pp. 15-17.

Monitoring implementation. The Commission should monitor an undertaking's implementation of the remedy and its compliance with the specifics of the decision imposing remedies.[284] The extent of any monitoring may depend, however, upon the type of remedy adopted. One should monitor actively behavioural remedies as an undertaking may have incentives to circumvent or avoid implementing such a remedy. Whilst a structural remedy may need a degree of monitoring, this need usually only manifests itself for a short period of time (perhaps for a couple of months), as once it is implemented an undertaking should no longer be incentivised to violate competition law.[285] In certain cases, early monitoring can be vital to the success of structural remedies and the need for it should not be overlooked when such remedies are contemplated.[286]

Flanking measures can be very important in securing effective implementation of remedies; such measures can include information obligations (for example, providing information to customers concerning the remedy adopted).[287]

The market testing of remedies can be an important measure that allows an authority to plan for any problems that could occur in the implementation of remedies.[288] Any internal testing of an envisaged compliance mechanism by the infringing undertaking should be supervised by the authority prior to implementation.[289]

Considering carefully the specific details of implementation, as well as how it will be governed is important in ensuring successful implementation.[290] Governance needs to be considered not only in the short term; the longer term aspect of governance impacts upon effectiveness in implementation too: "*with effective governance and a clearly stated intention for the intervention, remedies can potentially be flexed over time to remain true to the original remedy intention, in the face of market changes or technological developments*".[291] The Commission should intervene swiftly and resolutely if the chosen compliance mechanism proves to be dysfunctional, and it should do so irrespective of the status of an appeal against the prohibition decision.[292]

Monitoring trustee. A key takeaway from interviews with the Commission, national competition authorities and practitioners was the importance of the role of the monitoring trustee, particularly in those cases where implementing the remedy would involve engagement with technicalities that are outside of the Commission's general competence.[293] Therefore, as a best practice, it was recommended by various interviewees to enhance the role of the monitoring trustee and ensure her/his appointment upfront. The need for a monitoring trustee is not simply founded upon a lack of Commission knowledge on the specifics of a given industry; rather, a monitoring trustee is needed as the Commission cannot trust that market

284 See Höppner T., *Antitrust Remedies In Digital Markets: Lessons For Enforcement Authorities From Non-Compliance With EU Google Decisions*, Hausfeld Competition Bulletin, 2020, available at: https://ssrn.com/abstract=3739813.
285 Maier-Rigaud F., *Behavioural versus Structural Remedies in EU Competition Law*, in Lowe P., Marquis M. and Monti G., *European Competition Law Annual 2013, Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, Oxford, 2016, p. 210.
286 Papandropoulos P. and Tajana A., *The Merger Remedies Study - In Divestiture We Trust?*, 27(8) European Competition Law Review 443, 448, 2006.
287 Maier-Rigaud F. and Lowe P., *Quo Vadis Antitrust Remedies*, in Hawk B., *Annual Proceedings of the Fordham Competition Law Institute*, New York, 2008, p. 604.
288 Italianer A., *Legal Certainty, Proportionality, Effectiveness: The Commission's Practice on Remedies*, SPEECH/12/07, 2012, p. 9.
289 Höppner T., *Antitrust Remedies In Digital Markets: Lessons For Enforcement Authorities From Non-Compliance With EU Google Decisions*", Hausfeld Competition Bulletin, 2020, available at: https://ssrn.com/abstract=3739813.
290 Fletcher A., *The Role of Demand-Side Remedies in Driving Effective Competition: A Review for Which*?, Centre for Competition Policy, University of East Anglia, 2016, p. 9.
291 Ibid.
292 Höppner T., *Antitrust Remedies In Digital Markets: Lessons For Enforcement Authorities From Non-Compliance With EU Google Decisions*", Hausfeld Competition Bulletin, 2020, available at: https://ssrn.com/abstract=3739813.
293 Ritter C., *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, 7(9) Journal of European Competition Law & Practice 587, 597, 2016.

participants will implement properly a remedy.[294] For the reasons above, one needs to be careful in selecting the monitoring trustees: "*all of the candidates put forward must be both technically qualified and independent from the parties, so that they can perform the task(s) entrusted to them*".[295] Interviewees stressed that with regards to the facilitation of the role of the monitoring trustee, when necessary, technical experts should be additionally employed. Furthermore, involving stakeholders such as businesspeople or technical experts in the monitoring of remedies would be advantageous, as such parties would be able to provide a better understanding of the implications of what is going on in the undertaking(s) concerned. Interviewees also stressed the importance of briefing and supporting the monitoring trustee in the early stages of monitoring, as the critical point of remedy implementation, to ensure a clear understanding of the most salient points it needs to oversee. The Commission remarked the opportunity to spend time and resources to closely monitor the implementation of remedies in selected strategic cases. This is because the case team can benefit a lot from learning through their own experience, in order to better design future remedies. For instance, the case of AT.393888 – *E.ON* was cited as an example where the knowledge acquired by the Commission - in relation to power plant divestitures - by closely monitoring the remedies imposed, proved very useful for later electricity cases.

Literature points out that in relation to behavioural remedies, and especially given that they are becoming ever more complex,[296] the Commission should rely for monitoring not only on monitoring trustees, but also on ADR mechanisms and compliance committees.[297] Case handlers from the Commission also noted that remedy implementation can be strengthened by enhancing the certainty of enforcement of behavioural remedies through arbitration clauses, quick enforcement mechanisms and sufficient penalties for effective deterrence in the case of non-compliance. Specific best practice considerations regarding the implementation of dispute resolution mechanism include experience with arbitration and mediation with third parties. Here the challenge is that third parties rarely want to spend the money to arbitrate particularly SMEs. However, a monitoring trustee´s mediation role is seen as very important. One example of an extensive arbitration at the International Court of Arbitration which was resolved once the Commission provided a one-page letter clarifying the interpretation of a clause in the commitments suggests that the Commission should be more proactive in clarifying the interpretation of commitments early in the process.

In relation to the implementation of structural remedies, several interviewees including a law practitioner suggested that the Commission should only accept structural remedies when they are offered upfront by the undertaking before the Article 9 decision, in order to ensure their effectiveness and their straightforwardness. However, it could suffice that the remedies accepted lead to the initiation of the divestment procedure, rather than its finalisation.

The interviews further revealed a number of crucial points with respect to best practice in the role of the monitoring trustee in the implementation of remedies. The arguments raised included:

- It is important to appoint a monitoring trustee to mitigate enforcement costs and to signal to the industry that the specific conduct is being monitored moving forward, particularly for behavioural remedies which are carried out over a long period of time and are difficult to monitor.

294 Papandropoulos P. and Tajana A., *The Merger Remedies Study - In Divestiture We Trust?*, 27(8) European Competition Law Review 443, 446, 2006.
295 Botteman Y. and Patsa A., *Towards a More Sustainable Use of Commitment Decisions in Article 102 TFEU Cases*, 1(2) Journal of Antitrust Enforcement 347, 372, 2013.
296 Hoehn T., *Challenges in Designing and Implementing Remedies in Innovation Intensive Industries and the Digital Economy*, 2020 in Gerard D. and Komninos A., *Remedies in EU Competition Law, Substance, Process and Policy*, Wolters Kluwer, 2020.
297 Weber Waller S., *The Past, Present, and Future of Monopolization Remedies*, 76(1), Antitrust Law Journal 11, 12, 2009.

- An independent monitoring trustee should be appointed to oversee implementation, as opposed to an industry regulator, who might be compromised in their ability to spot competition concerns.
- One should brief and support the monitoring trustee in her/his early period of monitoring remedies, which is the most important period, to ensure that she/he understands which elements she/he should monitor.
- The use of an independent monitoring trustee, rather than the Commission, avoids confirmation bias, as some case teams would naturally be tempted to see positive effects of the remedies that they designed.
- One should involve stakeholders such as businesspeople or technical experts in the monitoring of the remedy, as such parties would be able to provide a better understanding of the implications of what is going on in the undertaking concerned.
- One should spend time and resources on closely monitoring enforcement in selected strategic cases, as the case team can benefit significantly from learning through their own experience.

5.7.5 Insights related to the implementation of Article 8

With regards to best practices related to the implementation of interim measures pursuant to Article 8 several interviewees suggested that the procedure for interim measures becomes less burdensome. In this way, interim measures could become - as in France - a very useful tool due to their ability to produce very swift outcomes in markets, particularly in fast moving sectors such as in electricity and telecoms.

5.7.6 Insights related to the effectiveness of Article 7 and Article 9 decisions

Enforceability. The effectiveness of antitrust remedies, regardless of whether they are pursuant to Article 7 or Article 9, and regardless of whether they are behavioural or structural in nature, depends on their enforceability and timeliness. Enforceability refers to the fact that an antitrust remedy should not be too costly or complex to implement. Timeliness refers to the fact that the remedy should be effective in addressing the identified competition concern at the point in time that the remedy is implemented. The requirement of timeliness is particularly important in fast moving markets.[298]

Stringency of remedies. To ensure that an antitrust remedy is effective, the Commission could impose a more stringent remedy, such as for example a structural remedy, if the undertaking(s) do not comply with lighter behavioural obligations.[299] One such example is the crown jewel obligation, which can be applied in merger control when short-term behavioural obligations are not respected and undertaking(s) concerned must divest significant assets.

Monitoring of commitments decisions. Remedies imposed via commitments decisions need to be monitored as much as those included in prohibition decisions, otherwise one risks irreparable damage to the competitive process. To ensure proper implementation, the text of the commitments decision needs to be clear and unambiguous, as this will facilitate monitoring and minimise disputes about implementation between third parties and the committing undertaking. To ensure effective antitrust interventions involving commitments decisions, one should allow in exceptional circumstances the possibility of re-opening

298 Vasconcelos R. L., *The Adoption of Remedies under Regulation 1/2003: Between Success and Coherence*, 5(2) Market and Competition Law Review 147, 2021.
299 Hoppner, T., *Google's (Non-) Compliance with the EU Shopping Decision*, European Economics: Microeconomics & Industrial Organization eJournal, 2020.

proceedings *"in cases where, despite full implementation, the competition concerns that prompted the investigation remain largely unresolved"*.[300]

Certainty of contract enforcement in commitments. It was recommended by practitioners that to ensure the effectiveness of antitrust remedies, certainty on the contract enforcement side should be enhanced - since behavioural remedies in the framework of commitments decision result in a contract between undertakings. This can be done through arbitration clauses, quick enforcement mechanisms and penalties for non-compliance.

Future proof remedies. To be effective, antitrust remedies should be as future proof as possible. With access and/or interoperability remedies, this may involve trying to capture the overall principle behind the remedy via a *"catch all upfront commitment"*, to make sure that all ways in which the remedy could be possibly circumvented are caught. This can be very useful in fast moving technological markets that can bring rapid changes in a business.

Guidance role of the Commission. The effectiveness of commitments could be enhanced by encouraging the Commission to come forward early, in order to provide guidance on the interpretation of commitments which may be raised in a dispute. Such a practice would prevent the parties from spending a lot of time and resources litigating a dispute on the interpretation of commitments, which could have been resolved by an early intervention of the Commission and/or the Legal Service.

Duration of remedies. In fast moving sectors, it is recommended that the Commission foresees for the expiration or review of remedies which may have been effective at a certain point in time but are no longer necessary.[301] This can be achieved through the utilisation of sunset clauses, which provide for the automatic expiration or suspension of remedies, if and when they are deemed as no longer necessary.

Non-compliance. Another best practice designed to improve effectiveness of antitrust remedies would be to adopt provisions similar to the ones included in the Digital Markets Act ("DMA") 2022 where in Article 18 the Commission can impose additional remedies for repeated systematic non-compliance with the DMA rules of conduct, such as further behavioural or even structural remedies. Such additional remedies would include divestment obligations.[302]

300 Botteman, Y., Patsa, A, *Towards a more sustainable use of commitment decisions in Article 102 TFEU cases*, Journal of Antitrust Enforcement, 2013, pp. 347-374.
301 Ibid.
302 Hoehn T., Menezes J. and Young A., *Big Tech Remedies - Recent Antitrust Case Law and Legislative Developments*", 44(2) European Competition Law Review 47, 58, 2023.

6. Ex post evaluation of twelve cases

The core part of this Study is the ex post evaluation of remedy implementation and effectiveness in the twelve significant EU antitrust cases that we are about to present.

As documented in Section 4.2.4 these cases have been carefully selected from the population of all EU non-cartel antitrust cases of the last twenty years, excluding Art. 7 cases completed with a simple cease-and-desist orders, cases that were under ongoing judicial review at the time of the selection, and cases that were broadly or fully annulled by the EU courts. The remaining, eligible cases were then ranked based on quantitative measures of case importance and remedy importance. The highest-ranking cases were lastly selected, while also ensuring a balanced sample in terms of legal basis (Article 101 or Article 102 TFEU), affected industries, type of competition concerns, type of remedies and year of the decision. By looking at the most significant cases, we expect to learn the most about remedy implementation and remedy effectiveness. By having a balanced sample of cases, we want our learnings to reflect the overall experience of the Commission with antitrust remedies over the last twenty years, without focussing on specific industries, competition concerns, remedy types or enforcement eras, bearing at the same time in mind how heterogeneous the antitrust space is.[303]

In performing each of our case studies we have relied on a common methodology to retrospectively evaluate the implementation and effectiveness of the remedies that were imposed or made binding on the concerned undertakings. In particular, for each case study we started with an examination of the official case related documents, such as the decision, the press release and the (proposed) commitments. This was accompanied by extensive OSINT research to gain a clear understanding of the specifics of each case. Following this initial information gathering, we prepared extensive questionnaires and we conducted in person interviews with members of the Commission case teams that had worked on the case. During these interviews, we asked questions about the substantive and procedural aspects of remedy design, implementation, and effectiveness. These interviews were invaluable in various ways, including the clarification of open questions that could not be answered by the assessment of official documents and OSINT research, the confirmation of the intended remedy objectives, as well as the identification of relevant stakeholders, such as customers and competitors of the decision's addressee.

After analysing all the information gather to this stage, we then prepared separate questionnaires for the relevant stakeholders in a decision, such as the addressee, its legal representatives, monitoring trustee (if appointed), competitors, customers, relevant public bodies and others. We reached out to the identified stakeholders, asking for their input, either in an interview or in writing, based on their preferences and availability. The overall process was iterative as new input from a stakeholder generally led to new/different questions for other stakeholders. Finally, based on all gathered information, we evaluated the level of implementation and the level of effectiveness against the Commission's intended objective.

The case study approach allows us to comprehensively explore the detailed context of and the complexities involved in each individual case. While this is a feature of case studies that is generally appreciated by modern

[303] Our exercise is the first of this scope in the antitrust area, as it covers twelve cases across a wide range of industries, competition concerns, remedy types and over time. In our knowledge, previous studies have been narrower in scope, such as the two sectoral studies in the energy and telecommunication sectors conducted on behalf of the Commission in 2015: "The economic impact of enforcement of competition policies on the functioning of EU energy markets", 2015, report prepared by IFC Consultancy Services and DIW Berlin for DG Comp, including a case study on antitrust cases AT.39388 – *German electricity wholesale market* and AT.39389 – *German electricity balancing market*; "Economic impact of competition policy enforcement on the functioning of telecoms markets in the EU", 2015, report prepared by Lear, DIW Berlin and Analysys Mason for DG Comp, including a case study on (pure cease-and-desist) antitrust case AT.39525 Telekom Polska.

research in empirical industrial organisation, this feature is particularly valuable in the context of non-cartel antitrust enforcement, where the overall number of cases is limited and the specificities of the individual case vast. The case study methodology is in other words very well suited to investigate the extent to which and the reasons why certain remedies turned out in practice to be implemented and effective in attaining their intended objective.[304]

At the same time, it is important to acknowledge the limitations of the case study approach. The main limitation of our ex post evaluation is the reliance on mostly qualitative information and on stakeholder input. While stakeholders offered countless invaluable insights for our Study and while we have striven to gather facts rather than opinions, in processing their input we have been mindful of the interests they may represent and we have sought to form a balanced view by combining the input of stakeholders with different interests. To all of our interview partners we have granted anonymity and have ensured the protection of the business secrets of their employers or clients.

6.1 AT.37792 – *Microsoft I*

6.1.1 Introduction

This case study deals with an Article 7 decision that was adopted following an Article 102 TFEU investigation which ordered to end the infringements and included a set of behavioural remedies for each of the two competition issues (hereinafter indicated respectively as "*interoperability information*" or "i*nteroperability issue*" and "*tying*" or "*tying issue*").[305]

The said decision (hereinafter the "Decision") was issued by the Commission on 24 March 2004 against the US software company Microsoft Corporation ("Microsoft") for abusing its dominant position in certain relevant markets.

The investigations had started on 10 December 1998, when Sun Microsystems ("Sun"), a US company, made an application to the Commission ("Sun's Complaint"). On 1 August 2000, the Commission sent an initial SO to Microsoft focusing on the interoperability issues which formed the basis of Sun's Complaint. Microsoft responded to the first SO on 17 November 2000. After having launched an investigation, on 30 August 2001 the Commission sent a second SO, which concerned the tying issue, represented by the incorporation of "Windows Media Player" in "Windows 2000". On 16 November 2001, Microsoft responded to the second SO. From April to June 2003, the Commission engaged in a wider market investigation ("the 2003 market investigation") and, in the light of the findings of the market enquiry, also in relation with the Commission's existing objections, a supplementary SO was issued on 6 August 2003 to which Microsoft replied on 17 October 2003. On 12, 13 and 14 November 2003, an Oral Hearing took place as requested by Microsoft.

The infringements have been perpetrated (i) from October 1998 until the date of the decision, by refusing to supply interoperability information and by refusing to allow its use for the purpose of developing and distributing work group server operating system products ("WGOS") in the market; and (ii) from May 1999 until the date of the decision by making the availability of the Windows Client PC Operating System ("Windows") conditional on the simultaneous acquisition of Windows Media Player ("WMP").

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[304] To this end see the discussion of various methods in the evaluation of competition policy provided in Ilzkovitz, F. and Dierx, A., *Ex-post economic evaluation of competition policy enforcement: A review of the literature*, 2015. The discussion summarises advantages and disadvantages of various research methods and praises the use of the case study approach for allowing for different methodologies and a more detailed assessment.

[305] Grimaldi took the lead in the preparation of this case study. NERA authors of the report abstained from participating in this case study as NERA advised Microsoft during this Commission investigation. For similar reasons Thomas Hoehn abstained from the drafting.

In the same period, Microsoft was also under antitrust scrutiny in the United States ("the US proceedings"). The US proceedings and the resulting 1999 Findings of Fact, 2000 Conclusions of Law, and 2000 Final Judgment were consistent with the interoperability issued investigated by the Commission. However, the relevant products and procedures were different, as were the remedies applied. The US Department of Justice in the end settled with Microsoft. No tying investigations were started in the US in that period.

The relevant markets for interoperability information: (i) PC operating systems, which control basic functions of a client personal computer and are designed to be used by one person at a time and that may be connected to a computer network; (ii) work group server services, which are the basic services that are used by office workers in their daily work - such as sharing files stored on servers, sharing printers, having their rights as users administered centrally by the organization's IT department; and (iii) WGOS, which are operating systems designed to deliver these services collectively to a relatively small number of PCs linked together in small to medium-sized networks.

The relevant market for tying: streaming media players, which are client-side software applications whose functionality is related to decoding, decompressing and playing digital audio and video files downloaded or streamed over the Internet, as well as those stored on physical supports such as CDs and DVDs.

The interoperability issue. The Commission decision concluded that Microsoft refused to provide Sun with information enabling the latter to design WGOS. Indeed, the decision stated that for Sun to enter the market, Microsoft needed to provide the specifications of the relevant technical protocols, without having to disclose the Windows software code. Furthermore, in accordance with the decision, the refusal at stake: (i) was part of a broader pattern of conduct of refusing the relevant information to any competitor in the WGOS market; and (ii) constituted a disruption of previous levels of supply, since analogous information for previous versions of Microsoft's products had been made available to Sun and other competitors. The Commission found that Microsoft's refusal risked eliminating competition in the market for WGOS because the input refused was indispensable for competitors operating in the market and not in any other way substitutable, limiting technical development and indirectly harming consumers and contravening Article 102 TFEU (ex Article 82 EC Treaty).

Therefore, Microsoft's refusal was deemed an abuse of its dominant position. The Commission's decision ordered to bring the infringement to an end, imposing to Microsoft the disclosure of the previously withheld information, as well as license interoperability details. The documentation had to be comprehensive enough for a skilled industry engineer to achieve interoperability between Windows servers and non-Microsoft servers, as well as between Windows clients and non-Microsoft servers.

This posed come challenges. The Commission had to establish the required level of interoperability. Additionally, the remedy imposed on Microsoft had to be forward-looking, necessitating updates to the disclosed information to adjust to new Microsoft's products. Second, to ensure the accuracy and completeness of the information provided by Microsoft, the decision required Microsoft to propose a mechanism to assist in monitoring compliance. This led to the appointment of a monitoring trustee to enforce both the interoperability and tying remedies.

The tying issue. According to the Commission's decision, Microsoft infringed Article 102 TFEU by tying WMP with Windows. Indeed, the Commission noted that: (i) Microsoft held a dominant position in the PC operating system market; (ii) Windows and WMP were two separate products; (iii) Microsoft did not give customers a choice to obtain Windows without WMP; and (iv) this tying limited competition.
The Commission found evidence that WMP usage increased due to tying. Finally, the Commission rejected Microsoft's argument related to the alleged efficiency and the benefits for consumers of having a preinstalled media player, holding that PC manufacturers could ensure a response to the demand by installing a media player of their choice and it was not required that Microsoft selected the media player for the consumers.

The Commission concluded that tying WMP with Windows protected Microsoft from effective competition, thereby reducing investment in media player innovation and limiting consumer choice.
Concerning the tying issue, the decision ordered Microsoft to cease-and-desist from tying WMP with Windows. The Commission decision ordered Microsoft to offer to end-users and Original Equipment Manufacturers ("OEMs") for sale in the EEA a full-functioning version of Windows that did not incorporate WMP ("Windows N"), as an alternative to the Windows incorporating WMP.

6.1.2 Identification of the remedies subject to evaluation

Interoperability information. The Commission's decision ordered Microsoft to disclose the information related to the protocol specifications and to ensure interoperability with the essential features that define a typical WGOS. The order applied not only to Sun, but to any undertaking that had an interest in developing in the WGOS market. The remedy aimed to enhance the ability of Microsoft's competitors to develop products that interoperate with the Windows domain architecture and thus compete effectively with WGOS.

The Commission's decision set further conditions under which Microsoft had to disclose the information and allow the use thereof. The decision ordered that the disclosure conditions had to be (i) reasonable and (ii) non-discriminatory. Therefore, any remuneration that Microsoft could have charged for supply ("pricing elements") or to any restrictions as to the type of products in which the information could have been implemented had to respect the mentioned requirements. Finally, terms and conditions of disclosure have been imposed, including the pricing elements imposed by Microsoft had to be sufficiently predictable. Lastly, Microsoft was ordered to disclose the relevant information as soon as it produced a working and sufficiently stable implementation of the information in its products.

Tying. The said decision ordered Microsoft to offer to end-users and OEMs for sale in the EEA a full-functioning version of Windows that did not incorporate WMP. Microsoft retained the right to offer a bundled version of Windows and WMP. Furthermore, the Commission decision ordered Microsoft to refrain from using any means which would have had the equivalent effect of tying WMP to Windows, preventing any circumvention of the remedy. For example by giving discounts, by providing selective access, by promoting WMP over competitors' products through Windows, or removing or restricting the OEMs and users' freedom to choose the unbundled version of Windows.

6.1.3 Identification of the main issues investigated for ex post evaluation

The ex-post evaluation conducted was aimed at thoroughly assessing whether (and to what extent) the remedies under examination have been implemented and have been effective in addressing the competition concerns expressed by the Commission, therefore achieving the objectives of the Decision. The relevant objectives can be divided according to the issues of interoperability and tying.

Interoperability information. The relevant objectives are: (i) improving competition in the market of WGOS, allowing the access to new competitors through compatible and interoperable systems (such as between Windows servers and non-Microsoft servers as well as between Windows clients and non-Microsoft servers); and (ii) enabling technical development in the interest of consumers.

Tying. The relevant objectives are: (i) improving competition in the market of Media Players; (ii) providing the consumers with a free choice between Windows with preinstalled WMP and an unbundled version of Windows; and (iii) preventing a network effect linked to the usage of WMP.

6.1.3.1 Implementation issues

Interoperability information. The intended objectives are: (i) to evaluate whether the disclosure of the interoperability information enabled competitors to develop and design WGOS and to distribute the latter in the market; and (ii) to evaluate whether new competitors have been allowed to access the downstream market and any technological development was produced as a consequence of the implementation of the interoperability remedy.

Tying. One evaluated whether Microsoft implemented the remedy, proposing a version of Windows unbundled from WMP.

6.1.3.2 Effectiveness issues

Interoperability information. The intended objectives are: (i) to evaluate whether the disclosure of the interoperability information enabled competitors to develop and design WGOS and to distribute the latter in the market; and (ii) to evaluate whether new competitors have been allowed to access the downstream market and any technological development was produced as a consequence of the implementation of the interoperability remedy.

Tying. One evaluated whether there was an increase of competition in the market of Media Player as a consequence of the introduction in the market of Windows N and any advantage for consumers have been produced.

6.1.4 Methodology and sources of evidence for the ex post evaluation

Our ex-post evaluation was carried out on the basis of a broad body of evidence (confidential documents, articles and literature) and through a wide-ranging consultation of interested stakeholders, including involved lawyers, developers, consumer associations, industry and business organizations. The consortium duly cross-checked the results obtained.

6.1.5 Main findings of the ex post evaluation of the effective implementation of the remedy

Interoperability information. Microsoft did not comply entirely with the interoperability remedy of disclosing the refused information until 2008, four years after the 2004 Decision, when FRAND terms in the Work Group Server Protocol Program ("WSPP") License Agreements were established. Therefore, disclosure did not occur under the conditions and in the timely manner designed by the case team of the Commission.

Informal complaints led to a Commission Decision of 27 February 2008 imposing periodic penalty payments, for failure to comply with the March 2004 antitrust decision, which Microsoft appealed and which led to the 2012 Court of First Instance Judgment.

Some of the market participants interviewed pointed out that the Commission could have included more specific FRAND conditions in the operative provisions of the Decision. Indeed, since the principles and guidance were set out only in the (non-binding) recitals of the Decision, Microsoft was able to cause a four-year delay until WSPP licenses were agreed, and litigation until 2012 on fees and royalties. These problems were predicted by some Market Participants who urged the Commission to take the disclosure process out of Microsoft's control and give it, as an initial matter, to the trustee and his staff.

More specifically, although Microsoft released the source code for interoperability within the deadline set by the Commission's decision, it delayed and imposed constraints on the disclosure of the specifications. These specifications, which could be implemented in various ways other than the source code Microsoft tried to

enforce, had to be sufficient to enable a supplier of a workgroup server operating system to develop a competing product that fully interoperates with the Microsoft workgroup server operating system.

According to the evaluation made by the experts at the time of the implementation of the Decision, the protocol information initially provided was inadequate to meet the goals of the Decision, as it was not sufficiently complete and correct to be implemented in a commercially practicable manner.

However, deciding whether to impose or not a price before knowing the completeness of the information to be disclosed was not an easy task for the case team of the Commission; neither was designing more detailed FRAND conditions, in particular considering the asymmetry of information.

In light of Microsoft's non-compliance with the decision, the Commission imposed on Microsoft a substantial periodic penalty payment. Eventually, the accumulated daily fines reached 1.5 billion EUR by October 2007, at which point Microsoft offered a lower price that the Commission accepted and determined the final implementation of the imposed remedy. In 2008, Microsoft agreed to two versions of the WSPP Agreements: one including a patent license and one without, to facilitate open-source implementation. However, the patent license was priced at 50,000 EUR, while the non-patent license was 10,000 EUR.

Eventually, the Commission had to initiate enforcement proceedings. It adopted a Decision on 27 February 2008, for failure to comply with the March 2004 antitrust decision, which Microsoft appealed, and which led to a judgment on June 27, 2012, eight years after the 2004 Commission Decision.

The monitoring trustee made credible attempts to monitor implementation of the interoperability remedy, but the remedy remained without useful effect. Eventually, the Court of First Instance annulled the provision of the Article 7 Decision relating to the monitoring trustee stating that the delegation of investigative powers - which only the Commission is authorized to exercise - to a monitoring trustee, lacked a legal basis.[306] Furthermore, it was established that the Commission had to pay the monitoring trustee rather than Microsoft, so the Commission was obliged to reimburse the addressee. A Commission Decision of March 3, 2009 ended the monitoring trustee's mandate.

Tying. Microsoft did comply with the behavioural remedy offering a full-functioning version of Windows without the incorporation of WMP in the EEA, without a price difference between the bundled and unbundled versions of Windows.

No issues in the implementation of the remedy have arisen.

6.1.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

Interoperability information. The remedies were necessary but not sufficient to achieve the objectives of the Commission decision. Specifically, the open wording of the operative provisions of the remedies – combined with Microsoft's strategy of minimizing the impact of the remedies – allowed Microsoft leeway to delay implementation by inadequate disclosures, and by reserving the right to charge for interoperability information even though the interoperability specifications had no intrinsic value.

306 See Judgment of the Grand Chamber of the Court of First Instance of 17 September 2007, Microsoft v *Commission*, T-201/04, ECLI:EU:T:2007:289. Paragraph 1271

As a lesson learned, the Commission could have included this reasoning in the explanatory section of the 2004 Decision, and imposed zero royalty in the operative provisions, providing predictability and guidance.

We are aware of one implementation of the WSPP remedy (by an open-source group which signed the "no Patent WSPP Agreement"), which had limited market impact as a result of Microsoft's delays. However, the remedy actually helped the increasing growth of the open-source community at the time of the implementation. We are unaware of anybody who actually signed a Patent Agreement as the Patent information was not strictly necessary.

Furthermore, producing servers that could be dropped into a network of Windows servers was not a very profitable business due to the low prices of the Windows server OS (Microsoft was a new entrant into the server OS market). The interoperability remedy sought to create a market which never fully materialized, as the emergence of cloud computing led to the dominance of non-Microsoft servers. In other words, the advancement of technology altered market dynamics and affected the remedy's impact.

The Commission should have designed the remedy providing for no fee for non-innovative interoperability specifications and requiring timely adequate specification documentation. However, the remedy and the Court of First Instance judgment in the interoperability case had a precedent effect for the follow-up case[307].

Finally, Microsoft produced protocol documentation that ended up getting used by the Open Source community to drive a new form of innovation and competition, contributing to technological development, although not in the specific scenario of interoperability within WGOS imagined by the Commission. The primary reason is tied to the rapidly evolving technology industry. Specifically, WGOS technology became obsolete with the advent of cloud technology.

Tying. Market Participants affirmed that Microsoft was able to deprive the remedy of all useful effect by providing Windows Media Player for free to every OEM and end-user. The absence of a price difference between Windows N and a full-functioning Windows version effectively resulted in a price squeeze, and continuation of the network effect from which WMP benefited. As a result of the absence of a price difference between Windows N and Windows with WMP, only a few versions of the unbundled versions were sold.

Market Participants reported that there was no interest in exclusivity agreements offered by media player vendors on Windows N, as the Commission expected. The reason was that, given a further usage of internet in the years after the issuance of the Decision, downloading by users was a sufficiently effective distribution channel for competitors. Therefore, considering the limited profitability of the media player business, media player vendors had no interest in sharing the low income with an OEM pre-installing their media player on a PC in view of the ease of downloading. Furthermore, the industry and the market quickly evolved away from media players through other form of media functionality such as YouTube.

The Court of First Instance determined that all Windows buyers (OEMs) were effectively paying for WMP, regardless of whether they used it or preferred an alternative platform.

According to some Market Participants, the Commission should have designed the remedy as a complete unbundling between the tying and tied products, and choice arrangements – such as a choice screen which is nowadays the most commonly employed solution in a tying case – as well as an appropriate price difference between bundled and unbundled versions.

307 For instance, AT.39530 – *Microsoft-Tying* and AT.40099 – *Google Android*

All the interviewed persons, including the case team of the Commission and the addressee of the decision itself (i.e. Microsoft), agreed that the commercial failure of the remedy and its lack of success in terms of effectiveness was due to the design itself. Among several alternative remedies proposed, an appropriate price difference was indicated unanimously as a possible effective one, as well as choice screen alternatives.

However, the remedy and the Court of First Instance judgment had useful precedent value for the follow-up case against Microsoft for the tying between Windows and the Windows browser Internet Explorer [AT.39530 – *Microsoft II (Tying)*]. In that case, the Commission accepted and made binding the commitments offered by Microsoft to address the alleged tying concerns. The commitments consisted of the introduction of a choice screen for users. In essence, when users used a browser for the first time on Windows, they were invited to choose from a choice screen their browser of choice and set it as a default. The choice screen included Internet Explorer, as well as the highest ranked rival browsers. While the second Microsoft case decision is an Article 9 decision and thus in a different setting (where there is more flexibility for the design of remedies), this follow-up case suggests that the Commission understood that the *Microsoft I* remedy was not a suitable solution for tying concerns.

More recently, the Commission imposed the tying remedy of the choice screen in the Decision under Article 7 (AT.40099 – *Google Android)* in which the Commission found that Google had, inter alia, abused its dominant positions in the markets for licensable smart mobile operating systems and for Android app stores by tying its search app and its Chrome browser (where the Google Search is the default search service) to the Play Store. According to the said Decision, Google had implemented a compliance mechanism where competing general search services had to participate in an auction to be displayed in the few available slots of the Choice Screen.

6.1.7 Conclusions

The Interoperability information remedy was implemented with many difficulties, which produced a considerable delay and an appeal before the Court of Instance. Overall, we consider that it was partially effective, because of an initially partial and the late full implementation. The reduced effectiveness due to the late implementation was superseded by an evolution in the market towards an unpredictable direction, away from WGOS. However, the open-source community implemented the non-patent version of the licenses, and its consequent growth would not have been otherwise possible. Therefore, even if not in the way initially intended, competition in the market did grow and technology development has occurred.

The tying remedy was implemented in a straightforward manner, but it was a commercial failure and unsuccessful in terms of effectiveness, as neither OEMs nor end users were interested in the unbundled product, Windows-N, which was offered at an identical price to the bundled product. The feedback received suggests that alternative remedies would have been more effective, for instance imposing full unbundling and an appropriate different price was needed between the bundled and unbundled versions, or a choice screen remedy that would allow consumers to choose which media player they want on their Windows PC at startup.

Lastly, the issue related to the appointment of the monitoring trustee led to a judgement that, in practice, limited the Commission in further appointing monitoring trustees for Article 7 Decisions.

AT. 37792 – *Microsoft I*

Summary

- An Article 7 Decision finding Microsoft abused of its dominant position by: (i) refusing to supply interoperability information and by refusing to allow its use for the purpose of developing and distributing WGSOS products in the market; (ii) by making the availability of Windows conditional on the simultaneous acquisition of WMP.
- Two remedies. 1) To address the refusal abuse, Microsoft had to disclose the information and allow the use thereof according to FRAND conditions. 2) To address the tying abuse, Microsoft had to offer a version of Windows without WMP.

Positive substantive and procedural aspects of remedy design and implementation

- Interoperability information. The remedy was overall well designed by the Commission to address the competition concerns. Interested third parties were involved in advising the Commission in respect of the design of the remedies. The Decision provided precedent for follow-up cases.

Critical substantive and procedural aspects of remedy design and implementation

- Interoperability information. Additional guidance during implementation, along with binding and more detailed FRAND conditions, would have prevented Microsoft from delaying the implementation of WSPP License Agreements.
- Tying. The remedy could have been better designed. For example, Microsoft could have been required to offer both bundled and unbundled versions at different prices or implement a choice screen that allows consumers to select their preferred media player when setting up their Windows PC.
- The Court of First Instance annulled the decision's provisions relating to the monitoring trustee on the ground that "the delegation to the monitoring trustee of powers of investigation which the Commission alone can exercise" was inappropriate.

Level of implementation

- Partially implemented. The Interoperability remedy was implemented with many difficulties which produced a significant delay. The Commission fined Microsoft 899 million EUR for non-compliance with the Decision.
- Fully implemented. The tying remedy was implemented straightforwardly.

Level of effectiveness

- Partially effective. For two complementary reasons (i) the late implementation (ii) the development of the market towards a not predictable direction. However, the open-source community implemented the non-patent version of the licenses, and its growth was made possible by the implementation of the remedies.
- Ineffective. The tying remedy was a commercial failure and unsuccessful in terms of effectiveness.

6.2 AT.34579 – *MasterCard I*

6.2.1 Introduction

This case study focuses on the Commission's decision issued on 19 December 2007 (the "Decision"), against MasterCard Incorporated, MasterCard International Incorporated, and MasterCard Europe SPRL (collectively referred to as "MasterCard").[308]

The Decision is a prohibition decision under Article 7 of Regulation 1/2003, by means of which the Commission found the existence of a competition infringement under Article 101(1) TFEU (formerly Article 81 of the EC Treaty) and consequently imposed a cease-and-desist order along with additional behavioural remedies.

The process that led to the Decision commenced on 30 March 1992, with the complaint lodged by the British Retail Consortium. The complaint concerned certain practices implemented by several card systems, including Europay International SA (now, MasterCard Europe SPRL), which - according to the complainant - raised competition concerns. These practices included the No Discrimination Rule ("NDR"), the Honour All Cards Rule ("HACR"), and notably, the application of multilateral interchange fees (the "MIFs").[309]

Following the complaint and after the examination of MasterCard's network rules, the Commission released a first statement of objections (the "1999 Statement of Objections"), addressing some of the practices targeted in the complaint, such as the NDR and the HACR. MasterCard later amended these rules in accordance with the 1999 Statement of Objection, thus prompting the Commission to announce its intent to take a favourable stance in that regard.[310]

However, since the 1999 Statement of Objection did not concern the fallback interchange fees applied by MasterCard to all cross-border card payments in the EEA (the "Intra EEA-fallback interchange fees"),[311] [312] in the wake of Visa's exemption,[313] on 25 July 2003, MasterCard urged the Commission to formally address the matter, by informing it of its intention to initiate proceedings under Article 232 of the Treaty due to a failure to act.

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308 Grimaldi Alliance took the lead in the preparation of this case study.

309 In general, the term "interchange fees" refers to the charges imposed by a card-issuing payment service provider (i.e., the cardholder's bank, also known as the "issuer") to a card-acquiring payment service provider (i.e., the merchant's bank, also known as the "acquirer"), for each sales transaction at a merchant outlet using a payment card. Interchange fees are typically used in four-party payment schemes and form a significant part of the overall fees charged to merchants by the acquirer for every card-based payment transaction, known as the Merchant Service Charge (the "MSC"). Because the MSC (which is usually a percentage of the transaction value) is partially retained by the acquirer, partially transferred to the issuer as the interchange fee, and partially paid to the payment card scheme as the so-called "scheme fee" - the MIF level directly impacts the MSC because acquirers treat the interchange fees as a cost and factor them into setting the MSC level. Merchants, in turn, include these costs, along with their other expenses, in the general prices of goods and services, thereby passing them on to consumers. A particular type of interchange fees are the so-called MIFs, which are those interchange fees agreed upon multilaterally (rather than bilaterally between the issuer and the acquirer), through a decision that binds all payment services providers participating in a certain payment card scheme.

310 See, the Commission's Notice pursuant to Article 19(3) of Council Regulation No 17 (1) Cases COMP/34.324 - Maestro, COMP/34.579 - Europay (Eurocard-MasterCard) and COMP/35.578 - Europay Membership Rules and Licensing.

311 The term "fallback" pertains to a specific category of MIFs that are applicable only in cases where the payment is not covered by either *(i)* a bilateral agreement between the acquiring bank and the issuing bank engaged in the transaction, or *(ii)* a multilateral agreement among representatives of member banks of the payment scheme (such as MasterCard) at a national forum that sets a predefined interchange fee for the payment.

312 See, para. 17 of the Commission's Notice pursuant to Article 19(3) of Council Regulation No 17 (1) Cases COMP/34.324 - Maestro, COMP/34.579 - Europay (Eurocard-MasterCard) and COMP/35.578 - Europay Membership Rules and Licensing, whereby the Commission clarified that the notice did not cover any interchange fees laid down in any of the notified agreements.

313 Reference is made to Case No. COMP/29.373 ("*Visa II*"), whereby the Commission exempted Visa's intra-regional MIFs in the European Union from Article 81 of the Treaty, for a period of 5 years subject to certain conditions, such as linking and capping the MIFs to certain costs.

In response, in September 2003, the Commission issued a second SO addressing MasterCard's network rules on Intra-EEA fallback interchange fees, after which followed, in June 2006, a supplementary statement of objections that presented a more in-depth analysis of the restrictive impact on competition of such fees.

After MasterCard's and third parties' hearings, the issuance of a letter of facts, the submission of MasterCard's response, and a competition sector inquiry on retail banking (which showed, among other things, the profitability of credit card issuing even in the absence of interchange fees),[314] on 19 December 2007, the Commission released its Decision, whereby it found that, from May 1992 and until December 2007, MasterCard infringed Article 101(1) TFEU by restricting competition between acquiring banks.

Specifically - having identified the relevant product market in the acquiring sector and having concluded that MasterCard remained an association of undertakings subject to Article 101 TFEU regardless of the initial public offering (IPO) that occurred in 2006 - the Commission found that MasterCard committed a 15-years-long competition infringement. This was done by setting a minimum fee that merchants had to pay to their acquiring banks for accepting MasterCard branded consumer (not commercial) credit and debit cards in the EEA (i.e., the Intra-EEA fallback interchange fees), in the Single Euro Payment Area ("SEPA")(i.e., the so-called "SEPA fallback interchange fees") [315] and in the Eurozone (i.e., the so-called "Intra-Eurozone fallback interchange fees").[316] Indeed, according to the Commission, the Intra-EEA, the SEPA and the Intra-Eurozone fallback interchange fees (together, "MasterCard's MIFs") artificially inflated the floor on which acquiring banks set their MSC, thereby rendering payment card acceptance more expensive than it would otherwise had been in the absence of said fees.

Even though it found that MasterCard's MIFs limited price competition among member banks, the Commission acknowledged that such fees were not "*as such illegal*",[317] since they could theoretically meet the criteria outlined in Article 101(3) TFEU. In this respect, however, the Commission ultimately concluded that MasterCard failed to demonstrate that MasterCard's MIFs fulfilled the necessary exemption conditions.

In particular, as to the first condition concerning the contribution to technical or economic progress, the Commission first recognised that in theory interchange fees could enhance the utility of a card network to all of its users (merchants and cardholders), but then noted that the specific model underlying MasterCard's MIFs operated with unrealistic assumptions and that no empirical evidence was ever presented to show any beneficial effects of these fees on the market. Instead, MasterCard heavily relied on the so-called "Baxter Framework" [318] and merely asserted in general terms that the balancing of cardholders' and merchants' demands achieved by means of its MIFs resulted in improved performance of the MasterCard system.

As to the second condition relating to consumers' fair share of the benefits, according to the Commission, there was no reason to simply assume that, by pursuing its member banks' aim of maximising sales volumes, MasterCard's MIFs had created efficiencies that benefit all customers, including those who bear the cost of its MIFs (i.e., merchants and purchasers).

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314 Reference is made to the Sector Inquiry under Article 17 of Regulation (EC) No. 1/2003 on retail baking, which resulted in the Final Report dated 31 January 2007.

315 According to MasterCard's initial announcements, SEPA fallback interchange fees had to be applied from 1 January 2008. However, in June 2007, MasterCard announced the delay of their implementation.

316 According to MasterCard's initial announcements, Intra-Eurozone fallback interchange fees had to be applied from 15 January 2008.

317 See, recital 666 of the Decision.

318 In essence, the Baxter Framework states that the size of a scheme and the welfare of its participants are maximized when the total cost incurred by issuers and acquirers at the margin are shared between cardholders and merchants, in a measure proportionate to the value that each of them places on the services received.

Further, as to the third condition related to indispensability, the Commission held that MIFs were not objectively necessary for the operation of the MasterCard scheme, as evidenced by the existence of numerous comparable open payment card schemes that operated without MIFs.

Consequently, considering the foregoing, the Commission concluded that the MasterCard's restriction of competition (as ascertained in the Decision) was not eligible for exemption.

6.2.2 Identification of the remedies subject to evaluation

In its Decision, the Commission issued a cease-and-desist order requiring MasterCard to end the infringement and refrain from determining (by way of setting Intra-EEA, SEPA and/or Intra-Eurozone fallback interchange fees) a minimum price merchants would have to pay for accepting consumer payment cards. In addition to the cease-and-desist order aimed at halting the infringement, the Commission also imposed supplementary measures that can be categorized as purely behavioural remedies.

First and foremost, to foster implementation of the cease-and-desist order, the Commission ordered MasterCard to formally remove, within 6 months from the notification of the Decision, the Intra-EEA fallback interchange fees and its recently adopted SEPA/Intra-Eurozone fallback interchange fees. For the same purpose, the Commission further instructed MasterCard to modify the organisation's network rules accordingly and thus to repeal all decisions previously taken with regards to the setting of MasterCard's MIFs.

Additionally, to ensure the effectiveness of the cease-and-desist order, the Commission imposed a series of informational obligations on MasterCard. Specifically, the Commission required MasterCard to communicate all changes in the organisation's network rules (as made pursuant to the remedy above) to all financial institutions which held a license for issuing and/or acquiring in the MasterCard scheme within the EEA, as well as to all clearing houses and settlement banks which cleared and/or settled POS payment card transactions in the MasterCard scheme within the EEA. The Commission further recognized the importance of adequately informing merchants that acquiring banks were now able to offer significantly lower merchants fees and consequently instructed MasterCard to publish on the internet the information outlined in Annex 5 of the Decision, starting from the expiration of the transition period and continuing until the publication of a non-confidential version of the Decision on the Commission's website and/or in the Official Journal of the European Union, whichever occurred first. MasterCard was also directed to provide a printout to the Commission of the first page of these country-specific websites within one week of publishing the Annex 5 information online and to furnish evidence of compliance to the Director General of the Directorate General for Competition.

Finally, to encourage compliance with the Decision, the Commission provided for provisional periodic penalty payments equal to 3.5 per cent of MasterCard's daily consolidated global turnover in the preceding financial year, applicable in the event of MasterCard's non-compliance within the transition period. Indeed, after having determined that there was a serious risk that MasterCard would have continued to apply Intra-EEA fallback interchange fees to payment card transactions in its scheme, that MasterCard would have implemented the SEPA or the Intra-Eurozone fallback interchange fees or that it would have attempted to circumvent the remedies, the Commission found sufficient ground for imposing periodic penalty payments aimed at forcing compliance by rendering it economically convenient for MasterCard to comply.

On the contrary, the Decision did not provide for the appointment of a monitoring trustee, nor did it impose a fine on MasterCard for the competition infringement committed. Indeed, as MasterCard's MIFs arrangements were notified to the Commission between 1992 and 1997 and given the specific circumstances of the case, the Commission declined to impose any fine.

The remedies imposed by the Decision were ancillary to the cease-and-desist order, as they were designed to ensure both its implementation and effectiveness. For instance, by prescribing the modification of the network rules, the Commission sought to ensure the implementation of the order, since such modification entailed the removal of any provision that set a floor under the merchant fee and thus a minimum price that merchants were required to pay for accepting payment cards. Likewise, by prescribing the divulgation of MasterCard's MIFs removal, the Commission aimed at ensuring the effectiveness of the order, since such divulgation put merchants in the condition to know that their banks were then in a position to offer considerably lower merchant fees.

It follows that the remedies indirectly sought to achieve the very same ultimate objective as the cease-and-desist order: to stop the inflation of the base on which acquiring banks set charges to merchants by establishing a floor, thereby halting the resulting competition restriction between acquiring banks and potentially enabling the emergence of new pan-Union players with business models featuring lower or no interchange fees. Indeed, whereas normally competition leads to lower prices (given that companies compete by offering cheaper solutions than their competitors), in the case of interchange fees, the opposite occurs, as interchange fees paid by the merchant allow the card scheme to remunerate the issuing bank, providing it in turn the means to buy the loyalty of its cardholders with incentives. Therefore, this mechanism is by necessity inflationary, as competition between card schemes to win over and retain the issuing banks' loyalty is based on ever increasing interchange rates.

6.2.3 Identification of the main issues investigated for ex post evaluation

The ex post evaluation conducted aimed at thoroughly assessing whether (and to what extent) the remedies under examination have been implemented and have proven to be effective in achieving their specific objective (as outlined above). The evaluation has identified specific issues related to implementation and effectiveness, respectively.

6.2.3.1 Implementation issues

The Commission granted MasterCard a transition period of 6 months following the date of notification of the Decision. Consequently, MasterCard had until 21 June 2008 to adjust its behaviour in such a way as to comply with the remedies.

Despite appealing the Decision before the General Court, on 12 June 2008, MasterCard repealed the MIFs subject to the Decision. At the same time, it began discussions with the Commission on a methodology to determine a level of MIFs that would be eligible for exemption and would satisfy the so-called "merchant indifference test".[319]

However, shortly after, on 1 October 2008, MasterCard independently made changes to its acquirer pricing structure in the EEA, by increasing certain existing fees, introducing a new fee, and eliminating several fee waivers for acquirers. It follows that, while MasterCard did comply with the main remedies imposed with the Decision, it did so for a short amount of time. Therefore, MasterCard's compliance with the remedies was merely provisional.

319 The so-called "Merchant Indifference Test" is a test developed in economic literature, which identifies the fee level a merchant would be willing to pay if the merchant were to compare the cost of the customer's use of a payment card with those of non-card (cash) payments.

Ultimately, the discussions with the Commission resulted in MasterCard offering unilateral undertakings (the "Unilateral Undertakings"). Specifically, as of July 2009, MasterCard undertook to roll back the changes to its acquirer pricing structure, which had been implemented in October 2008 in violation of the Decision. Further, MasterCard undertook to, among others, *(i)* set weighted average MIFs for credit and debit card at 0.30 per cent and 0.20 per cent respectively; *(ii)* continue to publish its intra-EEA cross-border interchange fees on its website and to facilitate the merchants to find them; *(iii)* introduce a rule requiring its acquirers to offer their merchants ex ante and ex post unblended rates; *(iv)* introduce a new rule prohibiting acquirers from mandating bundling of the processing; and *(v)* appoint an independent trustee in charge of monitoring MasterCard's compliance with the Unilateral Undertakings.

Interestingly, no enforcement from the Commission followed MasterCard's October 2008 amendments of its acquirer pricing structure: indeed, even though MasterCard violated the Decision by provisionally increasing its fees, the Commission never applied the periodic penalty provided for in the Decision itself nor did it pursue MasterCard either for non-compliance or for infringing EU antitrust rules. The Commission later explained that such enforcement actions were deemed unnecessary given the subsequent implementation of the commonly agreed Unilateral Undertakings. Nevertheless, as far as implementation *stricto sensu* is concerned, MasterCard's compliance with the Unilateral Undertaking cannot technically be regarded as compliance with the Decision, since the latter was never formally amended (nor in any case revoked) to reflect the commitments undertook by MasterCard upon the Commission's approval.

6.2.3.2 Effectiveness Issues

Given that MasterCard implemented the remedies set forth in the Decision for only a few months and that the Decision was soon de facto superseded by MasterCard's Unilateral Undertakings, assessing the effectiveness thereof (i.e., the capacity to achieve their objective, as identified above) proved inevitably challenging. This difficulty was compounded by the fact that removing MasterCard's MIFs required (or would have required) reissuing millions of cards or at least notifying millions of merchants, leading to a prolonged period between the removal of the targeted interchange fees and its impact on the market.

Instead, what could be clearly examined are the consequential impacts triggered by the Decision, as the remedies imposed undeniably paved the way for the adoption of the Unilateral Undertakings and, according to many, also contributed to the enactment of the Regulation (EU) 2015/751 on interchange fees enacted by the European Parliament and the Council ("MIFs Regulation").

Of course, the adoption of the MIFs Regulation further confined the assessment of the remedies' effectiveness to a period that goes from 2007 (when the Decision was adopted) to 2015 (when legislative regulation on interchange fees was first implemented at European level).

6.2.4 Methodology and sources of evidence for the ex post evaluation

The ex post evaluation concerning this case study was conducted using a comprehensive range of evidence, including articles, literature, and direct consultations with stakeholders, such as merchants' and consumers' banks (respectively, "Acquirers" and "Issuers"). This also involved firsthand information from competitors (the "Competitors", and together with the Acquirers and Issuers, the "Stakeholders") and its respective lawyers, which was generally gathered through interviews and/or a structured questionnaire covering substantive, procedural, implementation, and effectiveness aspects.

Additionally, the ex post evaluation heavily relied on the insights that emerged from interviews with the Commission's officers who oversaw the case at the time (the "Case Team"). The perspectives offered were valuable for assessing the peculiar procedural aspects of the case and were instrumental in understanding the objectives sought through the remedies imposed.

Moreover, while the ex post evaluation reflects the inputs received from merchants and association of merchants (the "Merchants"), it does not incorporate feedback from the addressee of the Decision (i.e., MasterCard) nor from consumers (i.e., cardholders). As to consumers, the lack of engagement can likely be attributed to the technicality of the subject matter, as well as to the significant time that has elapsed since the Decision was adopted.

6.2.5 Main findings of the ex post evaluation on the effective implementation of the remedies

As previously observed, MasterCard implemented the remedies imposed by the Commission temporarily. The reason behind MasterCard's non-compliance (or, more correctly, of its merely provisional compliance) is likely attributable to the fact that the sudden removal of MasterCard's MIFs proved in fact to be unsustainable.

Although such finding could not be verified with MasterCard itself, it is noteworthy that Stakeholders (notably, both Acquirers and Issuers) reported that the outright elimination of MasterCard's MIFs was disproportionate and unfeasible (as well as - concretely and potentially - ineffective, as discussed below).

In particular, according to some Stakeholders, MasterCard implemented the remedies only temporarily due to the fact that, in the short run, the implementation of any subsequent measures necessary for the removal of MasterCard's MIFs required an overly burdensome amount of resources, in terms of both labour and economic effort; and that, in the long run, the absence of interchange fees would have hindered innovation in the payment-sector[320], as issuers would have either gone uncompensated for transaction services or would have had to cover their costs solely through fees paid by cardholders, leading to increased costs for payers and greater uncertainty for merchants.

In other words, Stakeholders argued that because the remedies were not well designed, they were difficult to implement and almost impossible to maintain. Therefore, according to Stakeholders, with the benefit of hindsight, a more collaborative approach by the Commission in defining the remedies could (and should) have been adopted, in order to lead from the beginning to the definition of exemptible MIFs' levels, rather than to an initial outright ban thereof. In fact, according to Competitors, the repeal order was de facto some kind of "interim measure", imposed despite the absence of any risk of irreparable harm whatsoever and in a rush to put an end to a 15-years-long infringement.

On the contrary, despite the absence of a formal amendment of the Decision, the Case Team, in accordance with the substance-over-form principle, regards the implementation of the Unilateral Undertaking as implementation of the Decision itself. Consistently, the Commission never applied the periodic penalty

[320] Conversely, although most Merchants agree that a certain level of MIFs should be allowed since the issuing service shall somehow be remunerated, they reject the argument that higher fees allow better products and stronger innovation, as demonstrated by the fact that, even though in the United States interchange fees are not regulated and are almost ten times higher than in Europe, features like the *Strong Customer Authentication* and *Chip&Pin* are not widely available yet.

provided for in the Decision nor did it pursue MasterCard either for non-compliance or for infringing EU antitrust rules.

6.2.6 Main findings of the ex post evaluation of whether the remedies had the intended effects on competition

Because the remedies were only implemented for a very limited amount of time, they were not effective in guaranteeing the implementation of the cease-and-desist order, and thus in halting the inflation of card acceptance's costs - as caused by the practice of setting a floor under the merchant fee.

Interestingly, it is the Merchants' opinion that, even if the remedies had been implemented further, the ultimate objective thereof (i.e. stopping the inflation of the MSC's base) would likely not have been fully achieved due to the existence of other potentially influential factors, such as *(i)* scheme fees, a large portion of which serves to finance incentives securing the continued loyalty of issuers; *(ii)* the prohibition of surcharge, which deprives the merchant of the ability to make the payer understand the costs that the card generates and potentially steer it towards cheaper payment instruments; and *(iii)* commercial cards, which are almost five times more remunerative than consumers cards, despite the minor risk of payer's default.[321] Regarding commercial cards specifically, Merchants pointed out that they made the cease-and-desist order and the remedies particularly easy to circumvent.

Similarly, Stakeholders have reported that the mere elimination of MIFs alone did not directly ensure (and would not have potentially ensured, if further implemented) greater competition in the acquiring sector nor meaningful entries of regulated four-party schemes in the EEA. In this regard, Competitors have stated that the Decision (as well as the MIFs Regulation) did not address an issue of lack of competition between payment schemes, acquirers, or issuers. Rather, the Decision merely addressed - according to Competitors - a perceived issue of cost of acceptance and, while the remedies adopted may have potentially led to modest reductions in the cost of acceptance to merchants, they would have done so at the expense of other participants in the system.

In conclusion, while the remedies implemented did not produce the intended effectiveness, the interviewees reached a consensus that they likely played a crucial role in significantly reducing the time required for the adoption of the Unilateral Undertaking. Furthermore, these remedies (and the consequent Unilateral Undertakings) may have also facilitated the groundwork for the adoption of the MIFs Regulation. In this regard, the remedies inadvertently contributed to the broader regulatory landscape by aiding in the establishment of acceptable levels of exemptible MIFs. This development is particularly noteworthy, as it created a framework that could be demonstrated to support innovation within the industry, while also ensuring that a portion of the benefits derived from these innovations would be passed on to consumers, thus promoting a more competitive market[322].

321 The term "commercial cards" refers to any card-based payment instrument issued to undertakings or public sector entities or self-employed natural persons which is limited in use for business expenses where the payments made with such cards are charged directly to the account of the undertaking or public sector entity or self-employed natural person.

322 See, Alen Veljan, Scott McInnes and Nicolas Petit, *Ex Post Assessment of European Competition Policy in the Payment Sector: The Visa Europe 2010 Commitments Decision*, 2021, page 46, whereby it is stated that "a *partial impact by the 2007 Mastercard decision, whereby a reduction of the Mastercard Intra-EEA IF to zero in April 2008 was followed by an increase to 0.2% for debit and 0.3% for credit cards as of July 2009, cannot be excluded*".

Ultimately, even if the remedies themselves did not achieve their primary objectives, their indirect effects played a significant role in shaping the regulatory environment and encouraging positive outcomes for both the industry and consumers alike.

6.2.7 Conclusions

The remedies imposed in the Decision were not implemented by MasterCard, in the sense that they were only implemented temporarily, from June 2008 to October 2008. The remedies proved ineffective, as their short implementation period prevented them from achieving their intended objectives.

Nevertheless, the remedies have undoubtedly had an indirect effect, as they accelerated the adoption of the Unilateral Undertakings. Further, although the Decision does not seem to have directly informed the MIFs Regulation, the impetus towards the adoption thereof gained momentum from the Commission's decisions on interchange fees - out of which MasterCard's was a pillar.

It's well known that in the years following the Decision and the Unilateral Undertakings, whereas in certain non-EU-countries MIFs had already been addressed by regulation, in the EU the Commission and the National Competition Authorities had adopted several decisions prohibiting specific arrangements under EU competition rules. As such decisions allowed for a wide variety of MIFs levels, presented different timelines, and covered different transaction (domestic and non-domestic), it became clear that there was no level playing field and that the absence thereof would have resulted in competition distortion within the payment sector, thereby exacerbating market fragmentation and preventing retailers and consumers from enjoying the benefits of the Single Market. It was precisely to avoid such fragmentation of the internal market and to halt the significant distortion of competition resulting from diverging laws and administrative decisions, that the MIFs Regulation was eventually enacted.

AT. 34579 – *MasterCard I*

Summary

- An Article 7 decision finding that from 1992 to 2007 MasterCard infringed Article 101(1) TFEU, as it restricted competition between acquiring banks by means of its MIFs.
- Mastercard was ordered to cease the anti-competitive conduct and to repeal the MIFs subject to the decision. Further behavioural and informational remedies were imposed.

Positive substantive and procedural aspects of remedies design and implementation

- The decision did not exclude the possibility that MIFs might be compatible with the EU antitrust rules, provided that they meet the exemption condition under Article 101(3) TFEU.

Critical substantive and procedural aspects of remedies design and implementation

- The remedies were only temporarily implemented, as the sudden repeal of the MIFs proved to be unsustainable.
- The decision that imposed the remedies was de facto superseded by the unilateral commitments undertook by MasterCard. Notably, the decision was never formally amended nor revoked.
- A more cooperative approach (i.e., an Article 7 cooperative procedure) would have led to the definition of an exemptible level of MIFs from the outset.
- The duration of the proceeding was extensive, as the first complaint was lodged in 1992 and the decision was only issued in 2007.
- No monitoring trustee was appointed with the decision.

Level of implementation

- Not implemented: the remedies were not implemented in the sense that they were only implemented temporarily, i.e., from June 2008 to October 2008. Indeed, after the initial repeal of its MIFs, MasterCard unilaterally amended its acquirer pricing structure. In the meantime, MasterCard engaged in discussions with the Commissions, which resulted in the Unilateral Undertaking to the fulfilment of which MasterCard committed. These Unilateral Undertakings included the setting of a weighted average Intra-EEA MIFs' level of 0.2% and 0.3% for debit and credit cards respectively.

Level of effectiveness

- Ineffective: the remedies did not prove to be effective. This was partially due to the fact that the remedies were implemented for a very short time and partially to the fact that the remedies themselves were not designed in such a way as to ensure their effectiveness. The remedies, however, hastened the adoption of the Unilateral Undertakings and paved the way for the enactment of the Regulation (EU) 751/2015 on interchange fees.
- Nevertheless, the remedies have undoubtedly had an indirect effect, as they accelerated the adoption of the Unilateral Undertakings. Furthermore, these remedies (and the consequent Unilateral Undertakings) may have also facilitated the groundwork for the adoption of the MIFs Regulation.

6.3 AT.39985 – *Motorola – Enforcement of GPRS Standard Essential Patents*

6.3.1 Introduction

The expression "smartphone patent wars" refers to a series of legal battles and disputes between various players of the telecommunication industry over intellectual property rights.[323] These conflicts began in the late 2000s and continued for several years, involving major players in the industry. They affected the industry, leading to increased litigation costs, product bans and market uncertainty. The intersection of competition laws and intellectual property rights in these wars raised intriguing questions and challenges for their enforcement. The Decision at hand was adopted in the context of and contributed to the resolution of these patent wars.

On 29 April 2014, the Commission adopted an Article 7 decision finding that Motorola Mobility ("Motorola") infringed EU competition rules by seeking and enforcing an injunction against Apple on the basis of a standard essential patent ("SEP") for the General Packet Radio Service ("GPRS") standard.[324] The decision found that, given Motorola's commitment to license the GPRS SEP on FRAND terms during the GPRS standard-setting process, and Apple's willingness to take a licence on FRAND terms, Motorola had abused, with its behaviour of seeking injunctions against a willing licensee, its dominant position under Article 102 TFEU.

With its Decision, the Commission ordered Motorola to bring the infringement to an end and to refrain from repeating any act or conduct having the same or similar object or effect. In addition, Motorola was required to eliminate the likely anticompetitive effects resulting from specific sections of a licensing agreement (the "Settlement Agreement") that was signed by Apple and Motorola in 2012, after Motorola had obtained a SEP-based injunction against Apple during legal proceedings in Germany.

The Motorola decision was adopted on the same day as the Article 9 decision in AT.39939 – *Samsung – Enforcement of UMTS standard essential patents* (the "Samsung case"). With the commitments made binding by the Commission with that decision, Samsung pledged not to seek injunctions in the EEA for the infringement of its SEPs against potential licensees that agreed to accept a specific licensing framework to determine FRAND conditions. [325] In our evaluation of the Motorola remedies we also make references to the Samsung remedies, since the two decisions are complementary. According to the Commission, the two cases taken together are a precedent that "*provides a path to 'patent peace' in the telecommunication industry*", especially in the context of the smartphone patent wars.[326]

The Motorola case established that seeking and enforcing injunctions based on FRAND encumbered SEPs against willing licensees is an infringement of Article 102 TFEU. This introduced a *"safe harbour"* for willing licensees against SEP-based injunctions.[327] The commitments decision under Article 9 in the Samsung case went on to implement the safe-harbour concept: Samsung committed not to seek injunctions based on SEPs

323 NERA took the lead in the preparation of this case study.
324 Commission Decision of 29 April 2014, Motorola, Case AT.39985.
325 This licensing framework foresees a twelve-month negotiation period followed by third-party determination of FRAND terms, either by a court or by an arbiter, if no agreement is reached during the negotiations. The Commission made the commitments binding for 5 years and decided to be advised by an independent monitoring trustee to oversee specific aspects of their implementation, mainly related to Samsung's reporting obligations.
326 European Commission, Directorate-General for Competition, *Competition policy brief – Standard-essential patent*, 2014.
327 Ibid.

against potential licensees which agree to accept a specific licensing framework and, in case negotiations are not successful, accept a third-party determination of the FRAND conditions.[328]

6.3.2 Identification of the remedies subject to evaluation

In addition to a cease-and-desist order, the Commission imposed with the Decision a behavioural remedy requiring Motorola to eliminate the likely anticompetitive effects resulting from its past behaviour and enshrined in Sections 1(3), 4(4) and 7(1) of the Settlement Agreement signed with Apple.[329] The Decision explains that *"the Settlement Agreement [was] still in force and certain of its provisions could affect the FRAND royalty rate and the amount of damages that Apple [would] be ordered to pay"*.[330] We evaluate this remedy not only because it is one of the few remedies imposed by the Commission in Article 7 decisions but because in addition the intended objective of this remedy is ambitious, encompassing the removal of the effects that the conduct had already had. Moreover, the cease-and-desist order also contained in the Decision, as well as the commitments outlined in the Samsung decision, represent a fundamental milestone in the evolution on the competition assessment of SEP-related disputes. As such, this case has implications beyond the patents and the products directly concerned. As we see in more detail below, the discussion on SEP has since evolved to include the CJEU judgment in *Huawei* v *ZTE,*[331] which confirmed that the seeking of SEP-based injunctions may be an abuse of dominance in certain circumstances, the 2017 Communication on SEPs,[332] the 2020 IP Action Plan[333] and the current draft SEP Regulation.[334]

We classify this remedy as a behavioural measure, which expands the scope of the cease-and-desist order contained in the same Decision. Indeed, while the latter obliged Motorola not to use injunctions on the basis of SEPs against willing licensees, the former was introduced to make sure that the Decision would not only prevent the anticompetitive behaviour from being repeated in the future but would also eliminate the harmful effects that the past behaviour was likely to have had. This remedy can in other words be seen as a restorative remedy. At a more granular level, we include the remedy in the "obligation to terminate or change existing contracts/exclusivity clauses" category of our remedy typology.

6.3.3 Identification of the main issues investigated for the ex post evaluation

6.3.3.1 Implementation issues

328 The Commission appears to have decided on an Art. 7 decision in the Motorola case because Motorola did not make a sufficient offer of commitments, whereas Samsung did. The two cases can be seen as a lucky coincidence because this allowed the Commission to adopt and Art. 7 and an Art. 9 decision on the subject matter. With the Art. 7 decision the Commission could establish the legal framework in a binding way, including establishing a safe harbour for willing licensees based on Art. 102 TFEU. With the Art. 9 decision on the other hand, the Commission could articulate how such a safe harbour could and should look like. In our interview the case team emphasized that the aim of the Decision was to set a process-based approach in FRAND disputes, rather than a direct FRAND determination. In particular, the aim was to provide a fair process where both parties (SEP holder and implementer) have a chance to negotiate without the threat of the injunction. Through the process of market testing foreseen by Art. 9, in designing this FRAND determination process in the Samsung case the Commission could obtain valuable information from market participants, achieving greater market acceptance of the resulting rules.

329 Section 1(3) included iPhone 4S in the list of infringing products. With Section 4(4) Apple contractually acknowledged both its prior violation of all SEPs included in the Settlement Agreement and Motorola's damages claims under German law. Section 7(1) allowed Motorola to terminate the Settlement Agreement in case Apple challenges any of the SEPs included the Settlement Agreement.

330 See the Decision, at recital 554.

331 Judgment of the Court of Justice of 16 July 2015, Huawei Technologies Co. *Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477.

332 European Commission, *Communication on Setting out the EU approach to Standard Essential Patents*, COM(2017) 712, 2017.

333 European Commission, *Making the most of the EU's innovative potential – An intellectual property action plan to support the EU's recovery and resilience*, COM(2020) 760, 2020.

334 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU)2017/1001*, COM(2023) 232, 2023.

In addition to a cease-and-desist order to refrain from seeking injunctions against willing licensees going forward, in the Decision the Commission also imposed an obligation on Motorola to eliminate the effects of its past conduct, in particular those resulting from Sections 1(3), 4(4) and 7(1) of the Settlement Agreement with Apple. In short, Section 1(3) expanded the set of Apple's allegedly infringing products to include the iPhone 4S, Section 4(4) acknowledged Motorola's claims for damages under German law and Section 7(1) essentially obliged Apple not to challenge the validity and essentiality of Motorola's patents. Indeed, according to the Commission, Apple would have not accepted those clauses of the Settlement Agreement if it had not been under the threat of the imminent enforcement of the injunction. In the ex post evaluation of the implementation of this remedy, we investigate how Motorola and Apple went about amending Section 1(3), 4(4) and 7(1) of their Settlement Agreement, primarily by interviewing both firms.

6.3.3.2 Effectiveness issues

In the ex post evaluation of the effectiveness of this remedy, we assess the extent to which the remedy improved Apple's bargaining position *vis-à-vis* Motorola on the licencing of Motorola's SEPs.

Moreover, we discuss the wider effects that the Decision as a whole (including its cease-and-desist order), together with the contemporaneous Samsung decision, had on the licensing of SEPs. In particular, it is widely acknowledged that the Motorola and the Samsung cases have motivated the preliminary reference that the Düsseldorf Regional Court made to the CJEU on the patent infringement dispute between Huawei and ZTE and have informed the resulting CJEU judgment of 16 July 2015.[335] In that judgment, the CJEU essentially confirmed the antitrust context of SEPs and that the seeking of injunctions against willing licensees may amount to an abuse of dominance. Given that the Motorola and the Samsung decisions sought to temper the enforcement of SEPs by patent holders in light of competition considerations, the fact that the CJEU broadly confirmed the Commission's approach can be analysed as a relevant indication of the Decision's effectiveness.[336]

6.3.4 Methodology and sources of evidence for the ex post evaluation

For the assessment of this remedy we relied mainly on our interview with the Commission as well as on the extensive response to our questionnaire that both Google and Apple provided us with.[337] Other materials that we relied on for the assessment are the academic literature that comments on the case, as well as the judicial and regulatory developments on SEP-based injunctions that followed the Decision.

6.3.5 Main findings of the ex post evaluation of the effective implementation of the remedy

According to both parties and the Commission the remedy was swiftly implemented, since already in May 2014 the parties terminated the Settlement Agreement altogether and with retroactive effect.[338]

335 See, for example, Banasevic, N., and Z. Bobowiec, *SEP-based Injunctions: How Much has the Huawei v ZTE Judgment Achieved in Practice?*, 14(2) Journal of European Competition Law & Practice 121, 2023.

336 See Ibáñez Colomo, P., *The New EU Competition Law*, Hart Publishing, Oxford, 2023, pp. 204-205.

337 Google acquired Motorola Mobility on 22 May 2012 (https://blog.google/inside-google/company-announcements/weve-acquired-motorola-mobility/). In 2014, Google sold Motorola to Lenovo (https://news.lenovo.com/pressroom/press-releases/lenovo-completes-full-acquisition-motorola-mobility-from-google/), while retaining its intellectual property portfolio.

338 The Settlement Agreement and side letters were terminated entirely and with retroactive effect, including the obligation for Apple to escrow funds in Mannheim.

The Commission considered the monitoring of the implementation of this remedy straightforward as it required the one-off amendment of a contract between two sophisticated parties. Further, the remedy beneficiary (Apple) would have been vocal had the amendment in the direction foreseen by the Commission not taken place. For these reasons, and even ignoring the hurdle on the appointment of monitoring trustees in Article 7 cases posed by the General Court *Microsoft* v *Commission* judgment,[339] the Commission did not consider appointing a monitoring trustee necessary in this case.

6.3.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

Shortly after the Decision the parties terminated the Settlement Agreement in their entirety and with retroactive effect. The parties also reached a new agreement (the "Joint Cooperation Agreement"), which beside resolving all outstanding litigation between them shifted the focus of their commercial relationship to broader issues. In fact, the behaviour sanctioned by the Decision had already ended on 29 May 2012 upon the execution of the Settlement Agreement, when Motorola *"filed declarations with the German courts that the injunction proceedings against Apple were moot"*.[340] Meanwhile, one week before Motorola declared that the proceedings against Apple were moot, Google had acquired Motorola Mobility. In this sense, while the relationship between Motorola/Google and Apple certainly changed between 2012 and 2014, it is difficult to tell the extent to which this was due to the investigation, the Decision and the remedy, from the extent to which it was due to the new ownership (by Google) of the disputed patents and the resulting change in the broader commercial relationship between the parties. We can nonetheless conclude that the remedy was effective, since effectiveness in this case follows directly from the amendment of the Settlement Agreement, and the Settlement Agreement was indeed terminated.

In addition to the remedy, the fact that the Decision is a prohibition decision is also relevant, since it includes a legal test for the finding of an antitrust infringement related to the use of SEP-based injunctions, which in turn establishes a safe harbour for the implementers against injunctions. In this sense, the Decision, together with the contemporaneous Samsung decision, is considered to have played a fundamental role in the subsequent judicial and regulatory developments on SEPs. In particular, in our interview the case team pointed to the calming down of patent wars in the mobile device industry (more recently new issues have arisen in the automotive sector and in the Internet of Things) and an increase in the use of competition-law based defences against SEP infringement claims in national courts.

In the remainder of our evaluation we take a closer look at these broader effects that the Decision may have had.

The standard that the German courts had applied to the dispute between Motorola and Apple was the so-called Orange Book standard.[341] According to this standard, the conditions under which a defendant in a patent infringement case can rely on a competition-law defence are quite narrow and crucially include making an unconditional offer to take a licence. In the dispute between Motorola and Apple, Apple made six different offers before the German courts considered it unconditional and Motorola accepted it. In the Decision, on the other hand, the Commission found that continuing to seek an injunction after Apple's second

339 See judgment of the Grand Chamber of the Court of First Instance of 17 September 2007, Microsoft v *Commission*, T-201/04, ECLI:EU:T:2007:289.
340 See Decision, at recital 17.
341 The so-called Orange Book judgment was issued by the *Bundesgerichtshof* (Germany's Federal Supreme Court) on 6 May 2009 in the context of a (only de facto standard essential) patent infringement and injunction claim (Case No KZR 39/06).

offer, at which point Apple had already shown to be a willing licensee (because it had committed to accept third party determination of the royalty rate), constituted an abuse of a dominant position.

Given the contrast noticed between the Orange Book standard and the one laid down by the Commission in the Motorola and the Samsung cases,[342] on 5 April 2013 the Düsseldorf Regional Court requested a preliminary ruling to the CJEU, with a view to clarifying under which conditions a SEP holder seeking an injunction may be considered to be abusing its dominant position.[343]

According to, among others, Banasevic and Boboviec (2023)[344] and Ibáñez Colomo (2023),[345] the CJEU, in its judgment issued on 16 July 2015,[346] confirmed the Commission's approach in the Motorola and the Samsung cases, concluding that refusing to license to a willing licensee a patent declared essential and subject to a commitment to be licensed on FRAND terms constitutes an abuse of a dominant position. In its judgment the CJEU went then on to laying down a framework of behaviour that, if followed properly, would protect both patent holders against a finding of an abuse of dominance and implementers from SEP-based injunctions. In essence the CJEU framework resembles the one established in the Motorola and the Samsung cases. Under the CJEU framework a SEP holder should inform the alleged infringer about the relevant patent(s) and the infringement and provide a FRAND offer. The alleged infringer should then express its willingness to conclude a licensing agreement on FRAND terms and send a FRAND counteroffer without resorting to delaying tactics.[347] In case of no agreement, *"the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party by decision without delay"*.[348] This is in line with the Samsung commitments, which foresee a similar procedure for FRAND determination.

More specifically, we note slight differences in the two frameworks, particularly as to what constitutes to be a willing licensee. In the Motorola case the competition law infringement starts with Apple's second Orange Book offer, because in that offer Apple accepted, without any limitations, the determination of FRAND rates by a competent court. The CJEU framework on the other hand provides for arguably stricter conditions for the licensees, according to which they have to make a counteroffer, and they have to make it in good faith (in particular without delaying). Moreover, the CJEU, unlike the Motorola and Samsung decisions, does not seem to establish a safe harbour for the licensee, consisting in the unilateral acceptance of third-party determination of the royalty rate. Third party determination is presented by the CJECU as something that the licensor and licensee can decide to do "by common agreement"; but the judgment does not explicitly recognize that a licensee's unilateral agreement to such determination is an indication of "willingness", which shields against injunctions. At the same time, the CJEU judgement spells out arguably stricter conditions for the SEP holders as well (such as providing a FRAND offer first). In summary, we conclude that the differences between the two frameworks do not stem from a fundamental difference in balancing the interests of SEP holders and implementers but rather from the fact that the CJEU judgement is more articulated in the

342 According to the CJEU judgment (at para. 34), the request for a preliminary ruling explicitly referred to the Press Release and the Memo related to the sending of a SO to Samsung. See European Commission Press Release, *Antitrust: Commission sends Statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents*, 2012; and European Commission, *Samsung – Enforcement of ETSI standard essential patents (SEPs)*, 2012.

343 Request for a preliminary ruling from the *Landgericht Düsseldorf* (Germany) lodged on 5 April 2013 — Judgment of the Court of Justice of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp and ZTE Deutschland GmbH*, C-170/13*,* ECLI:EU:C:2015:477.

344 Banasevic, Nicholas, and Zuzanna Bobowiec *SEP-Based Injunctions: How Much Has the Huawei* v *ZTE Judgment Achieved in Practice?*, Journal of European Competition Law & Practice 14, no. 2, 2023, pp. 121-133.

345 Ibáñez Colomo, P., *The New EU Competition Law*, Hart Publishing, Oxford, 2023.

346 Judgment of the Court of Justice of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13*,* ECLI:EU:C:2015:477.

347 Ibid, recital 65.

348 Ibid, recital 68.

conditions under which a SEP holder would abuse its dominant position and an implementer can rely on competition law defence.

The CJEU judgment set a precedent not only in the EU but also in other jurisdictions, as countries including Japan, China, and Canada were also influenced by the CJEU framework, which can be seen in their Internet Protocol (IP) licensing guidelines.[349]

At the same time, as it has been pointed out by the parties of the Motorola case and by Banasevic and Boboviec (2023), in the years following the CJEU judgment some national courts, especially in Germany, have tended to return to a precedent standard that, in addition to objective criteria, considers subjective criteria to assess the willingness of the potential licensee, thereby creating uncertainty among implementers about the exact perimeter of the safe harbour. Whether the draft SEP regulation currently discussed will provide a more lasting basis for the competition-friendly enforcement of SEP rights remains to be seen.

6.3.7 Conclusions

The remedy in the Motorola case expanded the scope of the cease-and-desist order also contained in this Article 7 decision, thereby ensuring not only that the anticompetitive behaviour would stop and not be repeated, but also that the effects that the behaviour may have already had in the past would be removed. The remedy is in other words a restorative remedy, in a context in which restoring competition was straightforward, consisting in removing a few clauses in a single contract. Overall, we conclude that the remedy was fully implemented and, in light of its simplicity, did not require the appointment of a monitoring trustee. When it comes to the remedy's effectiveness, while the relationship between Motorola/Google and Apple certainly changed in the run-up to the Decision, and it is likely that the Settlement Agreement would have been terminated even in the absence of the Decision, the three clauses of concern of the Settlement Agreement, together with the agreement itself, were terminated. It is for this reason that we consider the remedy to have been fully effective.

Looking beyond the *Motorola* v *Apple* dispute, the Motorola case is widely credited, together with the contemporaneous Samsung case for having informed the CJEU judgment in *Huawei* v *ZTE*, which in turn has provided guidance to national courts in the EU and overseas on how to assess SEP-based infringement allegations and injunction claims. There are at the same time indications that the influence of the CJEU judgment is waning and that the standard on SEP infringement defendants for showing willingness to take the licence on FRAND terms has increased.

349 See, for example, Japan Patent Office, *Guide to licensing negotiations involving standard essential patents*, 2022, p. 5.

AT. 39985 – *Motorola – Enforcement of GPRS Standard Essential Patents*

Summary

- An Article 7 decision finding that Motorola abused its dominant position under Article 102 TFEU by seeking and enforcing an injunction on the basis of a SEP against a willing licensee.
- Motorola was required to eliminate the anticompetitive effects resulting from specific sections of a licensing agreement that was signed after it had obtained an injunction.

Positive substantive and procedural aspects of remedy design and implementation

- Complementarity with contemporaneous Samsung case in establishing a legal precedent and articulating a framework for SEP licencing negotiations.
- Removal of the adverse effects of the behaviour on competition through contract amendment.

Critical substantive and procedural aspects of remedy design and implementation

- Limited guidance on the implementation of the remedy. Besides endangering implementation, the risk of not providing further guidance is that an amendment that may work for the negotiating parties may not also improve competitive outcomes.

Level of implementation

- Fully implemented. Within a month the parties terminated the Settlement Agreement altogether and with retroactive effect.

Level of effectiveness

- Fully effective. After the termination of the Settlement Agreement the parties reached a Joint Cooperation Agreement which resolved all outstanding litigation between them and included clauses on broad commercial issues. It is thus difficult to distinguish between the impact of the remedy and the change in the broader commercial relationship between the parties (through Google's acquisition of Motorola). Yet, the Settlement Agreement was terminated.
- Broadly, the Decision influenced the CJEU's judgment in *Huawei* v *ZTE* and, in turn, national jurisprudence on SEP licensing disputes.

6.4 AT.39759 – *ARA Foreclosure*

6.4.1 Introduction

This case study covers an Article 7 decision imposing a structural remedy following an investigation under Article 102 TFEU.[350]

The ARA Foreclosure case, dated 20 September 2016, concerns an abuse of a dominant position in the market for the exemption of household packaging waste in Austria ("the market"). The Commission issued a prohibition decision (the "Decision") pursuant to Article 7 of Regulation 1/2003 related to a proceeding under Article 102 TFEU addressed to the Austrian company Altstoff Recycling Austria Aktiengesellschaft ("ARA"). The abuse occurred as ARA imposed unjustified access conditions for the shared use of its household waste collection infrastructure ("the infrastructure") which was non duplicable and whose shared use on national basis was indispensable for market entry. The infringement lasted from 1 March 2008 until at least 2 April 2012.

The facts related to the case began at the end of 2009, when the Commission received an informal complaint by the company EVA GmbH, later renamed Interseroh Austria GmbH ("Interseroh"). That complaint motivated the initiation of an investigation carried out by the Commission in 2010. In 2011, the Commission decided to initiate proceedings and in 2013 adopted an SO addressed to ARA, after which an Oral Hearing took place. In addition, the Commission addressed to ARA two Letters of Facts ("LoF") in 2014 and 2016. On 21 July 2016, ARA - instead of a substantial reply to the second LoF - submitted a formal offer to cooperate with the Commission ("Cooperation Submission") by acknowledging its infringement and proposing the imposition of a structural remedy with the acknowledgment that it was proportionate, and not more burdensome than a behavioural remedy.

In Austria, the market for exemption of household packaging waste arose because of a legal obligation that producers collect and recycle their waste. ARA exempted producers from their legal obligation to collect and recycle waste themselves, in exchange for a fee ("exemption system"). Under an Austrian law in force during the period of infringement, any company wishing to enter the household exemption market had to prove a nationwide coverage of the collection system to obtain the required authorization from the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management ("the Ministry"). ARA set up a nationwide collection infrastructure via contracts with collectors and municipalities, also owning 5% of the infrastructure itself. The Commission held that, at the time of the infringement, ARA was the only company which obtained authorization from the Ministry, as a result it was dominant in the market.

A previous Commission decision adopted in 2003 (the "2003 Decision") concluded that the infrastructure could not have been duplicated. Indeed, in the Decision, the Commission held that the Ministry had been remarking that a duplication of the infrastructure would have raised concerns related to landscape and environment protection, as well as higher costs and the doubts related to the public interest. The 2003 Decision was upheld by the General Court in 2013. In 2007, following discussions with the Austrian Competition Authority, ARA included in its contracts with municipalities and collectors, provisions for a shared use of the infrastructure. Following this, Interseroh/EVA contacted municipalities, collectors and ARA itself (for the part of the infrastructure it owned) asking for shared use. As a response, ARA offered a shared use of the infrastructure on a regional rather than on a national basis, requiring, in addition, that each potential new entrant proved the non-duplicability of the infrastructure region by region.

350 Grimaldi took the lead in the preparation of this case study.

The Commission concluded that ARA de facto refused the requested shared use by imposing unjustified access conditions by its competitors to the infrastructure which could not be duplicated and whose nationwide shared use was indispensable for market entry, therefore abusing its dominant position and foreclosing competition.

While the Commission investigations were ongoing, the structure of the market changed. Indeed, in September 2013 a new Austrian waste law entered into force (hereafter "Austrian Waste Management Act" or "WMA"), explicitly clarifying that the infrastructure could not have been duplicated and access to competitors had to be granted through shared use.

6.4.2 Identification of the remedies subject to evaluation

In the said 2003 Decision, the Commission imposed on ARA behavioural remedies that have been ineffective in addressing the Commission's concerns and, thus, in preventing the identified abuse of a dominant position.

In accordance with Article 7 of Regulation 1/2003, the Commission imposed on ARA a structural remedy in order to ensure that the infringement would not be repeated. As mentioned, the remedy was suggested by ARA in its Cooperation Submission, in which ARA acknowledged the infringement and recognized that the divestiture was necessary, proportionate and not less burdensome than a behavioural remedy.

In the Decision, the Commission, besides finding an infringement and fining ARA, required ARA to divest the part of the household collection infrastructure it owned because its shared use, while only constituting 5% of the overall infrastructure, was essential for ARA's competitors to enter the market since they had to ensure a nationwide coverage of their collection infrastructure to obtain the authorization by the Ministry.

The structural remedy suggested by ARA and agreed by the Commission represented the first structural remedy imposed in an Article 7 decision. In this case, the remedy did not anticipate any buyer approval since the circle of possible buyers was limited to the municipalities and the collectors active in the specific regions where the containers were placed.

Furthermore, the Commission underlined that the divestiture of the part of the household collection infrastructure which ARA owned fulfilled the conditions as specified in recital (12) of Regulation 1/2003, as ARA acknowledged the proportionality and necessity of the remedy, indicating that the divestiture of the owned part of the infrastructure was not more burdensome than a behavioural remedy.

As mentioned, the Commission imposed a fine on ARA. Indeed, the Commission considered that the infringement has been committed at least negligently and that, considering the gravity of the infringement, a proportion of the value of sales (up to 30% according to the Guidelines on fines) was to be established and multiplied by the number of years over which the infringement was committed. However, a reduction of 30 % of the fine was applied for ARA's cooperation. ARA made its Cooperation Submission conditional upon the imposition of a maximum fine not exceeding the amount of EUR 6.1 million. The final amount of the fine imposed on ARA pursuant to Article 23(2) of Regulation 1/2003 was, then, slightly over EUR 6 million.

6.4.3 A sui generis cooperation approach

The ARA Foreclosure case showed how a cooperation approach can be applied to antitrust cases. Indeed, collaboration may be ensured even when a procedure under Article 9 of Regulation 1/2003 is not suitable. Whilst the undertakings are able to benefit from a reduction of the fine, as well as preserving the public image and speeding up the resolution of the case, the Commission may better gather evidence, obtain an

acknowledgement of the infringement from the addressee, improve the design of the remedies in terms of target and effectiveness and achieve the overall objectives in the implementation of the EU antitrust rules, namely fostering compliance and providing for deterrence.

Before the ARA decision there was no practice for rewarding cooperation for the undertakings cooperating in the framework of a prohibition decision according to Article 7. Indeed, a reduction of the fine for cooperation by the parties was not widely used since Regulation 1/2003 entered into force.

As a further mutual benefit, by way of acknowledging the infringement, a cooperative approach may reduce disputes, while a judicial review by the European Court of Justice is warranted also in these cases, in particular concerning the imposed fines.

Regarding the timing for cooperation, for enabling the gathering of evidence it may be particularly useful to start cooperation before an SO is issued, while in relation to acknowledging liability for an infringement and suggesting targeted remedies it may also be relevant following the adoption of the SO. Indeed, the scope of the cooperation may depend on the stage of the proceedings in which it occurs, being decisive in terms of the realized advantages resulting from the cooperation and for the reduction of the fine, which is assessed on a case-by-case basis.

The cooperative approach in the ARA Foreclosure case filled a gap in the framework of cooperation, creating a sui generis process, distinct from both the existing cooperation in cartel cases and from the commitments proceedings in antitrust cases.

6.4.4 Identification the main issues investigated for the ex post evaluation

6.4.4.1 Implementation issues

In the ex post evaluation of the implementation of this remedy, we discuss whether the assets to be divested were clearly defined by the decision and assess whether ARA complied with the implementation of the remedy. In particular we investigate the straightforwardness of the implementation, as one of the positive sides of the cooperation between the Commission and the addressees in antitrust cases.

6.4.4.2 Effectiveness issues

We investigate whether the remedy imposed played a complementary role in relation to the Austrian Law introduced in 2013.

We assess to which extent the divestiture of ARA's own infrastructure was a guarantee that the most direct means of refusal was not any longer available to ARA and that the latter was not able to perpetrate the abuse of its dominant position.

6.4.5 Methodology and sources of evidence for the ex post evaluation

We rely on information collected during our interviews with market participants, lawyers with first-hand experience and associations, as well as the contribution received by the case team of the Commission and a literature review.

6.4.6 Main findings of the ex post evaluation of the effective implementation of the remedy

According to all the parties interviewed, the WMA-Amendment had a substantial influence on the development of the ARA case. It introduced a model for the mandatory shared use of the household packaging collection infrastructure in Austria, based on a regional allocation of responsibilities among the various exemption systems.

The remedy was smoothly implemented. ARA sold about 10.600 containers to various purchasers, which were either municipalities or private waste collection companies which won the tender for operating the collection infrastructure in a specific region, under the model established in the WMA-amendment. Therefore, within the framework created by the WMA-Amendment, the divestiture of ARA's assets pertaining to the household collection infrastructure was an instrument easy to implement.

The cooperation between the Commission and the undertaking played a crucial role in the effective designing of the remedy and in its consequent straightforward implementation. Furthermore, it allowed the application of a structural remedy instead of a behavioural remedy with similar effects, which would have been much more complicated to implement and to monitor, probably assisting in a less efficient manner the market opening process started with the WMA-Amendment.

6.4.7 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

According to the collected information, the remedy applied by the Commission was considered complementary to the Austrian law of 2013.

On a narrow level, according to the information collected, the remedy contributed to achieving the objective of opening up the market. Indeed, new competitors have been able to enter the market starting from 2015, prices have been fallen and no further concerns related to an abuse of dominant position have been registered after the remedy implementation. However, the degree of the impact is difficult to assess.

The competition concerns raised by the Commission in the SO have been greatly addressed by the WMA-Amendment. While the divestiture did not change the overall market structure already in place, it eliminated the risk that ARA continued to refuse the shared use of the part of infrastructure owned, even after the entry into force of the WMA-Amendment.

On a broader market competition level, market participants interviewed reported that ARA was able to maintain its dominant position, having more than 70% market share nowadays. Furthermore, the reserves accumulated during the years of monopoly allows ARA to apply tariffs and discounts that are difficult to match for the smaller competitors that, in the meantime, were able to access to the market.

Furthermore, the circumstance that the WMA-Amendment completely changed the scenario that was in place during the investigation, as well as the mentioned findings, confirmed how the cooperation agreement under Article 7 of Regulation 1/2003 was an effective tool in the ARA case.

Indeed, on the one hand a decision under Article 9 of Regulation 1/2003 would not have been suitable as establishing the infringement perpetrated and imposing a fine was in this case crucial to ensure deterrent and remunerative effects. On the other hand, a structural remedy without cooperation would have been difficult to impose considering the different scenarios in place and would have increased the risk of litigation.

The Commission took into account that ARA cooperated relatively late in the procedure, namely after the Commission issued the SO. However, the cooperation was effective in terms of gathering of evidence and designing of the remedy and justified a reduction of the fine imposed, which was the condition of the Cooperation Submission.

With the benefit of the hindsight, the remedy design and the procedure chosen by the Parties achieved the intended effects on competition and played a complementary role with respect to the WMA-Amendment.

6.4.8 Conclusions

The remedy was implemented without any issue. It was complementary to the WMA-Amendment and effective in achieving the intended effects on competition. The Cooperation Procedure was an innovative and successful tool in this case, allowing the parties to design a remedy easy to implement and effective to address the Commission initial concerns, despite the far-reaching changes in the legal framework of the market under investigation. Imposing a structural remedy was key in this case, after the behavioural remedies imposed in 2003 Decision failed addressing the competition concerns already raised by the Commission at the time.

A better designing of remedies already at the time of 2003 Decision would have had a better impact in terms of effectiveness, avoiding a delay in the effective intervention.

However, we can assess that the structural remedy imposed in the Decision at stake have been fully effective in addressing the abuse of dominant position of the undertaking.

AT. 39759 – *ARA Foreclosure*

Summary

- An Article 7 decision finding ARA abused its dominant position under Article 201 TFEU by imposing unjustified access conditions for the shared use of its household waste collection infrastructure.
- In 2013 WMA entered into force, explicitly clarifying that the infrastructure could not have been duplicated and access to competitors had to be granted through shared use.
- ARA was required to divest the part of the household collection infrastructure it owned to ensure the shared use and prevent further refusal by ARA.
- ARA in its Cooperation Submission acknowledged the infringement and recognized that the divestiture was necessary and proportionate.

Positive substantive and procedural aspects of remedy design and implementation

- The remedy was complementary to the WMA-Amendment, preventing any possible further refusal to allow the shared-use of the infrastructure.
- The Cooperation Procedure was an innovative and successful tool.

Critical substantive and procedural aspects of remedy design and implementation

- The degree of the impact of the remedies is difficult to assess, given that the market was mainly opened by the WMA-Amendment.

Level of implementation

- Fully implemented. No issue was raised in relation to the implementation.

Level of effectiveness

- Fully effective. The Cooperation Procedure allowed the parties to design a remedy easy to implement and effective to address the Commission initial concerns, despite the far-reaching changes in the legal framework of the market under investigation. We can assess that structural remedy in this case have been the appropriate ones rather than the behavioural remedies imposed in the previous 2003 Decision issued by the Commission.

6.5 AT.40134 – *AB InBev Beer Trade Restrictions*

6.5.1 Introduction

This case study concerns a prohibition decision following an investigation of certain unilateral practices that according to the Commission had the aim and the effect of partitioning the single market for a number of popular beer brands and allowing the concerned undertaking to price discriminate between different countries.[351] The remedies that were also imposed with the Decision are behavioural in nature, binding the undertaking to provide multilingual labelling information on its beer products (belonging to 19 distinct brands) sold to off-trade customers in Belgium, France and the Netherlands.

On 13 May 2019, the Commission issued a decision (the "Decision")[352] pursuant to Article 7 of Regulation 1/2003 related to a proceeding under Article 102 TFEU, addressed to Anheuser-Busch InBev NV/SA and two of its subsidiaries, InBev Belgium BVBA/SPRL and InBev Nederland NV (the undertaking comprising those three entities will hereafter be referred to as "AB InBev"). AB InBev is a Belgian multinational brewing company and the largest beer brewer in the world, owning internationally popular beer brands such as Jupiler, Leffe, Budweiser and Stella Artois.

After gathering market information from retailers and retailer associations, the Commission initiated an ex officio investigation concerning the existence of cross-country price differences for identical branded goods, specifically between Belgium and other Member States. It concluded that part of the differences in prices resulted from the artificial partitioning of the single market implemented by AB InBev to exercise price discrimination, which runs counter to the goal of the European Union to establish a single market (Article 3 TEU) and can therefore be investigated by the Commission under Article 102 TFEU as a possible abuse of a dominant position.[353]

On 29 June 2016 the Commission initiated proceedings against AB InBev, after carrying out inspections at AB InBev's premises. Subsequently, on 30 November 2017, the Commission issued an SO alleging that AB InBev abused its dominance by engaging in several anticompetitive practices. Next, AB InBev submitted a formal offer to cooperate (the "Settlement Submission") with the Commission in adopting a decision pursuant to Article 7 and Article 23, acknowledging liability for the infringement and proposing to commit to a remedy, which is the object of our evaluation.

The Decision, adopted on 13 May 2019, establishes that from 9 February 2009 to 31 October 2016 (the "Relevant Period") AB InBev restricted imports of its beer products from the Netherlands into Belgium through various practices, including the removal of food information in the French language from the 2014 FIFA World Cup Dutch edition of the Jupiler 33cl can.

In addition to a cease-and-desist order and a fine of EUR 200.4 million, the Commission imposed on AB InBev a behavioural remedy requiring that the addressee provide, for a period of 5 years, the mandatory food information on the labels of all products of its 19 beer brands sold to off-trade customers in the Netherlands, France and Belgium in both French and Dutch language.

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351 NERA took the lead in the preparation of this case study.

352 Commission Decision of 13 May 2019, AB InBev Beer Trade Restrictions, Case AT.40134.

353 See Section 7.1 of the Decision, titled *Partitioning of the Internal Market by restricting cross-border trade as an abuse of a dominant position*. On the notion of "*effect on trade*" in Art. 101 and Art. 102 TFEU, see European Commission, *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101/07, 2004.

6.5.2 Identification of the remedies subject to evaluation

According to the Decision, during the Relevant Period, AB InBev imposed different supply restrictions, such as volume restrictions, tying and conditioning, on some of its customers. Such supply restrictions were addressed by the cease-and-desist order included in the Decision. Moreover, AB InBev differentiated the packaging of otherwise identical beer products between Belgium and the Netherlands, thereby establishing an obstacle to imports into Belgium. This allowed AB InBev to maintain distinct pricing and promotional policies for its products between Member States.

Starting in April 2014 AB InBev also adjusted can sizes in the Netherlands by replacing the Jupiler 50cl cans with 44cl cans, which discouraged cross-border trade as customers in Belgium had become accustomed to the 50cl product layout.

Moreover, from 1 January 2014 to 13 July 2014, InBev Nederland and InBev Belgium marketed country-specific versions of the Jupiler 33cl can, each one displaying photos, logos and slogans supporting respectively the Dutch or the Belgium football national team on occasion of the FIFA World Cup in 2014. In addition, AB InBev removed the food information in French from the label of the cans sold in the Netherlands. Due to Belgian law requiring multilingual food information on packaging, this specific beer product could therefore not be sold in Belgium and thereby compete with its more expensive and, apart from the packaging, identical Belgian counterpart.[354]

The Commission's examination of AB InBev's internal documents reveals that various other attempts to modify the languages on product labels, as well as alterations to the size of cans, were considered with the aim of market segmentation. For procedural-economy reasons, the Commission focused on the behaviour with the most compelling evidence, that is the language on product labels of cans for the FIFA World Cup and did not investigate other behaviours in greater depth.

The Commission imposed a behavioural remedy on AB InBev to provide multilingual labelling information on all products of 19 beer brands sold to off-trade customers in Belgium, France and the Netherlands for a duration of 5 years from the date of notification of the Decision. This remedy is the primary focus of our ex post evaluation. Additionally, AB InBev was subject to reporting obligations, submitting an initial report within 9 months to document the implementation of the remedy and a final report after the expiration of the remedy period.[355]

In addition to the multilingual labelling remedy, the case team internally discussed the possibility of implementing the further remedy of requiring AB InBev to revert the can size from 44cl to 50cl, aiming to restore market conditions and mitigate the negative impact on consumers that AB InBev's past behaviour (the reduction in can size) may have had. However, in the absence of conclusive evidence on how the market had adapted over the several years since AB InBev's initial can size change, the case team decided not to pursue a can size reversal as an additional remedy. This highlights the challenge of introducing a restorative remedy several years after an infringement occurred.

As a result, during the cooperation procedure under Article 7, the case team clarified that the remedy would have not gone beyond tackling the effects they identified as a result of the failure to use multilingual labels, and reverting the change of can sizes was not part of the remedy discussion between AB InBev and the case

354 Given Belgium's multilingualism, food labels must be at least in the language(s) of the areas where they are marketed (see the Belgian *Code of Economic Law*, Article IX.9). Removing the French language from the label of the Jupiler 33cl cans sold in the Netherlands made it impossible to export them in most of the Belgian territory.

355 Our interview with the case team took place before the submission of AB InBev's final report.

team. The Commission did not conduct an informal market test as it concluded that no alternative remedy would have adequately addressed the anticompetitive concerns and brought the infringement of restricting parallel trade through differential language labelling effectively to an end.

Case AT.40134 – *AB InBev Beer Trade Restrictions* is among the few Article 7 cases in which a (positive) remedy is imposed in addition to a cease-and-desist order. Additionally, the remedy, put forward by the addressee, has a wider scope than the behaviour that was sanctioned. Rather than solely applying to the Jupiler brand, it covers all new and existing products of a set of 19 beer brands sold by AB InBev to off-trade customers in France, Belgium and the Netherlands. However, when considering the scope of the remedy, it is important to distinguish between formal aspects and practical implementation. While the remedy covers a broad range of 19 brands traded in France, Belgium and the Netherlands, only a limited number of products required actual label changes because the majority of products among the covered brands already had multilingual labelling. However, any narrower range of products covered by the remedy would have allowed for potential circumvention by enabling label changing practices for products that are not covered by the remedy, which in turn, would have rendered the achievement of the Commission's intended objective of removing artificial barriers to parallel beer trade related to product labelling less likely.

The case team did not consider an Article 9 decision in this case given the compelling evidence of deliberate market partitioning, obtained through AB InBev's internal documents, but rather aimed to set a precedent by declaring an infringement, thereby establishing that the removal of languages from labels can constitute a restriction to parallel trade.

Compared to the standard procedure for the imposition of remedies under Article 7, the cooperation procedure followed in this case allowed for a more interactive process between AB InBev and the Commission, in which the fine-tuning of remedies could respond to each other's concerns. The resulting common understanding of the suitable extent of the remedy, in turn, increased legal certainty and reduced the likelihood of potential disputes and litigation later on. Moreover, compared to the standard procedure under Article 7, the cooperation procedure enabled a broader scope of the remedy, considering that the actual infringement only concerned a minority of the brands included in the remedy scope.

According to both parties, from the time it was activated, after issuing the SO, the cooperation procedure went smoothly and consensually, saving time and resources and aligning expectations about the details of implementation. In return for accepting the cooperation procedure, and proposing the remedy, AB InBev received an exceptionally high 15% reduction of the fine.

6.5.3 Identification of the main issues investigated for ex post evaluation

6.5.3.1 Implementation issues

We evaluate the extent to which AB InBev complied with the obligation to apply bilingual package labelling for the products of the 19 beer brands covered by the remedy and supplied to off-trade customers in France, Belgium and the Netherlands. We also examine the extent to which AB InBev complied with the reporting obligations associated with the remedy as modalities and ancillary measures.

6.5.3.2 Effectiveness issues

The primary concern identified by the Commission was the partitioning of the single market through limitations placed by AB InBev on parallel trade. In a narrow sense, the intended objective of the remedy is to prevent differential language labelling of beer products from posing a barrier to trade between the

Netherlands, Belgium and France. More broadly, the remedy aims to foster parallel trade of AB InBev beer products.

In light of this intended objective, we assess whether language labelling ceased to pose a barrier to parallel trade of AB InBev beer products, whether other features to the packaging of beer products hinder parallel trade, and embed this assessment into a broader evaluation of effectiveness. Additionally, in our assessment of the effectiveness of the remedy we offer some considerations as to how the remedy relates to the cease-and-desist order.

6.5.4 Methodology and sources of evidence for the ex post evaluation

We conducted interviews with the case team at the Commission, AB InBev and a number of customers of AB InBev to assess the implementation and effectiveness of the remedy.[356] The interviews with the case team and AB InBev provide us with information on procedural aspects and contribute to the assessment of the implementation of product labelling obligations.

Interviews with AB InBev's customers allow us to explore whether the obligation to print multilingual labels created new sourcing opportunities or made the ones already existing easier to exploit. Moreover, the customer interviews can provide information on price developments as well as other potential barriers to trade which impact the effectiveness of the remedy in a broader sense.

6.5.5 Main findings of the ex post evaluation of the effective implementation of the remedy

Considering that the remedy was imposed with an Article 7 Decision, the simplicity of the remedy and the fact that AB InBev's customers can easily spot and report non-compliance, no monitoring trustee was appointed in this case. No disputes arose in the implementation of the remedy and no complaints from any retailer, wholesaler or consumer have been reported to the Commission. All customers of AB InBev that responded to our questions confirmed that the remedy has been implemented successfully.

Considering that only a very limited number of products required actual changes to their labels, AB InBev does not consider the implementation and reporting obligations very burdensome. AB InBev complied by submitting the initial report to the Commission, in which it documents the implementation of label changes for the existing products, subsequently turning the focus to ensuring compliance for the new products. Based on our interviews, we conclude that the remedy was fully implemented.

6.5.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

A central feature of remedy design to enable effectiveness, as emphasised by the case team, is the remedy's broad coverage of AB InBev's beer brands, which was intended to prevent repetition of the problematic behaviour and circumvention of the prohibition. In contrast with this remedy, a single cease-and-desist order

356 Some of the retailers, wholesalers and retail/wholesale associations which we contacted were unwilling to provide input for the Study.

regarding language labelling would have possibly only covered the products for which the infringement was established. Hence, AB InBev could have possibly implemented similar label changes for other beer brands or created separate product labels only on demand, rather than establishing multi-language labelling as the default across all beer brands and sales.

Although the remedy was imposed for a 5-year period, its impact is likely to extend beyond that timeframe. The Decision establishes a precedent regarding the compatibility of label changes with EU competition law. In addition, AB InBev's customers and final consumers are likely to have become accustomed to the multilingual labels, and would react vocally to label changes in the future.

The case team as well as market participants regard the remedy as fully effective in addressing concerns about restrictions on parallel trade due to differential language labelling. However, even the fullest implementation of the remedy cannot rule out that other barriers to trade may continue to exist. When it comes to the other barriers that, according to the Decision, AB InBev itself had erected, the cease-and-desist part of the Decision prevents them from re-occurring. The remedy and the cease-and-desist order are in this sense complementary in that they enhance each other's effectiveness by jointly limiting AB InBev's room for circumvention of the overarching obligation not to artificially segment trade in its beers between Belgium and neighbouring countries.

While the remedy addresses the language labelling of AB InBev beer products, it does not tackle the change of can sizes that had also been part of AB InBev's behaviour, since there were questions about the opportunity of demanding the re-introduction of products that by then had long been withdrawn from the market. According to some market participants, though, the lingering presence of differential can sizes between Member States does constitute a further friction to the cross-country trade of AB InBev beer products, thereby dampening the broader effectiveness of the remedy.[357]

In any case, there are frictions to parallel trade between Belgium, France and the Netherlands that go beyond the behaviour of the individual suppliers and include national regulatory features, such as differential bottle and can deposit systems. The continuous existence of differences in the national systems inhibits the possibility of parallel trade even with a fully effective remedy in the narrow sense.

A recent assessment by the Belgian Competition Authority finds, for example, that in the period 2018-2022, average retail prices for consumer goods increased less rapidly in Belgium compared to its three neighbouring countries.[358] For alcoholic and soft drinks it finds that this trend was mostly driven by a reduction in gross margins of retailers in Belgium, rather than by a reduction in wholesale prices. However, before being reflected in retail price changes, the removal of trade restrictions imposed by the manufacturers would manifest themselves first in wholesale price changes. Not seeing a reduction in wholesale prices could then confirm that even after the implementation of the remedy other barriers to trade have continued to prevent convergence of wholesale prices for consumer goods between Member States. In addition to differential deposit systems, factors contributing to continued wholesale price differences can include, for example, transport, distribution and other regulation.[359]

357 Interview partners pointed out in particular that at the end of 2019 AB InBev launched a new can size for its Jupiler brand in Belgium. In addition to the 33cl can, 35.5cl cans became available and remain on the market to this day.

358 Belgian Competition Authority, *Recent Trends in Fast Moving Consumer Good Prices in Belgium and a Comparison with the Netherlands, France and Germany: Descriptive Statistics on Retailer and Manufacturer Selling Prices Euromonitor Passport Data*, 2024.

359 Over the course of the project we also received annual sales data of AB InBev beer products from a large retailer, from 2018 to 2023. At this level of aggregation, however, we have not been able to empirically detect the impact of the remedy on prices and sales.

6.5.7 Conclusions

On 13 May 2019, the Commission issued an Article 7 decision in case AT.40134 – *AB InBev beer trade restrictions*. Following the cooperation procedure, the Commission imposed, in addition to a cease-and-desist order and a discounted fine of EUR 200.4 million, a behavioural remedy that obliges AB InBev to provide multilingual labelling information on its beer products in France, Belgium and the Netherlands, for a period of 5 years.

Overall, the remedy was implemented without any issues and it fully achieved its intended objective of effectively eliminating differences in language labelling as a barrier to parallel trade for AB InBev beer products between Belgium, France and the Netherlands. More broadly, however, the lingering presence of different can sizes and different national regulatory settings, in particular with respect to bottle deposit systems, continue to constitute frictions to the trade of beer products between Belgium, France and the Netherlands.

AT.40134 – *AB InBev Beer Trade Restrictions*

Summary

- AB InBev was fined in 2019 for abusing its dominant position on the Belgian beer market by hindering cheaper beer imports of its own products from the Netherlands into Belgium.
- Infringement: tying, conditioning and other supply restrictions and changes to the packaging of beer products, in particular can size and label languages.
- Remedy: Language labelling was addressed through AB InBev's obligation to include mandatory food information in both French and Dutch on the labels of all existing and future products in Belgium, the Netherlands and France for a period of 5 years.

Positive substantive and procedural aspects of remedy design and implementation

- Cooperation procedure saved time and resources – if only in the design of remedies, after the issuance of the SO.
- Cooperation procedure enabled, if not the imposition of remedies in the first place, then a broad product and geographic remedy scope (labelling), covering 19 AB InBev brands rather than only the SKUs for which the infringement was established.
- In turn, the broad scope and also otherwise clear-cut obligation gave confidence about compliance to both the case team and AB InBev itself.
- Synergies between the remedy and the cease-and-desist order led to a significant reduction in AB InBev's room for circumvention.

Critical substantive and procedural aspects of remedy design and implementation

- Earlier intervention could have made it possible to address, in a restorative way, aspects of the infringement (can size) that it was no longer considered meaningful to address at the time of the Decision.

Level of implementation

- Fully implemented. No complaints received.

Level of effectiveness

- Fully effective in eliminating differential labelling of AB InBev beer products as a potential barrier to trade.
- However, the lingering presence of differential can sizes still poses according to some market participants a barrier to parallel trade. This raises the question whether the Commission should have also required a remedy regarding can sizes.
- More broadly, frictions to the parallel trade of beer between Belgium, France and the Netherlands that are independent of the infringement, such as differential bottle and can deposit systems, continue to exist.

6.6 AT.38636 – *Rambus*

6.6.1 Introduction

This case study covers an Article 9 decision following an Article 102 TFEU investigation of a complex conduct by technology firm Rambus Inc. ("Rambus").[360] The conduct, which has become known as a "patent ambush", consisted in a first step in concealing the existence of patents while participating in a standard-setting process and in a second step in demanding excessive royalty rates once the adopted standard included the patent-protected technology. The commitments, concentrating on the second step of the conduct, establish caps on royalty rates not only for the standard generations that were adopted when Rambus was part of the US independent Standard Setting Organization ("SSO") Joint Electron Device Engineering Council ("JEDEC") and in the ignorance of Rambus's patents, but also for subsequent standard generations that were adopted once Rambus's patents had become known.

The case study offers important insights into an area at the intersection between competition and intellectual property law and is in this sense related to our other case study, on the Article 7 decision in case AT.39985 – *Motorola – Enforcement of GPRS Standard Essential Patents*. However, while the latter case concentrates on the behaviour of a patent holder in relation to the use of injunctions against implementers once the technology covered by its patents has been included in a standard, the former case looks jointly at the behaviour of the patent holder once the standard has been adopted (as regards the charging of possibly excessive royalty rates) as well as during the standard-setting process itself. Because of the focus on regulating possibly excessive prices, this case study is also related to our case study on the Article 9 commitments decision in case AT.40394 – *Aspen*, which concerns possibly excessive prices on pharmaceutical products.

On 9 December 2009, the European Commission issued a decision[361] pursuant to Article 9 of Regulation 1/2003, according to which Rambus had potentially infringed Article 102 TFEU by demanding potentially abusive royalties for the use of its patents from manufacturers of Dynamic Random Access Memory ("DRAM") chips that relied on a standard set by SSO JEDEC – patents that had been concealed by Rambus when the standard was set.

In its preliminary assessment, the Commission found a relevant worldwide technology market for DRAM interface technology. DRAM is a temporary storage component for data that needs to be accessed by other components of a computer system like the Central Processing Unit (CPU), which DRAM interface technology allows.[362] This data traffic is governed by a chip called Memory Controller.

At the time of the Decision, Synchronous DRAM ("SDRAM") complying with the standard set by JEDEC represented the great majority of DRAM chips sold and Rambus asserted patents on all JEDEC-compliant chips.[363] As Rambus patents were necessary to implement JEDEC standards and these standards were followed by the vast majority of the industry, manufacturers of DRAM chips had to obtain licenses from Rambus. Moreover, as the industry was locked into JEDEC standards, the market presented high barriers to entry, considering the high costs of developing a new standard and of redesigning products to be compliant with it.[364] The Commission thus preliminarily concluded that Rambus was dominant in the relevant market.[365]

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360 NERA took the lead in the preparation of this case study.

361 Commission Decision of 9 May 2009, Rambus, Case AT.38636.

362 See the Decision, at recitals 16 and 17.

363 See the Decision, at recitals 19 and 20.

364 See the Decision, at recitals 22-25.

365 Rambus also asserted patents on Memory Controllers, which are complementary components that control DRAM chips and are compatible with industry-standard DRAMs.

The allegation against Rambus was that, at the time of standard setting when Rambus was a member of JEDEC, Rambus had not disclosed to JEDEC the existence of patents that it owned and read on the standard under development. When Rambus subsequently sought to enforce its intellectual property rights, it was not bound by any commitments on licencing terms that it would have had to make if it had disclosed its patents during the standard-setting process. The Commission preliminarily concluded that, free from this commitment, Rambus charged excessive prices for the licensing of its patents, therefore possibly violating Article 102 TFEU. Had Rambus disclosed its patents and patent applications on some of the technology that was in the process of being included into the standard, either Rambus would have had to commit to certain licencing terms or its patent-protected technology would have not been included into the standard.[366]

With the commitments that were made binding on Rambus with the Decision, Rambus was bound to offer bundled 5-year worldwide licences subject to a royalty-rate cap for its patents on certain technologies included in DRAM products. In particular, for the old standards the commitments specify a royalty holiday (in other words, a 0% royalty rate).[367] For later generations of standards, adopted when Rambus was no longer a member of JEDEC, Rambus committed to grant maximum royalty rates ranging between 1% and 2% of the unit selling price. The case team stressed that such maximum royalty rates were not intended to necessarily represent FRAND rates but only to force Rambus to lower the prices below a level that the Commission considered excessive.[368] The commitments expired in 2014.

The same matter was also investigated in the US by the FTC, whose decision in 2006 was ultimately set aside by the Court of Appeals for the D.C. Circuit in 2008.[369]

6.6.2 Identification and discussion of the remedies subject to evaluation

In their final version, the commitments establish royalty caps and other terms of standard licenses for different products compliant with JEDEC standards (DRAM chips) and interfacing with JEDEC standard DRAMs (Memory Controllers). We consider the whole set of final commitments in our ex post assessment because they refer to products in the same relevant market and they address the same underlying competition concern. Evaluating the implementation and effectiveness of individual licensing terms separately would, therefore, not be sensible. We classify the remedy as being purely behavioural, specifically as an "*obligation to respect certain price caps/conditions*".

366 For a discussion of the facts of the case by Commission officials that were involved in it, see Schellingerhout R., and Cavicchi P., *Patent ambush in standard-setting: the Commission Accepts Commitments from Rambus to Lower Memory Chip Royalty Rates*, 1 DG COMP Competition Policy Newsletter, 2010. Schellingerhout R., *Standard-setting from a Competition Law Perspective*, 1 DG-COMP Competition Policy Newsletter, 2011 provides a broader discussion of competition-law aspects of standard setting.

367 This covers the SDRAM and DDR standards adopted by JEDEC during the period in which Rambus was a member, namely from 1991 to 1996. Rambus rejoined JEDEC in May 2014.

368 In its subsequent decisions in cases AT.39985 – *Motorola – Enforcement of GPRS Standard Essential Patents* and AT.39939 – *Samsung – Enforcement of UMTS standard essential patents* the Commission further distances itself from the determination of FRAND rates by only ensuring that the process that the parties follow when licencing technology is conducive to such outcomes (Samsung) or at least is not distorted by behaviour that prevents such outcomes from being reached (Motorola).

369 In its investigation, the FTC focused only on the old standards (SDRAM and DDR) and issued an order limiting maximum royalties on these standards only. In contrast to the US approach, the EU approach also considered and obtained remedies on the later standards. The FTC was ultimately set aside by the relevant Circuit Court because, among other issues, it failed to demonstrate that Rambus would have not been able to charge the same royalty rates absent the conduct at issue. See Judgment of the United States Court of Appeals for the district of Columbia Circuit of 22 April 2008, *Rambus Incorporated* v *Federal Trade Commission*, No. 07-1086, pp. 10-11. Culley D., Dhanani M. and Dolmans M., *Learning from Rambus – How to Tame those Troublesome Trolls*, 57(1) Antitrust Bulletin 117, 2012 provides a thorough discussion of the case from both an EU and a US perspective. Because NERA advised Rambus in the US investigation and litigation, US developments will not be further discussed in this case study.

6.6.3 Identification of the main issues investigated for the ex post evaluation

6.6.3.1 Implementation issues

In our ex post evaluation, we assess the extent to which the commitments were implemented as they were specified in the Decision and whether there were any disputes in their implementation. In particular, we assess whether implementers were able to obtain licenses from Rambus on terms that comply with the commitments or whether there is any indication that at least some implementers were unable to do so.

6.6.3.2 Effectiveness issues

To assess the effectiveness of the remedies in this case, in our ex post evaluation we mainly compare the royalty rates that applied before the Decision to the rates that applied thereafter, accounting as much as possible for confounding factors.

Since the commitments concern caps on royalty rates in case of (possibly) excessive prices, the intended objective of the commitments was to bring down those prices to a level that would no longer be excessive. We could confirm in our interview with the case team that this was the objective and that, under the commitments, prices went down compared to before. Yet, the objective is not unambiguous since the questions remain open as to against which benchmark the prices were evaluated as (possibly) excessive in the first place, and as to what level of reduction in the prices was deemed to be adequate to make them no longer excessive. *"As the competition concerns arise from the fact that Rambus may be claiming abusive royalties for the use of its patents at a level which it would not have been able to charge absent its conduct",*[370] a candidate benchmark price (against which the prices were preliminarily found to be excessive) could be the counterfactual price, that is the price that would have emerged absent Rambus's conduct (during standard setting). Other candidates which may or may not coincide with the counterfactual price include the FRAND price, a price reflecting the "true economic value" of the underlying technology, or a price that is usually observed for comparable technologies in similar markets. Clearly both the choice of such a benchmark and determining what price level that benchmark would imply are not straightforward endeavours,[371] and it is not clear whether a competition authority, which is not a price regulator, should engage in such endeavours. Indeed, the Commission stood clear of setting FRAND rates also in subsequent cases AT.39985 – *Motorola – Enforcement of GPRS Standard Essential Patents* and AT.39939 – *Samsung – Enforcement of UMTS standard essential patents*.[372]

Lastly, we also assess the broader impact of the commitments and of the Decision itself. As mentioned already, the behaviour at issue in this case is twofold, that is the concealing of patents during the standard-setting process first and the charging of excessive royalty rates on those patents subsequently. At the same time, the commitments concentrate on the latter aspect of the behaviour. In our ex post evaluation, we consider the impact that the Decision may have had beyond the impact of the commitments, which concentrate on setting caps on the relevant royalty rates. In particular, while not finding an infringement, the Decision may have had an impact on the behaviour that Standard Setting Organisations (SSOs) demanded from their members while participating in the standard-setting process, in the interest of reducing the occurrence of patent ambushes in the future.

370 See the Decision, at recital 71.

371 Note that the Decision is not explicit on any such benchmark. In the Decision the (potentially) excessive characterisation of prices seem to follow from the firm's market position (and the way in which it was achieved) rather than from an empirical comparative exercise.

372 See footnote 328.

6.6.4 Methodology and sources of evidence for the ex post evaluation

To retrospectively assess the implementation and the effectiveness of remedies in this case, we rely, in addition to the interview with the Commission, on interviews with market participants and their written answers to our questions. We also consider some of Rambus' licencing agreements, as well as Commission guidelines and other publications.

6.6.5 Main findings of the ex post evaluation of the effective implementation of the remedy

No monitoring trustee was appointed with this Decision, nor were any reporting obligations by Rambus to the Commission agreed. To monitor implementation, the Commission thus relied on the commitment beneficiaries' interest and ability to report any non-compliance with the commitments to the Commission directly. While the assessment could be different today, at the time this was deemed sufficient, considering that the remedy beneficiaries were multinational companies with substantial legal departments well-versed in patent law. As a result, it would have been straightforward for them to detect and report to the Commission any deviation from the commitments.[373] Market participants also did not point out for a specific need for a monitoring trustee.

Neither the Commission nor any market participant that we have reached out to has raised any implementation concerns. Against this background, we consider this remedy to have been fully implemented.

6.6.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

When it comes to the remedies' effectiveness, the feedback that we received from market participants is mainly sceptical. On the face of it, assuming that Rambus charged the same rate on the DDR, DDR2 and DDR3 standards, which was 3.5% according to the Commission,[374] a reduction from 3.5% to the (at most) 1.0%-to-2.65% Rambus was bound to by the commitments would have constituted a very substantial reduction, making for an effective remedy.

At the same time, during the market test of the commitments, *"all respondents generally considered the proposed rates to be too high"*.[375] Multiple respondents provided calculations in support of their claim that there were companies which were paying lower royalties than the capped rates already before the Decision. Although the commitments were amended in several aspects upon the results of the market test, such as the removal of the most-favoured-licensee clause, the capped rates were not revised.[376]

Similarly, our research suggests that already before the Decision some licensees were paying a much lower royalty rate. In particular, Infineon Technologies AG ("Infineon") had lodged on 18 December 2002, together with Hynix Technologies Inc., the joint complaint that gave rise to the Commission's investigation against

373 After all, the commitments themselves, which can be seen as an annex to the Decision, are a lean six-page document.
374 See the Decision, at recital 55. Based on the responses to our questionnaires we were not able to ascertain whether this was a uniform rate charged to all implementers or whether some were able to negotiate lower rates.
375 See the Decision, at recital 54.
376 The proposed commitments included a most-favoured-licensee clause. During the market test market participants argued that they could not negotiate a lower rate than the capped rates, because under this clause Rambus would have to offer the same rate to all other licensees. In the final commitments this clause was removed.

Rambus.[377] Infineon subsequently withdrew its complaint on 5 April 2005, having signed a settlement agreement with Rambus few days before.[378] The agreement foresaw quarterly royalty payments of USD 5.85 million for the first 2 years for all of Rambus' patents. In proportion to the relevant Infineon revenues at the time, this would suggest a much lower royalty rate than the caps foreseen by the commitments.

Moreover, other licensees argued that a zero royalty rate (royalty holiday) should have been applied not only to the old standards SDR and DDR but also to the new ones. This is because, according to them, alternative technologies were being considered at the time JEDEC took the SDR and DDR standard decisions, and JEDEC, which was cost-conscious, would have not chosen such technology if they had known that Rambus' patents read on it and that Rambus could have charged any royalties at all for its use. For its subsequent decisions on the DDR2 and DDR3 standards, it is true that, by that time, JEDEC had become aware of Rambus's patents and its royalty rates, but by then JEDEC was, according to these stakeholders, locked into subsequent generations of the same standard because of the switching costs associated with adopting a different standard and redesigning products to be compliant with such standard.

This discussion raises fundamental questions about the appropriate benchmark for antitrust remedy design and the assessment of remedy effectiveness. In particular, should the intended effect of the Commission when designing antitrust remedies just be that of halting the problematic behaviour (and preventing it from being repeated), or should it also include the restoration of competition? Judging by the first standard, one could say that in the Rambus case remedies have been effective to the extent that the royalty rates have ceased to be excessive. Judging by the second, and higher, standard, though, one should only conclude that remedies have been effective if they succeeded in bringing royalty rates to the level at which they would have been in the counterfactual scenario absent the problematic behaviour at the standard-setting stage. These considerations also highlight that, while in a pure excessive-prices case it may be difficult to establish an economic standard for excessive prices, in the Rambus case it is possible to conceive of a counterfactual scenario in which the problematic behaviour at the standard-setting stage is removed and the price-setting incentives and constraints are accordingly altered. The Commission however left open in the Decision the question of whether the patents would also have been included in the standards absent Rambus' conduct, which was also confirmed in our interview with the case team.

Following these considerations, we consider this remedy to have been partially effective in achieving its intended objective of bringing down excessive prices.

Beyond the direct effect of the commitments on the licensing rates for DRAM products, the Decision also had broader influence on standard setting, deterring future "patent ambushes" either directly or through subsequent policy initiatives. This Decision could indeed represent a case in which, while no infringement was found and thus no prohibition was declared, the Decision may nonetheless have had a deterrent effect for the problematic behaviour. In addition, while the Commission's 2001 Horizontal Guidelines do not discuss disclosure of patents in the standard setting process, the 2011 Guidelines require *"good faith disclosure"* of the Intellectual Property Rights (IPR) of participants in the process,[379] and the 2023 Horizontal Guidelines make a specific reference to *"patent ambushes"* and the Rambus case while discussing disclosure of IPR in the process of standard setting.[380] The Commission's advocacy efforts may have also encouraged SSOs to clarify and expand their transparency obligations during the standard-setting process.

377 See the Decision, at recital 5.

378 The agreement, dated 21 March 2005, can be found here: https://contracts.justia.com/companies/rambus-inc-1103/contract/915340/.

379 European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 2011, recital 286.

380 European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 2023, recital 457.

In some of our interviews with stakeholders, it was also suggested that one unintended consequence of the Decision may have been that patent holders may now err on the side of caution and declare patents to be standard-essential even when in fact they are not, which could result in unnecessary litigation challenging and defending the essentiality of patents for certain standards.

6.6.7 Conclusions

We conclude that while remedies in this case were fully implemented, questions remain as to their effectiveness. In particular, remedies were found to have an effect in reducing the royalty rates some implementers paid to Rambus, which was the intended objective of the Decision. However, some of the market participants' responses suggest that effectiveness may have been limited by the caps being set too high.

AT. 38636 – *Rambus*

Summary

- A commitments decision following an Article 102 TFEU investigation of a two-step conduct, which has become known as "patent ambushes", by Rambus. According to the Commission, the conduct consisted in a first step in concealing the existence of patents while participating in a standard-setting process, and in a second step in demanding excessive royalty rates on them.
- The remedies establish caps on royalty rates.

Positive substantive and procedural aspects of remedy design and implementation

- The remedies were forward-looking, in that they covered not only the old standards, but also the later generations of those standards.

Critical substantive and procedural aspects of remedy design and implementation

- The Decision could have been more transparent as to how the specific caps were determined and why they were fit for purpose (of bringing down possibly excessive prices, to a sufficient degree).
- The Decision could have been adopted earlier. Rambus started to assert its patents in 2000, while the Decision was adopted only in 2009.

Level of implementation

- Fully implemented. No complaints received by the Commission nor heard in our Study.

Level of effectiveness

- Partially effective. There was a reduction in licensing fees. Yet, respondents to the market test argued that the capped rates were too high. We could not conclusively assess whether the reduction was sufficient to bring fees down to the competitive/FRAND/counterfactual level.
- More broadly, the Decision influenced subsequent disclosure rules in standard setting organisations in a positive way and was reflected in, among others, the Horizontal Guidelines (2011).

6.7 AT.39596 – *BA/AA/IB*

6.7.1 Introduction

On July 14th, 2010, pursuant to Article 9 of Regulation (EC) No 1/2003, the Commission adopted a Decision related to competition concerns raised under Article 101 TFEU, making binding the commitments proposed by British Airways Plc. (hereafter "BA"), American Airlines Inc. (hereafter "AA"), and Iberia Lineas Aereas de España S.A (hereafter "IB").[381]

The case concerns the agreements between BA, AA and IB (hereafter collectively referred to as "the Parties") to establish a Joint venture ("JV") covering all their passenger air transport services on the routes between Europe and North America (hereafter "transatlantic routes"). The agreements provide for extensive cooperation between the parties on the transatlantic routes, which includes pricing, capacity and scheduling coordination, as well as revenue sharing.

In relation to the JV announced by the Parties in June 2008, the Commission on 25 July 2008 opened an ex-officio investigation. A competitor filed a formal complaint in this case on 30 January 2009. In an SO issued on 29 September 2009, the Commission took the preliminary view that the parties' agreements would restrict competition on transatlantic routes.

Indeed, the Commission was concerned that, as a result of the JV, the parties would to a large extent act as a single entity on these routes, which would deprive the market of the competitive pressure that was previously exerted by them on each other and on other competitors. The remaining competitors would have been unable to compete effectively, due to the parties' strong position on these routes and the barriers to entry such as the shortage of peak-time slots at London Heathrow airport ("LHR") and London Gatwick ("LGW") the parties' frequency advantage and their control of most connecting traffic on the routes.

After the parties' replies, the Commission maintained its preliminary concerns in relation to six transatlantic routes: London-Dallas (premium and non-premium markets); London-Boston (premium and non-premium markets); London-Miami (premium and non-premium markets); London-Chicago (premium market); London-New York (premium market); and Madrid-Miami (premium market).

More in detail, the Commission considered that on these routes, the parties' position was particularly strong and there were high barriers to entry or expansion, in particular lack of peak-time slots at LHR and LGW and New York Newark/JFK airports, frequency advantage of the parties, limited access to connecting traffic and the parties' strength in terms of frequent flyer programmes (hereinafter "FFPs"), and corporate contracts and marketing.

To address the Commission's preliminary competition concerns BA, AA and IB proposed commitments. On 10 March 2010, a notice was published in the Official Journal of the European Union inviting third parties to give their observations on the commitments. On 12 May 2010 and ultimately on 25 June 2010, the parties submitted amended commitments, taking into account the observations received from the market participants, which were made binding by the Commission by Decision issued on the 14th of July 2010.

The remedies which were agreed and shared between the Parties were designed to facilitate entry onto routes of concern in order to alleviate the Commission's concerns and enable the start of the Parties Atlantic Joint Business ("AJB").

381 Grimaldi took the lead in the preparation of this case study.

6.7.2 Identification of the remedies subject to evaluation

As mentioned, the Commission made legally binding the commitments proposed by the parties to ensure competition on transatlantic passenger air transport markets in relation to the six transatlantic routes noted above. The remedies included were the following:

1. Slot Commitments. Their nature is classified quasi-structural (hereinafter "Slot remedies")

To make available slots at London airports (Gatwick or LHR, at the entrants' choice) on four routes:

- London-New York 21 weekly slots (3 daily);
- London-Boston 14 weekly slots (2 daily);
- London-Miami 7 weekly slots (1 daily);
- London-Dallas 7 weekly slots (1 daily).

On the London-New York route, the parties committed also to offer matching operating authorisations at New York John F. Kennedy airport.

2. Commitments other than Slot ones. Their nature is classified as purely behavioural (hereinafter "Behavioural remedies"). In detail:

- Fare combinability agreements ("FCA"). Concluding agreements to allow competitors to carry passengers one-way on their own planes and sell tickets for the other way on the parties' flights. This was to enable competitors to offer more attractive schedules thanks to the parties' higher number of frequencies;
- Special pro-rate agreements ("SPA"). Allowing competitors to obtain favourable terms from the parties for connecting passengers from the parties' short-haul flights in Europe and North America to competitors' transatlantic services;
- Access to the parties' frequent flyer programmes ("FFPs"). This would allow passengers flying with competitors that do not have an FFP programme in terms of earning and redemption possibilities comparable to that of the parties to earn and burn miles on the parties' FFPs;
- Data report. Obligation to report to the Commission relating to the parties' cooperation. This reporting obligation would allow the Commission to monitor the effects of the joint venture on the markets over time.

The commitments duration was 10 years and therefore, they expired on 14 July 2020.

This was due to the need to ensure to potential entrants a sufficiently long duration to justify entry on the routes of concern, in the light of their business plans or aircraft planning. At the same time, a longer duration would have failed to take account of the likely changes in the aviation sector over time.

The commitments were designed to facilitate the entry or expansion of competitors on the routes of concern by eliminating or lowering the barriers for launching new flights. These barriers were lack of slots, frequency advantage of the parties, access to connecting traffic, and the strength of the parties' frequent flyer programmes.

The ultimate objective was to ensure an adequate choice of flights, quality of service and lower fares for passengers.

6.7.3 Identification of the main issues investigated for the ex post evaluation

6.7.3.1 Implementation issues

Slot remedies. We investigate to what extent the slot remedies have been implemented through ad hoc agreements in each of the routes of concern. We assess whether the implementation occurred smoothly and the available slots have been taken up by competitors.

Behavioural remedies. We investigate to what extent the FCA, SPA and FFP commitments have been implemented and agreements with competitors have been signed in the routes of concern. We assess whether the designing of the commitments allowed a smooth and full implementation.

6.7.3.2 Effectiveness issues

Slot remedies. We assess to what extent slot commitment have been effective in addressing the competition concerns expressed by the Commission in its SO. In particular, we investigate whether the commitment successfully opened the market to competitors and prevented potential price increases that could have resulted from the joint venture, as envisaged by the Commission.

Behavioural remedies. We investigate to what extent the FCA, SPA and FFP commitments have been successful in the market and whether they contributed to the achievement of the intended objectives.

6.7.4 Methodology and sources of evidence for the ex post evaluation

To assess the implementation and the effectiveness of the remedies in this case, we relied on interviews with market participants, who provided us with written responses to our questions and additional material that they wished to disclose under confidentiality. Furthermore, we considered relevant the comments expressed by the monitoring trustee during the conducted interview and the written response we received by the relevant public authorities such as the Competition and Markets Authority (hereinafter: CMA) in the UK. Lastly, we reviewed the report on investigations published by the CMA and reliable published statistics.

6.7.5 Main findings of the ex post evaluation of the effective implementation of the remedy

According to our sources, the remedies have been partially implemented. In detail:

Slots remedies. Slots have been released in London-Boston, London-Miami and London-Dallas routes. All of the slots are currently in use:

- **London-Boston.** Slots released under the terms of the commitments are currently being used by two competing carriers to provide non-stop services. Both carriers have further expanded their services using slots in addition to those available under the commitments. BA/AA retain a strong position in the Premium market although the commitments reduced this with the introduction of additional services provided by a competitor;

- **London-Miami**. slots released under the terms of the slot commitments are currently being used by a competitor to provide non-stop services in Winter seasons and one-stop services in Summer seasons;

- **London-Dallas.** BA and AA are the only non-stop operators on the route. The slot commitments on this route are currently being used by a competitor to provide a year-round one-stop service.

- **The London – New York** commitment slot has never been made available because the number of daily competing services has never fallen below the 2010 levels.

Behavioural remedies:

1. FCA Commitments. One competitor entered into a fare combinability agreement in three routes of concerns (London-Boston, London-Miami, London-New York) not long after the commitments were put in place;
2. SPA commitments: occurred in relation to London-Boston, London-Miami, London-Chicago (Premium Only). Data collected during the interviews showed that the provisions for the indexing of SPA rates have been difficult to implement as there was no industry standard for such a calculation and no guidance have been provided;
3. FFP Commitment: no commitment was signed due to the circumstance that FFP commitments were limited to airlines that did not have their own FFP, while AJB competitors already had established FFP schemes.

6.7.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

Since 2010, the number of direct UK-US routes has increased, from 39 in 2010 to 63 in 2018, and seat capacity on these routes has increased by 30%. The number of direct Europe-US routes has also increased from 138 to 252.[382]

Efficiency improvements and increased competition held down fares to passengers on transatlantic routes. We focus on transatlantic routes given the availability of fare data provided in confidentiality by our interviewees for these routes.[383]

Between 2008 and 2018, the average economy fare on UK non-stop transatlantic routes fell by 21% and the average business fare on these routes by 32%.[384]

Competition between airlines on transatlantic routes (and on long-haul services more generally) takes place on key parameters, including: (i) pricing; (ii) scheduling and frequency; (iii) product and service quality and reliability and; (iv) network based parameters (such as network coverage and Frequent Flyer Programmes ("FFPs"). The importance of each parameter may differ between passenger groups, such as Premium and Non-premium passengers.

Slot remedies.

Pursuant to the 2010 Commitments, AJB entered into a number of contractual arrangements with competitors for the release of slots in accordance with the 2010 Slot Commitments, known as Slot Release Agreements ('SRAs').

[382] OAG available data

[383] United States Department of Transport data - Reporting Carriers

[384] United States Department of Transport data – O&D Sup International (2007-2018)

Overall, the Slots Commitments have had positive effects on competition. By itself, the circumstances that all the slots released have been taken up by competitors – excluding the route London-New York where competition concerns were no further in place at the time of implementation - is an indicator of the success of the remedy in the market. Furthermore, the entry barrier in LHR and LGW airports due to lack of slots available has been overcome by the implementation of the SRAs.

Indeed, according to the information gathered during our interviews, the parties unanimously recognized that competitors would not have been able to obtain slots at LHR without the implementation of the slot remedies.

More in detail:

- **London-Boston.** In the non-premium market, the entry of two new competitors on the route, allowed by the Slot Commitments, resulted in a shift in market share from the AJB to competitors. In the winter 2018-2019 the ABJ only accounted for 20-30% of market shares. However, in the premium market the ABJ still retains a strong position. In the summer of 2019, BA was still accounting 40-50% of premium passengers. Competition in the Non-premium market relied on the Commitments.
- **London-Dallas.** The Slots Commitments allowed the entry of a competitor to the market. However, in 2020 ABJ was the only non-stop operator. Indeed, nowadays it still accounts for more than 70/80% of all passengers, considering a combined market for one-stop and non-stop operators. There are no strong competition constraints nor in relation to the premium market nor to the non-premium market.
- **London-Miami.** The Slots Commitments facilitated the increase of competition on this route. Indeed, it allowed the temporary entry of a first competitor in 2011 and the subsequent launch of additional services of second competitor, namely a non-stop in Winter season and a one-stop in Summer seasons. However, the AJB continues to hold a substantial frequency advantage over other airlines operating services, particularly in the premium market.

Behavioural remedies.

- **London-Dallas (no behavioural remedy has been taken up).**
- **London-Boston (FCA and SPA commitments have been taken up).**
- **London-Miami (FCA and SPA commitments have been taken up).**
- **London-Chicago Premium only (only SPA commitment has been taken up).** In the Premium market, the AJB maintains a high market share even if a competitor operates its largest hub at Chicago O'Hare airport and offers an attractive alternative to the AJB.
- **London-New Tork Premium only (only FCA commitment has been taken up).**
- **Madrid-Miami Premium only (no behavioural commitment has been taken up).**

The positive effects of the behavioural remedies in the routes of concern have been difficult to assess as they have been limitedly implemented and eventual pro-competitive effects on the interested routes were always combined either with external reasons or with slot commitments.

Routes of concerns where behavioural remedies have been implemented without the implementation of slots remedies have been London-Chicago and London-New York:

- London-Chicago. A competitor which operates a major hub at Chicago O'Hare airport exercises competition constraints. SPA between the above-mentioned competitor and British Airlines may had contributed to the pro-competitive effects produced.
- In London-New York route, although competition concerns were already lowered by the higher number of competitors operating on the route after 2010, a FCA has been taken up by a competitor.

In all the other routes where also slot remedies have been implemented, the latter have been considered by the interviewees the main factor producing pro-competitive effects, allowing the entry of competitors to the market.

However, behavioural remedies may had been effective in contributing to the competitive constraints on the AJB on the Routes of Concern, playing a role in supporting competitors.

As a result of Brexit, 2020 the CMA took jurisdiction over AJB, and affirmed that it would not be able to complete its investigation before the expiry of agreements still in place pursuant to the 2010 Commitments. After that, the CMA imposed an interim measure that extended the terms of the 2010 Commitments for an additional 2 years until March 2024 to avoid an "enforcement gap ". In 2022, the interim measure was prolonged until March 2026, in consideration of the impact of the COVID-19 pandemic on the aviation sector and, as a result, the impossibility for the CMA to conclude its investigations in the absence of stability in the sector.

In its latest published Study, the CMA concluded that the AJB raised and still raises competition concerns, stating how the Parties' arguments failed to demonstrate the consumer benefits and the absence of negative effects of the AJB on competition. While some routes taken into account by the Commission in the 2010 commitments have not been considered of concern anymore, in other routes AJB position was still raising competitive concerns in 2020, according to the CMA.

However, investigations by CMA are still ongoing given that a material change of circumstances since the commitments were accepted. By today, 2010 commitments are still ongoing due to interim measure applied by the CMA.

6.7.7 Conclusions

To sum up, we can assess a partial implementation of the remedies agreed in the 2010 commitments. Indeed, while slots remedies have been greatly implemented through the SRAs, behavioural remedies had not much success in the market and FFP commitments have not been taken up.

We can also assess a partial effectiveness of the remedies. Indeed, slot remedies opened up the market to competitors, allowing new entries otherwise impossible due to barriers of the slots. Behavioural remedies had a more limited effect, due also to the limited success they had. However, they played a limited role - together with other factors - in supporting competitors in the market.

AT. 39596 BA/AA/IB

Summary

- An Art. 9 commitments decision which addressed the concerns of the Commission in relation to a joint venture between BA, AA and IB in relation to six transatlantic routes ("ABJ").
- The addresses committed: (i) to make available slots at London airports; (ii) to conclude fare combinability agreements ("FCA"); (iii) to allow competitors to obtain special pro-rate agreements ("SPA"); (iv) to allow airlines without a comparable program the access to the parties' frequent flyer programmes ("FFP"); (v) to report data on parties' cooperation to the commission to monitor the effects.

Positive substantive and procedural aspects of remedy design and implementation

- The Slot Commitments was well implemented through SRAs.
- The Slot Commitments produced positive effects in all the routes of concern, allowing the entry of competitors to the market;

Critical substantive and procedural aspects of remedy design and implementation

- Behavioural remedies did not produce much interest in the market. FFP commitments were not taken up, probably due to designing issues.
- The length of the slot commitments lead to a quasi-structural nature of the Slot Commitments which raised some doubts.

Level of implementation

- Partially implemented. Slot remedies have been implemented through SRAs. All slots have been taken up, with the exception of the route London-New York which did not meet the conditions for the slot release agreement, given the high number of competitors after the 2010 commitment. A monitoring trustee was appointed. Behavioural remedies have been partially implemented, due to a combination of designing and lack of interest in the market.

Level of effectiveness

- Partially effective. Slot remedies produced positive effects in the competition market. Behavioural remedies had a limited success among competitors and limited effects which have been difficult to isolate.

6.8 AT.39315 – *ENI*

6.8.1 Introduction

This case study concerns the application of a divestiture remedy in the energy sector in an Article 9 commitments decision, following an Article 102 TFEU investigation into the gas transmission sector.[385] The remedies were designed to open up the market of transport of natural gas to and into Italy. The case study allows for the consideration of the pros and cons of structural remedies in antitrust cases.

Case AT.39315 – *ENI* is an alleged abuse of dominance based on Article 102 TFEU, whereby commitments were offered pursuant to Article 9 of Regulation 1/2003. The addressee of the commitments decision issued by the Commission is ENI, at the time, an Italian state-controlled company active on multiple levels of the transportation and supply chain of gas into Italy.

The Commission opened an ex-officio investigation concerning ENI's practices, followed by an inspection of its premises in 2006 and further fact-finding between 2006 and 2008. On 6 March 2009, the Commission adopted an SO reaching the provisional conclusion that ENI abused the dominant position held both in the market for transport of gas to Italy and in the gas supply market in Italy. With respect to the market for natural gas transport, the Commission considered that ENI held a dominant position, as it effectively owned or jointly controlled all viable international pipelines for shipping gas to Italy. The Commission did not consider that there were any economically viable alternatives to import gas to Italy to challenge ENI's dominant position.

The relevant product markets in the case were (i) the market for natural gas transport to and into Italy and (ii) the market for the sale (supply) of natural gas to wholesalers and final customers. The relevant geographic market for natural gas transport to and into Italy was constituted by the entirety of the existing routes that a supplier could use to bring gas to the wholesale market in Italy. The relevant geographic market for the sale (supply) of natural gas was considered to be the Italian market.

Practices of ENI on the following three pipelines were identified as raising potential anti-competitive concerns by the Commission: (i) as regards TAG, ENI jointly controlled the transmission system operator ("TSO") that held the entirety of the capacity rights for the transport of natural gas on the TAG pipeline pursuant to a lease agreement and that provides natural gas transportation services. ENI was entitled to approximately 85-95% of the transport rights of the existing capacity on the TAG; (ii) with regard to TENP, ENI jointly controlled the pipeline and the TSO that provided natural gas transportation services for approximately 67% of the capacity rights on TENP held by ENI; and (iii) concerning Transitgas, ENI jointly controlled the pipeline and the TSO that provided natural gas transportation services including the marketing of the approximately 85-95% of transport capacity held by ENI.

ENI's transport infrastructure was considered indispensable to import gas and compete in the gas supply markets in Italy, as it would have been unreasonably difficult, if not impossible, for the would-be importer to duplicate ENI's transport infrastructure.

In the downstream gas supply market, ENI was also dominant since it held a significant portfolio of long-term gas import contracts and also remained a gas producer of its own right in Italy and abroad. Entry barriers to the Italian wholesale market were also high due to existing bottlenecks in import capacity (tight capacity and long-term bookings by ENI of a significant part of the existing capacity) as well as difficulties in international

385 Grimaldi took the lead in the preparation of this case study.

gas procurement and storage. Therefore, wholesale gas suppliers in Italy did not have the ability and economic incentive to exercise effective competitive pressure on ENI.

In the SO the Commission considered that ENI had abused its dominance and violated Article 102 TFEU by implementing a refusal to supply capacity on TENP/Transitgas and TAG Pipelines. The strategy may have been implemented by (i) refusing to grant competitors access to capacity available on the transport network (capacity hoarding); (ii) granting access in an impractical way (capacity degradation); and (iii) strategically limiting investment (strategic underinvestment).

With respect to capacity hoarding, the Commission found that despite a steady and significant demand for capacity by third parties, ENI refused to offer existing available or unused capacity to other shippers on the TENP/Transitgas and TAG pipelines. The Commission also found that ENI may have understated the capacity technically available to third party customers, leading to unjustified refusals. Regarding capacity degradation, ENI could have intentionally delayed allocation of new available capacity or offered it to third parties on a short-term basis, rendering it more difficult for competitors to organise and plan their operations. The type of capacity offered (interruptible and not firm) lowered its value for third parties. With respect to strategic limitation of investment, ENI's decisions to enhance transport capacity were mainly based on ENI's own needs, while refusing to consider and eventually carry out expansions of capacity that would have allowed responding to third party requests.

6.8.2 Identification of the remedy and reasons for the choice

ENI committed to divest its shareholdings in companies related to international gas transmission pipelines (TENP, Transitgas and TAG) to a suitable purchaser approved by the Commission that was independent of and unconnected to ENI and did not raise prima facie competition concerns.

With respect to TAG, the commitment foresaw the divestiture to a public entity directly or indirectly controlled by the Italian government. ENI committed to ensure that if no binding sale and purchase agreements were signed within the divestiture period, an exclusive mandate to an independent trustee would have been granted in order to sell the divestment business to a suitable purchaser at no minimum price.

As the infringement allegedly committed by ENI derived from the structure of the company, where its vertical integration created a structural conflict of interest among ENI's various roles along the chain. The divestiture of ENI's shareholdings in the divestment business was necessary to remove the incentive for ENI to abuse its dominant position in the market, preventing ENI from the implementation of abusive practices.

As regards proportionality, an eventual behavioural remedy would have involved long-term and constant monitoring on the undertaking management, therefore being more burdensome for the parties. The structural remedy proposed by ENI was agreed as the most appropriate to address the competition concerns. Market Participants confirmed that the commitments decision considered the comments they submitted during and after the Market Test.

Furthermore, as from 22 December 2009 and until the time of the closing of the divestitures, ENI committed to not prolong or renew any transport contract or enter into any new transport contract for its benefit as a shipper on the TENP, Transitgas and TAG pipelines, except for possible future auctions and other public allocation procedures for reverse flow transportation capacity towards markets other than the Italian one.

6.8.3 More detailed description and discussion of relevant parts of decision concerning the remedy

Concerning the gas transmission system business in Austria, ENI committed to divest (Divestment Business Austria): its share of 89% in Trans Austria Gasleitung GmbH, which holds 100% of the capacity rights for the transport of natural gas on the TAG pipeline, pursuant to a lease agreement and that provides natural gas transportation services.

Concerning the gas transmission system business in Germany, ENI committed to divest (Divestment Business in Germany): (i) the entire shareholding in ENI Gas Transport GmbH which corresponds to a controlling participation of 49% in Trans Europea Naturgas Pipeline GmbH &Co, the company that owns and operates the TENP pipeline; (ii) the entire shareholding in ENI Gas Transport Deutschland S.p.A., which provides gas transportation services through its circa 60%-70% of the capacity rights on TENP pipeline.

Concerning the gas transmission system businesses in Switzerland, ENI committed to divest (Divestment Business Switzerland): (i) its share of 46% in Transitgas AG which owns and operates the Transitgas pipeline system; and (ii) the entire shareholding in ENI Gas Transport International SA, which provides natural gas transportation services for approximately 85-95% of the capacity of the Transitgas pipeline system.

6.8.4 Identification of the main issues investigated for ex post evaluation

In the ex post evaluation of case AT.39315 – *ENI*, the main issues to be investigated are: (i) Implementation - the extent to which ENI complied with the obligation to divest the divestment businesses in Germany, Switzerland and Austria as well as the extent to which it did not prolong or renew any transport contract or enter into any new transport contract for its benefit as a shipper on the TENP, Transitgas and TAG pipelines; (ii) Effectiveness - the extent to which the implementation of the remedies has opened up the market of transport of natural gas to and into Italy; and (iii) Effectiveness - the extent to which the implementation of the remedies has opened up the market for the supply of natural gas to Italy.

6.8.4.1 Implementation issues

In the ex post evaluation of the implementation of this remedy, we assess how ENI commitments have been implemented, and we verify in particular whether ENI complied with all divestitures period provided for Divestiture Business Germany, Divestiture Business Switzerland and Divestiture Business Austria to their full extent.

6.8.4.2 Effectiveness issues

In the ex post evaluation of the effectiveness of this remedy, we evaluate whether the remedies made binding by the Commission have obtained the intended effects on competition, taking into account the important changes occurred in the markets of gas transport to and into Italy and gas supply market in Italy. We we examine the impact of ENI's extension of ship-or-pay contracts with companies associated with the three pipelines, which could have maintained in place a control of capacities operated by ENI on the three infrastructures.

6.8.5 Methodology and sources of evidence for the ex post evaluation

We mainly rely on our interviews with the Commission and the addressee, as well as the feedback of the survey conducted with market participants. Commission guidelines and other Commission publications related to the ENI case were also taken into account.

6.8.6 Main findings of the ex post evaluation of the effective implementation of the remedy

The ENI proceeding ended with the divestment of ENI's shares in the companies related to the gas pipelines TAG, TransitGas and TENP. The shareholdings in TAG were divested to an Italian state-controlled company while the shareholdings owned in TransitGas and TENP had a belgian company which transports and storages natural gas as the beneficiary.

The commitments decision was a result of a protracted exchange and negotiation between the addressee and the Commission, which started before the issuance of the SO. ENI offered different kind of cooperation such as the adoption of the ISO model (Independent System Operator) of the concerned assets, involving the internal reorganization of the company. This proposal was refused by the Commission and considered not appropriate to address the concerns.

Following the SO and the subsequent Oral Hearing, ENI presented the proposed commitments to the Commission addressing the Commission's statement regarding the necessity of a structural remedy to tackle the competition concerns raised in the SO. The stage of the proceeding in which ENI decided to offer the commitments was considered late in comparison with other commitments decisions issued under Article 9 of Regulation 1/2003. However, the parties considered it convenient even after the SO, as the same structural remedies would have been applied under Article 7 of Regulation 1/2003, ensuring quicker effectiveness, and avoiding longer investigations, the imposition of a fine and eventual disputes.

The divestiture period means the period within ENI had to sign binding sale and purchase agreements and lasted less than 9 months. The length of the period was discussed between the parties and, with the benefit of hindsight, was indicated as reasonable and no issues were reported as ENI fully complied with the divestiture agreed. No divestiture trustee was appointed in this case as, when possible, a divestiture conducted by the company itself is more appreciated and requires less resources.

The divestiture of the shareholding in TAG to an Italian state-controlled company was deemed to be necessary. Indeed, the Italian authorities, e.g. the Ministry of Economy and Finance, claimed the strategic importance of such asset in terms of national security of supply for Italian gas system. Furthermore, the indicated purchaser was deemed to meet the criteria set out by the Commission itself, in particular (i) independence and lack of connection to ENI; (ii) having the financial resources, competencies, and incentives to develop the divested business; and (iii) not creating competition concerns. However, the independence and lack of connection of the latter from the concerned undertaking raises doubts and concerns. Indeed, the purchaser at stake has been a shareholder of ENI since years before the opening of the proceeding.

ENI refrained from prolonging or renewing any transport contract or enter into any new transport contract for its benefit as a shipper on the TENP, Transitgas and TAG pipelines during the divestiture period as for the commitment but the circumstances that ENI was able to prolong or renew contracts after the closure of the divestiture was not monitored.

6.8.7 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

The European energy and gas market has been changing consistently since the decision was adopted. Indeed, the market became increasingly interconnected thanks to harmonized sectoral regulation at EU level (such as the EU Third Energy Package for gas[1], which provided *inter alia* for regulated Third Party Access), ultimately favouring the development of fair competition. Therefore, a sectoral regulatory framework has been indicated as a key factor that allowed Italian gas market to be opened regarding both supply and transport of natural gas.

As for Divestment Businesses Austria and Germany, the declining of the prices of natural gas in the Italian market - as a common indicator of increased competition - might instead be a result of the more interconnected European gas market which, in the last years, has eroded the spread between the most liquid EU gas hub (which has played the role of reference price in most transactions at the EU level) and the Italian gas hub. Similarly, the investments in gas infrastructures might have been favoured by sectoral regulation both at National and European level. A direct causal link between the commitment and these positive effects in the markets is difficult to assess.

As for the Divestment Businesses Switzerland, considering that there have not been significant sectoral regulatory developments as in the EU, the remedy was - with the benefit of the hindsight - the only possible option to address the concerns of the Commission.

A few market participants reported that the commitment had positive effects, contributing to opening up the markets to competition. Major benefits deriving from the remedies were indicated in the introduction of the *use or lose it* principle on pipelines and the promotion of a higher liquidity into the market to supply gas in Italy, which allowed small operators to access and operate.

However, a market participant reported that ENI managed to extend the ship or pay contracts with the three companies related to the gas pipeline for a long period of time, maintaining de facto unchanged the control of primary and secondary capacities on the three infrastructures, in spite of the divestment of the shareholdings. This circumstance, together with the lack of a remedy directly addressing to the transport capacity of ENI, limited the effectiveness of the structural remedy applied by the Commission, which by itself was not sufficient to effectively opening the market. As a result, the competitive structure in the Italian gas market remained substantially unchanged after the divestiture of the shareholdings by ENI, although other factors such as the contemporary entry into operation of Adriatic LNG regasification terminal and the development of new projects (i.e. OLT in Livorno) as well as the recent energy crises contributed to achieving the objectives related to opening up the competition that the Commission pursued.

Therefore, ENI was able to maintain a control over the pipelines and its role along the chain after the divestiture. Indeed, as for the commitment, ENI was deemed to abstain from prolonging or renewing any transport contract or enter into any new transport contract for its benefit as shipper on the TAG, TENP and Transitgas from 22 December 2009 and until the time of closing of the divestitures.

To ensure a fully effectiveness of the remedies, the commitment should have extended the provision above, imposing a behavioural remedy for, at least, a few years after the divestiture was completed, monitoring its implementation. As a lesson learned, the ownership unbundling of infrastructures is not a fully effective remedy to ensure the opening of the upstream and downstream market.

The circumstance of the ship or pay contracts remained in place have been double confirmed by press releases[386] still available on the ENI website. In fact, while announcing the completion of the sale of its

[386] Eni completes the sale of its participations in Transitgas and TENP gas pipelines; Eni sells its participations in Transitgas and TENP gas pipelines to Fluxys G;

participations in the Transitgas, TENP, and TAG gas pipelines, ENI emphasized that the Ship or Pay contracts for these pipelines remained valid.

In addition, the choice of the Italian state-controlled company as divestiture buyer may have lowered the effectiveness of the remedies imposed, as questions about the independence and lack of connection of the latter from the concerned undertaking can be raised.

6.8.8 Conclusions

The divestiture was implemented without any issue and in a reasonable timing. Nevertheless, a further monitoring was needed in relation to (i) the status of the transport contract during the divestiture period and (ii) the independence of the purchasers and the lack of connection to ENI.

The divestiture related to the Business in Germany and Austria complemented well the emerging EU regulatory framework (EU third energy package for gas), by ensuring a greater accessibility to transport services and opening up the downstream markets for both transport and supply of natural gas in Italy. The divestiture of the Business in Switzerland addressed successfully the concerns of the Commission. However, a mix of short-term (divestiture) and longer-term remedy (prohibition to maintain transport contracts) would have increased the remedy effectiveness.

AT. 39315 – *ENI*

Summary

- An Article 9 commitments decision responding to the concern ENI had abused its dominance and violated Article 102 TFEU by implementing a refusal to supply capacity on TENP, Transitgas and TAG Pipelines.
- ENI committed to (i) divest its shareholdings in companies related to international gas transmission pipelines to a suitable purchaser approved by the Commission that was independent of and unconnected to ENI; (ii) not prolong or renew any transport contract or enter into any new transport contract for its benefit as a shipper on the mentioned pipelines during the divestiture period.

Positive substantive and procedural aspects of remedy design and implementation

- The divestiture related to the Business in Germany and Austria complemented well the emerging EU regulatory framework (EU third energy package for gas), by ensuring a greater accessibility to transport services and opening up the downstream market for supply in Italy. The divestiture of the Business in Switzerland addressed successfully the concerns of the Commission.

Critical substantive and procedural aspects of remedy design and implementation

- Limited control concerning the conservation of the transport contracts signed by ENI with the pipelines (TAG) or the companies controlling the pipelines (Transitgas and TENP) during the divestiture period.
- A mix of short-term (divestiture) and longer-term remedy (prohibition to maintain transport contracts) would have probably increased the effectiveness of the remedies.
- Lack of in-depth control on the independence of one of the purchasers and absence of connections between the latter and ENI.

Level of implementation

- Fully implemented. The divestiture was implemented without any issues. However, a further monitoring was needed in relation to (i) the status of the transport contract during the divestiture period and (ii) the independence of the purchasers and the lack of connection to ENI.

Level of effectiveness

- Partially effective. ENI maintained in place the ship-or-pay contract signed with TAG, Eni GTI and Eni D, Eni Gas Transport International and Eni Gas Transport Deutschland (Transitgas and TENP). Press releases issued by ENI after the finalization of the divestitures and still available on the ENI website confirm this circumstance. Combining the divestiture with a longer-term behavioural remedy aimed at prohibiting transport contracts for the benefit of the undertaking as a shipper on the mentioned pipelines would have increased the effectiveness of the remedies imposed.

6.9 AT.39847 – *E-books*

6.9.1 Introduction

On 12 December 2012 the Commission issued a commitments decision (the First Decision) pursuant to Article 9 of Regulation 1/2003 related to preliminary competition concerns raised under Article 101 TFEU.[387] The addressees of the First Decision were four publishing groups (the Four Publishers) and Apple Inc (Apple) a technology company based in the US. The Four Publishers were Hachette Livre (Hachette), HarperCollins Publishers Limited and Harper Collins Publishers LLC (Harper Collins), Georg von Holtzbrinck GmbH & Co and Verlagsgruppe Georg von Holtzbrinck GmbH (Holtzbrinck/Macmillan) and Simon&Schuster Inc, Simon&Schuster UK Ltd and Simon &Schuster Digital Sales Inc (Simon & Schuster).

After having opened proceedings, on 13 August 2012 the Commission adopted a preliminary assessment setting out the Commission's competition concerns under Article 101 TFEU in relation to a possible concerted practice between the Four Publishers and Apple for the sale of e-books with the aim of raising retail prices (or avoiding lower retail prices) of e-books. In response, each of the Four Publishers submitted initial commitments (the Initial Commitments). After the publication of the Initial Commitments for the observation by interested third parties, the Four Publishers amended their commitments (the Final Commitments).

On 25 July 2013 the Commission issued another commitments decision (the Second Decision) pursuant to Article 9 of Regulation 1/2003, related to competitive concerns raised under Article 101 TFEU. The addressees of the Second Decision were Penguin Random House Limited and Penguin Group USA (Penguin) which at the time of the preliminary assessment were a division of Pearson Plc (Pearson), referred to jointly with the Four Publishers as the Five Publishers. On 1 March 2013 the Commission adopted a preliminary assessment expressing concerns relating to a possible concerted practice between Apple and the Five Publishers for the same concerns as for the preliminary assessment of 13 August 2012. Subsequently, Penguin offered initial commitments (Initial Commitments) which were market tested by the Commission before the Final Commitments were submitted.

By way of background, Amazon launched its Kindle e-book platform in 2007 in the US. Between 2007 and the Spring of 2010 publishers sold e-books to retailers under wholesale agreements (the Wholesale Model), at a wholesale price which was below the suggested retail price determined by the publishers (the List Price). Moreover, as of 2007 in the US and as of October 2009 internationally (and therefore in the EEA), Amazon started offering certain newly released English language bestselling e-books for USD 9.99, a retail price significantly lower than the e-book List Price set by publishers.

In 2008, the Five Publishers started being concerned about Amazon's e-book pricing policy spreading in the US and in the EEA and Amazon's growing market shares. At the time, Apple was not selling e-books. However, in view of its upcoming launch of the iPad, it had entered into negotiations with the Five Publishers regarding such possible sales. In December 2009 Apple communicated to the Five Publishers its intention to start selling e-books and to opt for an agency model instead of a wholesale model, with the purpose of eliminating meaningful retail price competition with Amazon and raising retail prices above those of Amazon. After that, Apple simultaneously submitted its proposed draft agency agreement to the Five Publishers which included a retail price most favoured nation (MFN) clause. The MFN clause provided that if another retailer offered a lower price for a particular e-book, including in situations where the retailer operated under a Wholesale Model and thus was free to set the retail prices, the publisher had to lower the retail price of that e-book in Apple's iBookstore and match that lower retail price. In January 2010, each of the Five Publishers signed

387 Grimaldi took the lead in the preparation of this case study.

Agency Agreements with Apple in the US, each containing the same key terms and the retail price MNF obligation became effective for everyone.

In its preliminary assessment, the Commission concluded that Apple and each of the Five Publishers understood that both Apple's goal of eliminating retail price competition with Amazon, and the Five Publishers' goal of raising e-book retail prices above those of Amazon, could be achieved only if the Five Publishers were able to impose an agency model on all retailers including Amazon. The Commission found that all the parties understood that the retail MFN clause created a strong incentive for each of the Five Publishers to convert Amazon to the Agency Model to avoid the costs of having to match Amazon's lower retail prices under the Agency Contract with Apple. The Commission's preliminary view was that the retail price MFN clause acted as a joint "commitment device" whereby each of the Five Publishers understood that assuming that all publishers had the same incentive during the same time period, and that Amazon could not have sustained simultaneously being denied access even to only a part of the e-books catalogue of each of the Five Publishers, the Five Publishers were in a position to force Amazon to move to an Agency Model Indeed, after an initial refusal to move to an Agency Model, the Five Publishers signed an agency agreement containing similar terms, including a retail price MFN, with Amazon in the US in 2010.

Using the agency agreement in the US as a template, between May 2010 and August 2010 each of the Five Publishers signed an Agency Agreement with Apple for the United Kingdom, France and Germany. In the Commission's preliminary view, Apple and each of the Five Publishers understood that like in the US, the retail price MFN clause created a commitment device and a strong economic incentive to convert Amazon to the Agency Model, to be able to increase e-book retail prices above those set by Amazon. In the UK four of the Five Publishers announced to Amazon their intention to move to an Agency Model and signed an Agency Agreement with Amazon. The fifth publisher suspended negotiations, after the Office of Fair Trading (OFT) started an investigation into e-books in the UK. In France, Amazon and Hachette (the only of the Five Publisher with French e-book titles at the time) signed an Agency Agreement for French titles in 2011. In Germany, Amazon and Holzbrinck/Macmillan (the only of the Five Publisher with German e-book titles at the time) signed an Agency Agreement for German titles in 2011.

The Commission's preliminary view was that to make that joint conversion possible, each of the Five Publishers had acted in parallel and disclosed to, and/or received information from the rest of the Five Publishers and/or Apple, regarding the future intentions of the Five Publishers with respect to entering into an agency agreement with Apple in the United States and the key terms under which each of the Five Publishers would enter into an agency agreement with Apple first in the United States and then as part of a global strategy, the EEA.

According to the Commission's preliminary conclusion, the direct and indirect contacts between the Five Publishers and Apple (hereinafter "the Parties") restricted competition by object as they eliminated the risk associated with normal competition. These contacts allowed the parties to sign Agency Agreements with Apple with the same key terms, including the retail price MFN, thereby raising the retail prices of e-books above those of Amazon or preventing the introduction of lower prices a in the EEA.

The Commission concluded that there was no alternative plausible explanation for the conduct of the Five Publishers or Apple. Apple's goal had been to find a way to have retail prices at the same level as Amazon's whilst still achieving its desired margins. For the Five Publisher entering into agency agreements would not have been in the economic interest of each of the Publishers individually. In order to achieve that aim, the Parties had therefore planned and jointly converted the sale of e-books from a Wholesale Model to an Agency Model on a global basis and on the same key pricing terms, first with Apple and then with Amazon and other retailers.

6.9.2 Identification of the remedy and reasons for the choice of remedy

The remedies adopted in the First and Second Decision consists of several commitments made binding for each of the Four and subsequently Five Publishers and Apple. First, there is a commitment to terminate the existing Agency Agreements between the Four and subsequently the Fifth Publisher(s) and Apple and/or other retailers (i.e. Amazon). In effect, the addressees committed to stop using "Agency model" agreements for the sale of e-books within the EEA. Second, there is a commitment for a two-year cooling off period during which discretion in price setting for e-books had to be maintained by the Four and subsequently the Fifth Publisher(s). Third, there is a commitment by the Four and subsequently the Fifth Publisher(s) and Apple not to enter for 5 years into any agreements containing retail price MFN clauses for the sale of e-books in the EEA.The Commission had concerns about the joint switch by five publishers and Apple from a wholesale model to agency contracts, including a retail price Most Favoured Nation ("MFN") clause.

Therefore, under the terms of their legally binding commitments the five publishers had to exit from agency agreements formed with retailers other than Apple if the agreements prevented those retailers from setting the retail price of e-books, from offering discounts or promotions, or if the agreements contained an MFN contract clause. Moreover, Apple and the five publishers faced a five-year ban on using MFN clauses in "*any agreement for e-books*" under the terms of their commitments.

It should be noted that MFN clauses are generally not unlawful unless (i) they are in breach of the rules prohibiting anti-competitive agreements (Article 101 TFEU) or (ii) the party that has the benefit of the obligation is dominant. In this case, the use of wide MFNs in standard contracts could were to constitute abuse under Article 102 TFEU as the use of MFN clauses across a market can lead to anti-competitive effects such as to a softening of price competition and can reduce innovation, entry, and expansion by new platforms (theories of harm). The Commission considered that the MFN clauses in the publishers' contracts with Apple provided the means to force the publishers to require Amazon to switch to agency agreements and charge the same higher retail prices as Apple. Indeed, the MFN clauses protected Apple from competition and led to a situation where to avoid lower revenues and margins for their e-books on the Apple store, the publishers exerted pressure on other major retail platforms offering e-books to consumers in the EEA to adopt the Agency model albeit in the context of an anti-competitive agreement between Apple and the 5 Publishers (Article 101 TFEU).

The Commission considered the inclusion of each of these aspects crucial to addressing the prima facie competition concerns.

6.9.3 Identification of the main issues investigated for ex post evaluation

Our evaluation will focus on the correct implementation and effectiveness of the remedies and their effects in the EEA e-book market.

6.9.3.1 Implementation issues

We investigate whether the Parties complied with the commitments (i) to terminate existing agency agreements between the Parties and/or any other retailers besides Apple (ii) that Apple and the Five Publishers do not enter into retail MFN clauses with e-book retailers and/or publishers for 5 years following the adoption of the relevant commitments decision (First and Second Decisions).

6.9.3.2 Effectiveness issues

We assess to what extent the implementation of the commitments enabled e-book retailers to set their own prices and discounts for at least 2 years following the adoption of the relevant commitments decisions (First and Second Decisions), driving down e-book prices in the EEA. We further investigate the effectiveness of the

remedy aimed at preventing the use to the MFN clause and the developments in the market of E-books in terms of competition.

6.9.4 Methodology and sources of evidence for the ex post evaluation

The primary sources of evidence for the ex post evaluation include: (i) market insights received from market participants; (ii) an interview with the Commission's case team directly involved; (iii) the reports submitted by the Parties to the Commission for monitoring purposes; and (iv) a review of related literature and articles.

6.9.5 Main findings of the ex post evaluation of the effective implementation of the remedy

No monitoring trustee was appointed in this case, despite the standard practice of commitments decisions, especially when applying behavioural remedies. The case team of the Commission interviewed for this case study decided and to monitor the commitment by itself due to the nature of the behavioural commitment and the market concerned. Indeed, the case team felt comfortable to manage the monitoring in a nascent market with a few players involved by supervising the agreements concluded - or re-concluded - by the addressees and submitted to the case team on a regular basis. No salient implementation issues were identified by the members of the case team, the monitoring effort required was confirmed as moderate.

The addressees complied with their reporting obligations. Each addressee submitted the annual reports on the implementation of the commitments.

Therefore, it can be considered that the Parties complied with the commitments to terminate existing agency agreements between the Parties.

During the relevant two year cooling off period, the Five Publishers did not enter into any agreement relating to the Sale of E-books within the EEA with any E-book Retailer that restricted, limited or impeded the E-book Retailer from setting, altering or reducing the Retail Price of any E-book or from offering Discounts except as permitted in accordance with the commitments.

Nor did the Parties did not enter into retail MFN clauses with E-book retailers and/or publishers for 5 years following the adoption of the relevant commitments decision.

Furthermore, the Parties confirmed that no disputes nor written complaints were received in relation to the implementation of the commitments and duly provided the Commission with copies of any agreement executed, renewed or extended related to the sale of E-books.

However, some market participants, including the addressees, rival publishers, major competitor retail platforms and category associations refrained from providing feedback on this decision for various reasons. Some indicated that, after many years, there was no internal documentation or recollection of the decision, while others stated they were not in a position to offer comments.

6.9.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

The Commitments reflect a clear view of the intended outcome namely, preventing the risk of infringement and protecting the – at that time - emerging market by resetting the conditions to those that existed prior to the conduct and allowed Amazon and other retails to compete effectively.
The case team considered an Article 9 decision the most appropriate given that this was a fast-moving and emerging market and the competition concerns to address. This was also confirmed in the comments received during the market test of the proposed commitments.

The case team noted that E-book prices increased significantly at the time of the introduction of the Agency Agreements and decreased after the decision. Although market participants have noticed that the prices of E-books decreased after the implementation of the commitments as the decision was effective in enabling E-book retailers to set their own prices and discounts for a 2 years period, they doubted the effects of the remedies in restoring the market and allowing for competition.

As discussed above the Commission took the view that Apple and each of the publishers understood that the MFN clause created a strong incentive for each of the publishers to convert Amazon to the agency model in order to avoid the costs of having to match Amazon's lower retail prices under the Apple agency contract. Thus, the Commission viewed the MFN clause as a facilitating device through which each of the publishers separately could credibly threaten Amazon to accept the agency model or be denied access to its E-books.

However, other competition concerns emerged in a subsequent proceeding opened a few years later by the Commission, this time investigating the use of the mainly non-price Parity Clauses imposed by Amazon, raising concerns regarding an alleged abuse of dominant position on the markets for the retail distribution of E-books in some EEA markets.[388]

Amazon had by this time managed to gain significant market shares in several EEA e-book markets. This observation raises questions concerning the effects of the commitment related to the MFN clause in the market.

The concerns raised in the AT.40153 - *E-book MFNs and related matters (Amazon)*, show how the E-books market – after the implementation of the commitments - was still dominated by few E-books retailers able to alter the competition on the market. Indeed, the Commission's concerns regarding an alleged abuse of dominant position on the markets for the retail distribution indicate ongoing competition concerns related to the MFN clause.

6.9.7 Conclusions

We have to acknowledge a general unwillingness of market participants to provide us with feedback related to this decision.

Nevertheless, we find that the implementation appears to have occurred without any significant issues being reported. The Commitments were easy to implement and monitor, and the Parties collaborated in submitting annual reports on the implementation to the Commission, together with the details of the agreements in place for the sale of E-books.

As for their effectiveness, the commitments can be considered to have been effective in enabling e-books retailers to set their own prices and discounts, leading to a decrease of e-books prices in the EEA. Regarding the remedy of the MFN clause, it had probably not much impact on the market and was followed by investigations related to E-book MFNs and related matters (Amazon) (AT.40153 - *E-book MFNs and related matters (Amazon)*. As discussed above, the intention of the Commission was to reset the nascent market of E-books and the MNF clause was identified as a tool for conversion to Agency Model. However, although a decrease of e-books prices occurred, the effects of the remedies in the market can be considered in this case as partially effective.

388 European Commission Decision of 4 May 2017, AT.40153 – *E-book MFNs and related matters (Amazon)*.

AT. 39847 – *E-Books*

Summary

- An Article 9 commitments decision which addressed the concerns of the Commission in relation to direct and indirect contacts between the Five Publishers and Apple.
- The addresses committed: (i) to stop using "Agency model" agreements for the sale of e-books; (ii) two-year cooling off period during which discretion in price setting for e-books had to be maintained; (iii) to refrain from entering for 5 years into any agreements containing retail price MFN clauses.

Positive substantive and procedural aspects of remedy design and implementation

- The remedies were straightforward to implement and to monitor. Article 9 was confirmed as appropriate given the fast-moving and emerging market. The comments received during the informal market test were taken into account.
- The remedies achieved the purpose of lowering e-books' prices in the EEA.

Critical substantive and procedural aspects of remedy design and implementation

- It is difficult to assess whether the remedy of the MFN clause produced a positive impact to the market.

Level of implementation

- Fully implemented. No issues were identified or raised regarding the implementation. No monitoring trustee was appointed. However, the Commission successfully monitored the implementation without any difficulties, and the addressees submitted annual reports on the implementation to the Commission in accordance with the commitments.

Level of effectiveness

- Partially Effective. E-books retailers have been free to set their own prices and discounts, overall driving down E-Book prices. However, on the one hand the MFN commitment seems to have had little impact on the market, and on the other hand EU retail platforms still face challenges in accessing the E-books market. The Commission's concerns regarding an alleged abuse of dominant position on the markets for the retail distribution in AT.40153 - *E-book MFNs and related matters (Amazon),* indicate ongoing competition issues related to the MFN clause. The intention of the Commission was to reset the nascent market of E-books and the MNF clause was identified as a tool for conversion to Agency Model. However, although a decrease of e-books prices occurred, the effects of the remedies in the market can be considered in this case as partially effective.

6.10 AT.39678/AT 39731 – *Deutsche Bahn I/II*

6.10.1 Introduction

On 18 December 2013 the Commission adopted an Article 9 decision in joined cases AT.39678/AT.39731 – *Deutsche Bahn I/II*.[389] [390] The cases relate to competition concerns in the market for the supply of traction current to railway operators in Germany (upstream market), potentially affecting the markets for freight rail services and long-distance passenger rail services in the same country (downstream markets). Traction current is a specific type of electricity used to propel locomotives, and DB Energie, an entity belonging to the DB group, is not only the owner of the traction current network in Germany but was also the only supplier of traction current on its network. The Commission was concerned that DB, in its dual role as railway operator and traction-current supplier, may have had the incentive and ability to disadvantage rival railway operators by charging them for traction current a price that was disproportionate to the revenues that they could generate in the provision of rail freight and rail long-distance passenger transport services. In other words, the concern was that the pricing system that DB, as a dominant firm, applied when supplying traction current on its network may have caused a so-called margin squeeze for rival railway operators, thereby potentially constituting a violation of Article 102 TFEU.

The commitments that DB offered to the Commission to allay its preliminary competition concerns are multi-faceted and comprise the following main elements:

- Implementation of a reform (in accordance with German energy law) of DB's pricing system that separates DB's provision to railway undertakings of traction-current network-access and traction-current supply services, while committing to offer access to the network to third-party energy providers;
- Measures that reduce rival railway operators' costs in looking for and switching to a rival traction-current supplier; and
- Measures that remove the margin squeeze in the short term, while the above-mentioned measures create the condition for competition in the supply of traction current in the longer term.

With the Decision the Commission made the multiple commitments offered by DB Energie and DB Mobility Logistics AG legally binding, initially for 5 years starting on 01 July 2014. On 8 April 2016 the Commission issued an additional decision terminating the commitments, since the early-termination conditions specified in the original decision had been met.

In our ex post evaluation of this case, we focus on the elements of the commitments package that were aimed at liberalising the traction current supply market. More specifically, our focus is, on the one hand, on the supply-side commitments (timely and effective implementation of a new pricing system with separate prices for network access and traction current as overseen by the responsible national regulatory body) that enabled the entry of third-party electricity suppliers and, on the other hand, on demand-side commitments (including allowing for the early termination of existing contracts, limiting the duration of DB Energie's new contracts to 1 year, transmitting information to railway operators on their recent energy consumption, and prohibiting volume- and duration-based rebates for the incumbent supplier) that made it easier for the railway operators to switch traction-current supplier.

389 NERA took the lead in the preparation of this case study.
390 Commission Decision of 18 December 2013, Deutsche Bahn I/II, Cases AT.39678 / AT.39731.

6.10.2 Identification and discussion of the remedies subject to evaluation

The Decision was not the first step in the process of liberalising the supply of traction current in Germany. Approximately 3 years before the Decision, in November 2010, the German Federal Court of Justice had ruled that the traction current network should be regarded as an energy network, whose access should then be regulated as specified by the German Energy Industry Act (*Energiewirtschaftsgesetz* – hereafter referred as "EnWG").[391] As a result, instead of a single all-inclusive price, there should be a separate grid access fee – distinct from the price for traction current supply – that is subject to regulation by the *Bundesnetzagentur* ("BNetzA").

In 2011 DB Energie started working on a model that would allow for the purchase of traction current by railway operators from third-party energy providers using its network. Throughout 2012 DB Energie consulted with market participants, relevant associations as well as with the BNetzA in designing this access model. The design of the model was finalised at the end of 2012, but for its implementation DB Energie said that approximately three years were needed.[392] Meanwhile in 2012, following the court decision, the BNetzA started regulating the grid access fees.[393] Yet, until the implementation of the commitments on 1 July 2014, DB Energie continued to be the sole supplier of traction current.

Against this background, the commitment to implement the pricing system on 1 July 2014 should not be seen as a commitment to separate the prices (which was already foreseen by German law) but rather as a commitment to implement the pricing system effectively within a shorter period of time than it would have been otherwise.[394]

The separation of prices is a necessary condition for competition on the price of electricity. The commitment to implement the pricing system thus provides for a deadline by which the necessary conditions for competition must emerge. This commitment, combined with the demand side commitments that aim at reducing the costs of switching energy suppliers, should therefore be evaluated as a package that aims at introducing competition in a previously monopolistic market of traction current supply in Germany in a timely manner, which would then in turn eliminate the possibility of a margin squeeze. We evaluate this commitments package as a set of behavioural commitments with structural elements.

An interesting comparison can be made between this case and two other EU antitrust cases of the last 20 years, namely AT.39389 – *German Electricity Balancing Market* and AT.39315 – *ENI* (the latter is one of our other case studies). In both cases the Commission made legally binding a commitment to divest the parts of an integrated firm that are related to its activities as the network operator, thereby eliminating the exclusionary incentives of the vertically integrated firm. While the competition concern was similar in the DB case, the solution that was found to it is different. In particular, rather than undertaking a divestiture of the network, in this case the Commission ensured through competition-enhancing measures (utilizing regulatory measures that were emerging at the national level already before the commitments) that DB's ownership of the network would not stand in the way of its accessibility to third-party operators.

391 Judgment of the *Bundesgerichtshof* of 9 November 2010, case EnVR 1/10.
392 DB Energie GmbH, *Regelungen für den Zugang zum Bahnstromnetz der DB Energie GmbH - Abschluss des Konsultationsverfahrens*, 2012, p. 17.
393 *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*, *Marktuntersuchung Eisenbahnen 2012*, 2012, pp. 35-65.
394 This is also related to the technical ability of the DB Energie to provide access to the network. As we learned from the Commission and the market participants, for DB Energie, it was technically not feasible to grant access (at least up to full capacity) by the time of the Decision. Therefore, the commitments specified a minimum capacity that DB should initially offer with the commitments coming into effect, which then should regularly increase until the access model is fully implemented by which the full capacity should be covered. See the Decision, at recital 20f, footnote 70.

6.10.3 Identification of the main issues investigated for the ex post evaluation

6.10.3.1 Implementation issues

We evaluate whether the commitments were implemented as they were specified in the Decision and whether there were any disputes in the implementation.

6.10.3.2 Effectiveness issues

The commitments aim at introducing and fostering competition in the traction current market. Thus, to evaluate the effectiveness of the commitments we examine the development of market entry and expansion in that market. In doing so, we distinguish as much as possible between the impact of the underlying regulatory and litigation process, and the impact of the Decision itself. To that end, we also consider the 2013 report on a market investigation by the BNetzA. In its report, the BNetzA interviewed market participants on the possibility of purchasing traction current from non-DB energy providers to understand better the hurdles to switching energy suppliers by railway undertakings that existed at the time, that is after the access fees had started to be regulated but before the commitments were implemented.[395] Lastly, we expand the time horizon of the evaluation and look at what happened on the market after the early termination of the commitments.

6.10.4 Methodology and sources of evidence for the ex post evaluation

In our analysis we primarily rely on the interview that we conducted with the Commission and the response to the questionnaires that we sent to the relevant stakeholders, in particular DB, rival railway operators and rival electricity suppliers.

6.10.5 Main findings of the ex post evaluation of the effective implementation of the remedy

The commitments were implemented without any complications. According to the Commission there were no disputes in the implementation. In addition, we have not received any negative comment on the implementation of the commitments from any of the market participants, including the Decision addressee.[396] The case team also confirmed not to have received any further complaints about the traction current market in the years following the early termination of the commitments.

6.10.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

Since the commitments aimed at opening up the traction current supply market, one of the key indicators of their success is the subsequent market entry of third-party energy providers. The commitments entered into

395 Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, *Marktuntersuchung Eisenbahnen 2013*, 2013, p. 44.
396 Some market participants expressed problems regarding the conditions of the access model, in particular long deadlines for billing the quantities of electricity supplied by third party energy providers that are mainly due to processing of the data traffic between market participants. Since the conditions of access, as also stated in the commitments, are subject to regulation by the BNetzA, these problems are not treated as commitments' implementation issues.

force in July 2014 and already in 2015 more than half of the traction current demand of non-DB railway operators were supplied by the new entrants, which led to their early termination.[397] After the early termination of the commitments, in 2018, this proportion was around 73%. In the same year there were in total 15 energy providers in the market.[398] Thus, we can conclude that the market was successfully opened up.

A more subtle question is the extent to which this result can be causally linked to the commitments rather than the underlying regulatory development. With this regard we received conflicting feedback. On the one hand, according to the addressee, the commitments had, if any, a negligible effect on market opening, which was taking place already, in light of the 2010 judgment. The addressee also believes that the Decision did not speed up the process. On the other hand, according to the Commission, regulating the access fees (and conditions), though a necessary condition, might not have been sufficient for effective market opening. The commitments were designed to complement the regulation subsequent to the 2010 judgment and aimed at speeding up the market opening process. This was achieved by making binding (i) the commitment of DB to start offering access to the network from July 2014 on as an interim solution until the access model was fully implemented and (ii) the commitments that aimed at reducing DB's downstream competitors' costs of switching suppliers.

Coming to the first point, DB Energie published a document at the end of 2012 concluding the consultation process regarding the access model, in which they expressed the need for additional 3 years for the implementation of the model.[399] Given the absence of any plans to provide access until the implementation of the model, we can assume that there would have been access to the network by third-party providers starting only from 2016 on. Thus, the commitment to grant access as an interim solution starting from July 2014 was indeed effective.

For the second point, that is the effectiveness of the commitments that were designed to make switching suppliers easy for DB's downstream rivals, we can make use of the BNetzA survey on the obstacles to switch energy suppliers. In the survey, some railway undertakings hinted at the high costs for balancing energy as a reason not to switch suppliers.[400] Others mentioned organisational reasons for not purchasing traction current from third-party supplier, including administrative costs, the contractual conditions of DB Energie and the state of the grid access model at that time. Some also cited the lack of offers from third-party suppliers or the unawareness about such offers.

Some of the cited problems, such as the state of the access model and balancing energy, were addressed by the commitment to introduce the new pricing system (balancing energy should be resolved because DB Energie could not offer the joint service anymore). The demand-side commitments also played a role in addressing the cited problems. The contractual conditions were for example directly targeted by the commitments. The addressee confirmed that the early termination of existing contracts made it easy for entrant energy providers to gain new customers quickly.

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397 European Commission, *Antitrust: successful market opening allows early termination of commitments in Deutsche Bahn case*, 2016, Press release. Moreover, according to the addressee (relying on the monitoring trustee's report of 1 September 2015, p. 10) already in the first half of 2015, 61% of the traction current demand of non-DB railway operators were supplied by the new entrants.

398 Deutscher Bundestag, *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Matthias Gastel, Lisa Badum, Dr. Julia Verlinden, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN*, Drucksache 19/10121, 2019.

399 See footnote 392.

400 Costs for balancing energy are incurred if the time at which traction energy is actually drawn (e.g. due to delays) deviates from the pre-defined schedule for drawing electricity. DB Energie did not ask for compensation of these costs when providing its joint service. However, if railway operators purchased traction current from third-party suppliers, they would have had to bear these costs on their own (see for example Monopolkommission, *Bahn 2011: Wettbewerbspolitik unter Zugzwang*, 2011 pp. 93-191).

6.10.7 Conclusions

The commitments were implemented without any issues. They were effective in opening up the previously monopolistic traction current supply market. Given the successful market opening there was also no subsequent possibility of a margin squeeze. The commitments thus achieved their intended objective. Although there were regulatory attempts to open up the market dating back to before the commitments, it is clear that the commitments speeded up the process.

AT. 39678/AT.39731 – *Deutsche Bahn I/II*

Summary

- An Article 9 decision addressing the concern that the pricing system that DB applied when supplying traction current on its network might have caused a margin squeeze for rival railway operators, potentially constituting a violation of Article 102 TFEU.
- The commitments are multifaceted and aim at liberalising the traction current supply market in Germany. They mainly foresee the prompt introduction of a new pricing system (separating traction current supply prices from the network access price), granting access to third-party energy suppliers, as well as measures to reduce third-party railway operators' costs in switching supplier.

Positive substantive and procedural aspects of remedy design and implementation

- The commitments complemented well the emerging regulatory framework for access to the German traction current network, in particular by accelerating the process of granting access and allowing entry by third-party energy suppliers.
- Good mix of short-term (one-time payments) and longer-term remedy (including demand-side measures) components to remove the prima facie margin squeeze.

Critical substantive and procedural aspects of remedy design and implementation

- There were some disputes regarding the access system (such as long deadlines for billing the quantities of electricity supplied by third parties), which could have been foreseen by the Commission.

Level of implementation

- Fully implemented. Although there were some disputes during the transitory access system, the disputes concerned issues about access conditions that were not covered by the commitments.

Level of effectiveness

- Fully effective. The commitments were terminated early as the intended remedy objectives were achieved early. The commitments speeded up the process of market opening.

6.11 AT.40608 – *Broadcom*

6.11.1 Introduction

This case study concerns a commitments decision (the "Commitments Decision"), preceded by an interim measures decision (the "IM Decision"), addressing certain quasi-exclusivity and leveraging contractual clauses of a leading provider of circuit chips for telecommunication equipment for customer premises.[401] The commitments consist primarily in an obligation for Broadcom Inc. ("Broadcom", the concerned undertaking) not to apply such clauses going forward. The case is noteworthy, among other reasons, because it is the first case since the entry into force of Regulation 1/2003 in which interim measures were imposed.

Broadcom is one of the world's largest designer, developer and provider of integrated circuits ("ICs") for wired communication devices. Broadcom supplies ICs, such as systems-on-a-chip ("SoCs"), front-end chips ("FE chips") and Wi-Fi chipsets, to Original Equipment Manufacturers ("OEMs"), which assemble them together with other components to manufacture TV set-top boxes ("STBs") and xDSL, fibre and cable residential gateways. OEMs then bid for the supply of network access equipment to service providers, which offer broadcasting and Internet connectivity services to end users.

The exclusionary competition concern raised by case AT.40608 – *Broadcom* was addressed in two separate decisions adopted by the Commission, the IM Decision and, one year later, the Commitments Decision.

First, on 16 October 2019 the Commission issued an Article 8 decision imposing interim measures on Broadcom. In the IM Decision, the Commission preliminarily established that Broadcom was abusing a dominant position in the markets for SoCs for (i) STBs, (ii) fibre residential gateways and (iii) xDSL residential gateways, by including exclusivity-inducing provisions in contractual agreements with six of its main OEM customers. As the Commission concluded that these provisions constituted a prima facie infringement of Article 102 TFEU and were likely to lead to serious and irreparable harm to competition in these markets, in particular in view of the upcoming tenders for equipment adopting the Wi-Fi 6 standard, it imposed interim measures on Broadcom, requiring it to stop applying these exclusivity-inducing provisions in all current and future contractual agreements with these six OEM customers for a period of 3 years. This was the first time ever that the Commission issued interim measures under Regulation 1/2003.[402]

Second, on 7 October 2020 the Commission accepted commitments first offered by Broadcom on 1 April 2020, and subsequently revised on 31 July 2020 to reflect the results of the market test, through an Article 9 decision. The Commitments Decision builds on the interim measures by expanding their product and customer scope and by extending them for 7 additional years. Indeed, compared to the interim measures, the final commitments additionally cover FE chips and Wi-Fi chipsets and apply to agreements with all OEMs, as well as EEA service providers. Moreover, they introduce a level of geographic differentiation with stricter rules applying for the EEA than for the rest of the world.

In particular, the commitments cover products in whose supply Broadcom was preliminarily found to be dominant, i.e. STB SoCs, SoCs for xDSL and SoCs for fibre residential gateways (together, the "Relevant Products"), as well as additional products, i.e. SoCs for cable residential gateways, FE chips and Wi-Fi chipsets for STBs and residential gateways (together, the "Other Products"). Broadcom committed to eliminate

401 NERA took the lead in the preparation of this case study.

402 The last interim measures decision had been taken by the Commission under the predecessor Regulation 17/1962 on 3 July 2001, in case *COMP D3/38.044 NDC Health/IMS Health interim measures*, which relates to IMS's alleged refusal to licence the so-called 1860 brick structure of Germany's territory. The decision was appealed by IMS in the General Court, which suspended the execution of the decision until its judgement. The decision was ultimately withdrawn on 13 August 2003. In the Broadcom case, the IM Decision was appealed as well (Case T-876/19 – *Broadcom* v *Commission*), but Broadcom withdrew its appeal once the commitments decision was issued.

contractual clauses which conditioned the supply of one of the Relevant Products, or the granting of related advantages, on the customer purchasing a specified minimum share of its total requirements of that Relevant Product, another Relevant Product, or an Other Product from Broadcom, from all new and existing agreements with all OEMs in the EEA and worldwide.[403] In addition, the commitments intend to ensure that Broadcom's obligation not to induce exclusivity through its contractual relationships with OEMs would not be undermined by either entering into similar agreements with service providers directly, or through practices such as changing standard-based interfaces.[404]

6.11.2 Identification and discussion of the remedies subject to evaluation

The commitments address exclusivity-related concerns on a worldwide level (excluding China), by preventing Broadcom from requiring an OEM to obtain more than 50% of its total requirements for Relevant Products from it or granting price and non-price advantages related to Relevant Products conditional on an OEM obtaining more than 50% of its total requirements for these products from it. At the EEA level, the commitment is stricter, as Broadcom committed not to impose any minimum percentage of its EEA requirements for the Relevant Products from Broadcom. Similarly, Broadcom committed to not link the supply of or advantage in one of the Relevant Products to an OEM also purchasing other Relevant Products or Other Products from Broadcom in the EEA, or, respectively, purchasing more than 50% of its requirements of other Relevant Products or Other Products at a worldwide level. The commitments (as well as the interim measures that preceded them) go beyond the EEA to make sure that competitors can fully take advantage of the economies of scale that can be realised in serving the demand released by Broadcom on a worldwide level. Indeed, since the EEA accounted for only […]% of Broadcom's worldwide sales, the 50% worldwide threshold effectively covers a larger volume than the 0% threshold in the EEA.

The commitments nonetheless allow for narrow forms of exclusivity for individual EEA tenders, in which Broadcom may condition tender-related advantages towards OEMs on them offering only Broadcom products to the service provider. This is balanced by the OEM's right to opt out of the agreement and by the service provider's ability to require tender participants to bid both Broadcom and non-Broadcom Relevant Products.

Furthermore, the commitments specify similar measures *vis-à-vis* service providers, limited to the EEA. In particular, Broadcom committed not to impose any minimum percentage requirement on service providers for the purchase of equipment that includes Relevant Products. Moreover, Broadcom may not require or incentivise service providers to request OEMs to offer only equipment incorporating Broadcom Relevant Products. The commitments towards service providers in the EEA were included because the Commission noted an emerging trend of direct contractual relationships between chipset suppliers and service providers and was concerned that exclusivity-inducing contractual clauses with the OEMs could be replaced with equivalent clauses with service providers.

The commitments also contain a non-circumvention clause, supported by a separate commitment concerning interoperability, according to which Broadcom commits not to modify the standard-based

403 The Commission uses the expression *"total requirements"* to indicate an OEM's demand over the period covered by an agreement as measured in unit volumes for each of the products in any category (Relevant Products or Other Products), with the exception of the OEM's demand for products integrated in STBs and residential gateways that service providers eventually provide to end users in China. *"EEA requirements"*, instead, only refers to an OEM's demand for products to be incorporated in equipment that serves the demand by an EEA service provider for its end users in the EEA.
404 The Art. 9 decision in this case also inspired FTC Decision and Order. See the FTC Decision of 4 November 2021, Broadcom, Docket No. C-4750.

interfaces used in its Relevant Products in a way that degrade interoperability with Other Products not manufactured by Broadcom.

In addition to the main obligations and the non-circumvention clause, the commitments package also include reporting obligations on the part of Broadcom. On the other hand, no monitoring trustee was appointed in this case. The commitments remain in effect for 7 years,[405] ensuring that they cover two to three product cycles and give rivals the opportunity to enter and expand. As the final commitments incorporate the results of the initial market test, no additional market test was required.

In summary, the commitments achieved a broader scope than the interim measures, covering not only the Relevant Products but also the Other Products. In addition, they allowed for significant precision of the behavioural obligations, making their implementation easier to monitor in the process. In particular, the Court of Justice in *Hoffmann-La Roche & Co. AG* v *Commission* simply affirmed that for exclusivity to constitute an abuse the dominant firm required its customers to purchase "all or most of their requirements" from it,[406] such that the obligation not to do this is all that would emerge from a simple cease-and-desist order. On the contrary, remedies in this case are much more precise, committing Broadcom not to condition its supply on a share of requirements greater than 50% at the worldwide level, and 0% at the EEA level. Our evaluation of the implementation and effectiveness of remedies focuses on the agreements between Broadcom and OEMs for the supply of Relevant Products in the EEA. These remedies can be classified as purely behavioural and constitute an "obligation to terminate or change existing contracts/exclusivity clauses". The purely behavioural nature of these commitments is in keeping with their origin in interim measures.

6.11.3 Relationship between interim measures and commitments

The scope of the final commitments made binding with the Article 9 decision expands the scope of the IM Decision in three key areas. First, the removal of exclusivity-inducing provisions in the commitments applies to all OEMs and EEA service providers, thus extending obligations to a greater set of OEMs and different groups of market participants compared to the IM Decision, which concerned clauses with six OEM customers. Second, for the removal of leveraging restrictions the product scope is broadened to include FE chips and Wi-Fi chipsets. While the Commission already expressed concerns about these products in its IM SO, it eventually decided not to include them in the IM Decision in the interest of a timely implementation of the interim measures. Third, the Article 9 Decision introduces geographic differentiation between the EEA and the worldwide level. In fact, following the market test for the commitments, a stricter threshold requirement was introduced for the EEA, moving from 50% to 0%. While the interim measures were initially imposed for 3 years, one year after imposition they were superseded by the commitments, which were extended from 5 to 7 years following the market test, bringing the total effective duration of the behavioural obligations in this case to 8 years.

The upcoming tenders for customer-premises telecommunication equipment for the adoption of the Wi-Fi 6 standard offered the case team a strong basis to invoke the risk of a serious and irreparable harm to competition resulting from Broadcom's behaviour, which is a requirement that needs to be met for the

405 This is in addition to the first of the 3 years that were envisaged by the IM Decision, since the Commitments Decision was taken one year after the IM Decision.
406 Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche & Co. AG* v *Commission*, Case 85/76 EU:C:1979:36, para. 89.

Commission to be able to impose interim measures under Regulation 1/2003.[407] By halting the possibly problematic conduct and thus removing the extra profits possibly associated with it, the interim measures deprived, in the view of the case team, Broadcom of an incentive to procrastinate the finding of a more durable solution to the Commission's competition concerns.[408] In addition to this possible effect on the subsequent "bargaining" dynamics between the concerned undertaking and the Commission, interim measures in this case also gave rise to procedural synergies with the subsequent Article 9 decision, in that the interim-measures SO and Decision served as the preliminary assessment for the purposes of the commitments decision. Last but not least, the interim measures gave the case team familiarity with the monitoring of the required revision of the contractual clauses, giving it the confidence that it would be in the position to monitor the implementation of the subsequent commitments as well.

6.11.4 Identification of the main issues investigated for the ex post evaluation

Since the Commitments Decision was officially adopted on 7 October 2020 and is valid for a period of 7 years, the remedies in this case are ongoing. Inevitably, any conclusions that we can reach on remedy implementation and effectiveness in this case can only be considered preliminary and incomplete, also in light of the long tendering and commercialisation cycle of the products at stake.

6.11.4.1 Implementation issues

We evaluate the implementation of the commitments package mainly by examining whether Broadcom removed the quasi-exclusivity and leveraging clauses from all new and existing agreements with OEMs. In addition, we also document the specific steps Broadcom took towards ensuring proper implementation, such as the training of relevant employees and monitoring their compliance. Furthermore, we assess whether all facets of the remedy package have practical relevance. Specifically, the market test referenced concerns regarding the remedies for individual EEA tenders. We address whether OEMs do make use of the "opt-out" clause in such arrangements and whether service providers explicitly request OEMs to bid equipment incorporating both Broadcom and non-Broadcom products.

6.11.4.2 Effectiveness issues

The intended objective of the main commitments is to stop Broadcom from applying certain quasi-exclusivity and leveraging clauses in its contracts for the supply of Relevant Products to OEMs, enabling them to pursue more flexible sourcing strategies and encouraging rival chipset suppliers to take advantage of them. We assess whether the commitments have been effective in accomplishing their intended objective. To the extent that the remedy's aim is to stop the problematic behaviour, one could argue that the remedy is effective as long as it is implemented, such that the assessment of effectiveness coincides with the assessment of implementation. Nonetheless, in our assessment of effectiveness we attempted to go beyond mere implementation and see whether the remedy was also having an impact on market outcomes, letting Broadcom's rivals expand. [409] Ideally, we would have tested the extent to which rival suppliers' market shares

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407 In addition to this requirement, and the requirement of a prima facie infringement, there exists the requirement of proportionality, which the case team considered met in particular because in this case the obligation simply entailed the suspension of a possibly problematic contractual clause rather the obligation to actively do something (as was for example the case with the obligation to licence intellectual property in Case *D3/38.044 NDC Health/IMS Health: Interim measures*).

408 On this and other insights, see Kadar, M., *The Use of Interim Measures and Commitments in the European Commission's Broadcom Case*, Journal of European Competition Law & Practice, 2021, Vol. 12, No. 6.

409 STMicroelectronics, once Broadcom's closest competitor in the market for STB SoCs, had already exited that market in 2016, while Intel discontinued development of STB SoCs in 2015 (See more in the IM Decision, at recital 439). The IM Decision and the Decision do not attribute these exits to Broadcom's conduct.

have increased since the IM and the Commitments Decisions lifted the artificial constraints posed on their ability and incentive to compete, but we were not able to obtain market share data from publicly available sources or market participants. In addition, while confounding factors are a pervasive challenge in empirical research on competition policy, the challenge is particularly difficult in this case, since the Decisions were taken shortly before/after the onset of the COVID-19 pandemic, which among other effects disrupted global supply chains, created additional demand for household-premises telecommunication equipment, and coincided with a significant increase in component prices.

6.11.5 Methodology and sources of evidence for the ex post evaluation

To assess the implementation and effectiveness of the main commitments, we rely on interviews with the Commission's case team as well as Broadcom's direct and indirect customers, and its competitors. Ultimately, we were not able to obtain input from Broadcom itself. Interviews with the case team and OEMs can directly inform our assessment of the implementation of the main commitments. OEMs and service providers are also central for assessing whether sourcing has become more flexible as a result of the main commitments, and whether competitive outcomes have changed as a result. In addition, the interview with the case team allows us to assess whether Broadcom followed the reporting obligations and trained its employees in the implementation of the commitments.

Apart from the case team, we have received feedback from four market participants. Some other market participants declined to respond to our requests for information and opinions, citing confidentiality concerns, made more pressing by the fact that commitments in this case are ongoing.

6.11.6 Main findings of the ex post evaluation of the effective implementation of the remedy

Overall, […].

[…] In summary, given that the remedy obligations are ongoing and that market participants have been reluctant to provide specific feedback for the relevant markets concerned by the Decision, we cannot conclusively evaluate the level of implementation of the remedies.

This case also belongs to the (still sizeable) minority of commitments cases in which no monitoring trustee was appointed. As already anticipated, the origin of these commitments in interim measures plays a big role in explaining this result. The purely behavioural obligations that can be imposed as interim measures are intrinsically relatively straightforward to implement and monitor, reducing the need for a monitoring trustee. In addition, appointing a monitoring trustee in Article 8 cases would likely be subject to analogous constraints as their appointment in Article 7 cases, following the General Court's judgment in *Microsoft*.[410] When it comes to the monitoring of the subsequent Article 9 remedies, the Commission had already monitored the implementation of the interim measures, which not only gave it familiarity with the monitoring job, but also simplified the job itself, since most of the behavioural shift had already occurred through the interim measures, such that what was left to monitor under the commitments was not a change in behaviour but

410 Judgment of the Grand Chamber of the Court of First Instance of 17 September 2007, Microsoft v *Commission*, T-201/04, ECLI:EU:T:2007:289.

the continuation of the existing behaviour.[411] In this the case team was encouraged by the existence of precise behavioural obligations […].

6.11.7 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

Based on the information and opinion that we could obtain, it looks to us as if the remedies have so far been effective in attaining their intended objective, which is to stop Broadcom from applying certain quasi-exclusivity and leveraging clauses in its contracts with OEMs and EEA-based service providers for the supply of Relevant Products and Other Products. The remedies may in fact already have been more effective than that, since according to some market participants OEMs have become more willing and able to offer to service providers equipment containing Relevant Products of manufacturers other than Broadcom. However, we cannot conclusively evaluate the level of effectiveness of the remedies, due to the remedy obligations being ongoing and the resulting reluctance of market participants to provide specific feedback on the relevant markets concerned by the Decision.

Additionally, the interim measures came into force shortly before the onset of the COVID-19 pandemic and the commitments shortly thereafter. The COVID-19 pandemic triggered massive disruptions in global supply chains and a surge in demand for household-premises telecommunication equipment and coincided with a significant increase in component prices. This makes it difficult to assess remedy effectiveness in a broader sense against the background of unprecedented confounding factors.

6.11.8 Conclusions

Broadcom has been the first case since the entry into force of Regulation 1/2003 in which the Commission imposed interim measures, considering the risk *of "serious and irreparable damage to competition"* that Broadcom's exclusivity-inducing contractual clauses posed on the eve of a wave of tenders for the procurement of customer premises telecommunication equipment implementing the Wi-Fi 6 standard.

One year after their adoption, the interim measures, which essentially consisted in the prohibition to apply certain exclusivity-inducing contractual clauses, were converted into a commitments package that, in particular: (i) set out a quantitative and thus easily verifiable ceiling on the share of a customer's requirements that could be contemplated in the clauses; (ii) apply at both the worldwide and, more stringently, the EEA level; (iii) in the EEA, apply to both OEMs and service providers; and (iv) cover SoCs for STB, xDSL residential gateways and fibre residential gateways, as well as other products.

Interim measures not only enabled the Commission to intervene promptly, but also created favourable conditions for the design of remedies because: (i) Broadcom was already complying with the interim measures, arguably increasing its incentive to arrive at a lasting solution to the competition concerns that the Commission had identified; (ii) the case team had already been monitoring the implementation of the interim measures, providing for a natural transition to the monitoring of the commitments; and (iii) there

411 For similar reasons, the Commission may be more comfortable in accepting interoperability remedies in a case, such as merger case *M.9660 Google/Fitbit*, in which APIs were publicly available already before the merger. On this and other merger cases in digital and tech markets, including a discussion of remedies, see the European Commission, *Merger Enforcement in Digital and Tech Markets: an Overview of the European Commission's Practice*. Competition Policy Brief No 02/2022, 2022.

were procedural synergies between the SO/decision for the interim measures and the preliminary assessment for the commitments.

Overall, […]. What is more, market participants have noted since the Commitments Decision an increase in the willingness and ability on the part of OEMs to include products other than Broadcom's in the telecommunication equipment they assemble. However, given that the remedy obligations are ongoing and that market participants have accordingly been reluctant to provide specific feedback for the relevant markets concerned by the Decision, we cannot conclusively evaluate the level of implementation or effectiveness of the remedies.

AT.40608 – *Broadcom*

Summary

- Broadcom was prima facie found to have abused a dominant position by including exclusivity-inducing provisions in contracts with OEMs. For the first time under Regulation 1/2003, interim measures were imposed to address these concerns.
- Subsequently, an Article 9 decision was adopted, in which Broadcom committed not to include exclusivity-inducing clauses towards OEMs and service providers, to a different extent on both a worldwide and an EEA level.

Positive substantive and procedural aspects of remedy design and implementation

- Interim measures suspended the problematic behaviour (exclusivity-inducing and leveraging contractual clauses) and created an incentive for Broadcom to quickly find a lasting solution to the competition concerns identified.
- Procedural synergies between interim measures and Article 9 decision (Article 8 SO and decision used as preliminary assessment for Article 9).

Critical substantive and procedural aspects of remedy design and implementation

- Some of the market participants that provided input raised issues which however relate to products and services that are adjacent to but not part of this case.
- Monitoring trustee could have been appointed, possibly facilitating the feedback from market participants and the Commission.

Level of implementation

- Inconclusive. […]. Commitments are ongoing.

Level of effectiveness

- Inconclusive. While some market participants regard the commitments as effective and report that component diversity has increased as a result of the commitments, commitments are still ongoing and we could not obtain sufficient input from market participant and OSINT research to arrive at a definitive judgement.

6.12 AT.40394 – *Aspen*

6.12.1 Introduction

This case study covers an Article 9 decision following an Article 102 TFEU investigation of exploitative pricing practices by a pharmaceutical company which led to behavioural remedies in the form of binding price reductions and price caps.[412] This case study serves to illustrate a number of critical issues relevant to similar pricing cases.

On 10 February 2021, the Commission issued a decision[413] pursuant to Article 9 according to which Aspen Pharmacare Holdings Ltd and Aspen Pharma Ireland Limited ("Aspen")[414] potentially infringed Article 102 TFEU, by imposing unfair prices in the EEA, excepting Italy,[415] in the form of excessive prices on six, off-patent, prescription medicines for human use in the treatment of hematologic cancer sold under the brand names Alkeran IV, Alkeran Oral, Purinethol, Leukeran, Lanvis and Myleran (the "Products").

According to the Decision, from 1 July 2012 to 30 June 2019, Aspen developed a pan-European strategy to significantly increase the price of the Products, based on an internal analysis showing that patients depended on the medicines and had basically no substitutes in Europe. Aspen followed a strategy of threats of de-listings and withdrawals,[416] and actual de-listings of the Products, to overcome the resistance of national and reimbursement authorities against its requests for price increases. Additionally, Aspen applied a stock allocation system, consisting of quotas and withholding deliveries for the Products in some Member States, to ensure that customers in those Member States would buy the Products only at the increased domestic prices and not at lower prices offered by parallel trade.

In its preliminary assessment, the Commission found that Aspen persistently earned high profits with the Products in the EEA, both in absolute and in relative terms. Aspen's prices exceeded its relevant costs by almost 300%, on average, even when accounting for a reasonable rate of return. Aspen's average EEA-wide profit margins were more than three times higher than the average profitability level of a sample of similar businesses in the pharmaceutical industry.[417] The Commission concluded that Aspen may have charged unfair prices for each of the Products, since no legitimate reasons were found for Aspen's price and profit levels.[418]

The commitment that Aspen offered to the Commission to address its preliminary competition concerns included the following main elements:

- Implement Reduced Net Prices (around 73% lower on average across the EEA) for each of the Products, which would be the maximum that Aspen could charge for a period of 10 years, with one

412 NERA took the lead in the preparation of this case study.
413 Commission Decision of 10 February 2021, *Aspen*, Case AT.40394
414 Aspen is an international pharmaceutical company. It primarily supplies generic medicines used in anaesthetics or in the treatment of thrombosis, the endocrine system, or cancer.
415 The exclusion of Italy is because on 29 September 2016, the Italian Competition Authority adopted an Art. 102 TFEU infringement Decision in Case A480 – *Incremento Prezzo Farmaci Aspen* with respect to Aspen's unfair pricing practices. Please see Italian Competition Authority Decision of 29 September 2016, Price increase of Aspen's drugs, Case A480.
416 De-listing is the removal of a medicine from the reimbursement list of the Member State concerned upon application of the pharmaceutical company which implies the loss of the reimbursement status for a medicine. A withdrawal means that a medicine is no longer commercialised in a Member State through all marketing channels.
417 The Commission found these findings by following the framework of analysis set out by the Court of Justice in its judgment in the United Brands case in which it was considered that *"a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse"*. For further information, refer to Judgment of the Court of Justice of 14 February 1978, *United Brands Company* v *Commission of the European Communities*, Case 27/76.
418 The Products have been off patent for approximately 50 years, and Aspen has not significantly innovated or developed the Products. Aspen outsourced the Products' manufacturing and most of the commercialisation activities.

possible review in the second half of the period, in case of a significant increase in Aspen's direct costs.

- Implement the Reduced Net Prices earlier (Transitory Rebate), specifically by reimbursing the excess amounts paid by public and private entities in the Member States, from 1 October 2019 until Aspen has successfully implemented the price reductions.[419]
- Guarantee the supply of the Products for the next 5 years, from the Decision's notification, followed by a second subsequent five-year period during which Aspen will either continue to supply or make Product's marketing authorisation available to other suppliers.

Additionally, Aspen offered to appoint an independent trustee to act on behalf of the Commission to ensure Aspen's compliance with this commitments package. After the corresponding market test and some clarifications of the commitment,[420] the Commission made the commitment offered by Aspen legally binding.

6.12.2 Identification and discussion of the remedies subject to evaluation

The commitment offered by Aspen aimed to address the competition concerns raised by the Commission. Specifically, Aspen addressed these concerns by reducing the prices of the Products by approximately 73% on average across the EEA (Reduced Net Prices), effectively eliminating concerns about excessive pricing. Furthermore, to implement these reductions as quickly as possible, Aspen committed to implementing the Reduced Net Prices starting from 1 October 2019, utilizing the Transitory Rebate mechanism. Additionally, Aspen provided a supply commitment to guarantee the availability of the Products throughout the committed period, mitigating any potential risk of unavailability.

In our ex post evaluation of this case, we consider the entire set of commitments as they were jointly designed to address concerns about excessive pricing. However, we evaluate these commitments separately, due to differences in their implementation and effectiveness.

We classify these commitments as behavioural remedies, specifically as "obligations to respect certain price caps/conditions". Similar pricing obligation remedies are applied in analogous cases of single-firm exploitative concerns (such as AT.38636 – *Rambus*) or in cases involving horizontal agreements (such as AT.34579 – *MasterCard I*). However, a unique aspect of the Aspen case is the "retroactive" application of the Reduced Net Prices ("Transitory Rebate"). As the case team emphasised, retroactive rebates are just a means to ensure that remedies become effective as soon as possible after the adoption of the decision and do not pursue any disgorgement/restitution aims.[421] This is clarified by the Commission in its response to the comments received during the investigation, which called for the retroactive application of the Transitory Rebate for the entire relevant period (before 1 October 2019). Specifically, the Commission stated that *"commitments in the context of Article 9 of Regulation 1/2003 have the purpose of addressing the preliminary competition concerns as set out in the Commission's Preliminary Assessment and not of compensating all*

419 The Commission received some comments suggesting the retroactive application of the Transitory Rebate for the entire relevant period. In response, the Commission highlighted that commitments under Art. 9 of Regulation 1/2003 are intended to address the preliminary competition concerns outlined in the Commission's Preliminary Assessment, rather than to compensate all those who may have suffered harm because of the suspected infringement. The decision to implement the Reduced Net Prices from 1 October 2019 is because Aspen first approached the Commission with a concrete commitments proposal on that date and offered to retain.

420 Those included: clarifying the prices for Products or pack sizes for countries where *Aspen* did previously not sell the Products; updating the identities of certain regulatory authorities and modalities relevant to the retroactively application of the Reduced Net Prices; and increasing the "notice period" (to national authorities) from 12 months to at least 18 months in case Aspen intends to discontinue commercialising any of the Products.

421 We identified that in Case AT.39816 - *Upstream gas supplies in Central and Eastern Europe*, there is a commitment that is applied retroactively. Nonetheless, this case is not part of our selected remedy cases. In the same spirit, retroactive rebates were included in the commitments in joined cases AT.39678/AT.39731 – Deutsche Bahn I/II, which are one of our other case studies.

those who may have suffered harm because of the suspected infringement".[422] The Transitory Rebate applied starting from 1 October 2019 because on *"this date Aspen first approached the Commission with a concrete commitments proposal and offered to retain, in the Proposed and the Final Commitments, this date for the Reduced Net Prices to take effect"*.[423]

The effectiveness of the Transitory Rebate is particularly interesting for an ex post evaluation, due to the challenges involved in implementing the reimbursement payments and the assessment of the suitability of this remedy as a complement of the implementation of the reduction on prices (price cap).

6.12.3 Identification of the main issues investigated for the ex post evaluation

Considering that the Decision was officially adopted on 10 February 2021 and is valid for a period of 10 years, the remedies are currently in progress, and the implementation and effectiveness of the remedies can only be evaluated up until the present moment.

6.12.3.1 Implementation issues

We evaluate the implementation of the Price Commitment primarily by examining whether Aspen has applied the Reduced Net Prices in the relevant Member States, addressing concerns about excessive prices for the Products. Additionally, we assess whether the payments related to the Transitory Rebate have been made without any major complication. This commitments package received special attention due to the regulatory process involved in implementing the Reduced Net Prices, considering the different types of Products and Member States with their respective regulatory contexts, as well as the complexity surrounding the payments of the Transitory Rebate.

6.12.3.2 Effectiveness issues

The objective of the Price Commitment, which includes Reduced Net Prices and the Transitory Rebate, is to address concerns regarding the likely excessive prices of the Products. Our evaluation focuses on determining whether the remedies effectively resolved the Commission's concerns. Firstly, we verify if the Reduced Net Prices have been implemented.

We highlight that the Commission has carefully assessed whether these price reductions address its concerns regarding excessive prices. Specifically, the Commission has verified whether the Reduced Net Prices remove the excessiveness of Aspen's profit margin, as defined in Limb 1 of the United Brands judgment,[424] in all Relevant Markets. Additionally, the Commission has examined whether the prices of Aspen's products are unfair, as defined in Limb 2 of the United Brands judgment.[425] Both of these aspects were part of the analytical framework used by the Commission in its assessment of the Products' prices.

Regarding the first limb, the Commission compared Aspen's profitability with that of other comparable undertakings to determine if Aspen's profits were excessive. The Commission compared Aspen's prices for the Products to the total cost of the Products increased by a "plus" (referred to as the *"cost plus level"*). The profitability comparison revealed that Aspen has achieved significantly higher profits compared to other undertakings. As a result, the Commission concluded that Aspen may have been earning excessive profits with the Products in most Relevant Markets during the Relevant Period.

422 Commission Decision of 10 February 2021, Aspen, Case AT.40394, Recital 233.
423 See the Decision, at recital 233.
424 Judgment of the Court of Justice of 14 February 1978, United Brands Company v Commission of the European Communities, Case 27/76.
425 Ibid.

Regarding the second limb, the Commission found that there were no legitimate reasons, such as innovation, investment, or efficiency gains, that justified the price level of the Products. Furthermore, Aspen's price increases were disproportionate when compared to the limited increase in production cost. Consequently, the Commission concluded that Aspen's prices for each of the Products during the Relevant Period may have been unfair.

With the Price Commitment, Aspen's prices will, on average, exceed the cost-plus level by between 10% and 20% across the Relevant Markets, which result in profit margins dropping to a level that no longer raises concerns about excessive prices. At any rate, the Commission relied on a market test before accepting the commitment offered by Aspen. Secondly, we determine whether the Transitory Rebate has complied with the objective of addressing the competition concerns from 1 October 2019 until the date when Aspen successfully implemented the Reduced Net Prices.

Furthermore, the effectiveness of the Price Commitment relies on the compliance with the Supply Commitment. Therefore, we verify whether this obligation has been adhered to. As we are currently in the first half of the committed period, we are unable to evaluate the effectiveness of this remedy regarding the review clause that allows Aspen to cease supplying the Products while making their market authorizations available to other manufacturers.

6.12.4 Methodology and sources of evidence for the ex post evaluation

In our analysis, we primarily relied on the interviews conducted with the Commission, the monitoring trustee and the European Consumer Organisation, as well as the responses to the questionnaire that was sent to the lawyers who represented Aspen during the investigation. We also requested participation from Aspen, regulatory authorities, and beneficiaries of the Transitory Rebate from Germany, France, Spain and the Netherlands, as well as a cancer patient association. However, we did not receive any responses from these entities.

6.12.5 Main findings of the ex post evaluation of the effective implementation of the remedy

Based on the input received, we find that, overall, the remedies were well designed, and their implementation was successful. Specifically, all the Reduced Net Prices were implemented in all relevant Member States by the end of April 2022. Likewise, as of June 2023, all the Transitory Rebates have been paid, including payments to fall-back recipients.[426]

Overall, the implementation of the Reduced Net Prices and the execution of the payments for the Transitory Rebates were successful. However, the process was demanding, as evidenced by the time it took for implementation (around 14 months for the Reduced Net Prices and 28 months for the Transitory Rebates).

As highlighted by all the interviewees, although the commitments were designed for fast and proper implementation, compliance with the regulatory systems and processes of all Member States was time-consuming and complex. In particular, the implementation process had to deal with different regulatory

426 The final commitments state that if an Appropriate Beneficiary fails to provide the necessary instructions for the payment of a Transitory Rebate, Aspen is required to notify the Regulatory Authority and, if necessary, transfer any unpaid portions of the Transitory Rebate to the identified fall-back recipients.

landscapes in different languages and faced challenges in contacting all relevant health authorities across all Member States. A similar scenario was faced regarding the payment process for the transitory rebate, as it had to be paid to hundreds of different institutions.

We find that the appointment of the monitoring trustee was critical for the fast and proper implementation of the remedies, especially considering the regulatory challenges regarding the implementation of the reduced net prices and the coordination and communication challenges regarding the reimbursement process of the transitory rebates.

The Commission specifically mentioned that the monitoring trustee was highly efficient and competent in overseeing Aspen's fulfilment of commitment, especially considering Aspen's difficulties in implementing them in countries where they had limited sales and local representation. The monitoring trustee highlighted the relevance of the participation of the Commission's case team, as they had contacts with national health authorities and regulators and were responsible for identifying the beneficiaries of the transitory rebates in the commitments.

When it comes to the implementation of the supply commitment, according to the Commission and the monitoring trustee, the Products are still being sold in all Member States. In other words, there have been no withdrawals.

Despite of the proper implementation of the remedies, we identified some issues in the payment of the transitory rebate.

For instance, according to the monitoring trustee, some beneficiaries did not show much interest in the payments or did not respond to communications because the cost involved in the payment process was higher than the amount of money they would receive (lower than EUR 100 in some cases). In the monitoring trustee's view, complying with the transitory rebate was more demanding in countries with patient co-payers (Germany and Czech Republic).

Although the commitments have a safeguard for these cases (fall-back recipient), it is important to remark the cost associated with the full implementation of the transitory rebate. The granularity of the beneficiaries in this case implied a significant use of resources not only by the addressee but also for the Commission case team itself, as they helped to contact relevant stakeholders.

In summary, we find that the remedies have been fully implemented within a reasonable period, considering their complexity and the difficulties observed in the implementation of the Transitory Rebate.

6.12.6 Main findings of the ex post evaluation of whether the remedy had the intended effects on competition

The commitments were aimed at addressing concerns about excessive prices for the Products. We have verified that the commitments have had the intended effects on competition, as the Price Commitment has been implemented and the Supply Commitment has so far being fulfilled.

Regarding the Price Commitment, we believe that its implementation alone would have resolved the competition concern going forward. The price reductions have been significant and appear to have been sufficient in eliminating excessive profit margins and unfair prices.[427] Therefore, with the Reduced Net Prices

427 Commission Decision of 10 February 2021, *Aspen*, Case AT.40394, recital 237.

implemented in all Member States since April 2022, the competition concern regarding the Products has been allayed.

Through the Transitory Rebate, the Commission aimed in addition to prevent any potential delays in the implementation of lower prices. We have verified that the Transitory Rebate has fulfilled the Commission's objective, as all payments have been made, since June 2023, according to the criteria established in the final commitment, without any significant issues, apart from the inherent complexity of the process and the issues related with the cost involved in the implementation of this remedy given the granularity of the beneficiaries.

We believe that the Transitory Rebate was relevant to limit the potential anticompetitive effect on consumers during the implementation of the reduced net prices. So, in practice, the Transitory Rebate played as a safeguard against potential delays in the implementation of the Reduced Net Price.

In retrospect, all interviewees remarked that the commitments were well-designed to address the competition concerns and considered the remedies to be effective. The Commission case team emphasises in addition the importance of the Supply Commitment for the overall effectiveness of the remedies. Ensuring the availability of the Products in all relevant countries was a significant challenge in the design of the remedies. Without the Supply Commitment, there would have been a risk of the Products becoming unavailable in certain markets, as the Price Commitment was mandatory but the decision to sell or not to sell the Products would have been left to the discretion of the company.

Apart from the intended effect on competition, we highlight that the analysis conducted in the Decision to establish a price level that eliminates concerns about excessive prices will provide guidance to the market, other authorities, and courts on assessing excessive prices in the pharmaceutical industry. This guidance also serves as a deterrent, making it easier for firms to apply excessive prices test and verify that their prices comply with the test.

In summary, the Price Commitment has effectively addressed the competitive concern about excessive prices going forward, with the effectiveness of this commitment reinforced by the presence of the Supply Commitment to ensure the continued availability of the Products at the lower prices. Likewise, the Transitory Rebate was crucial to play as a safeguard against possible delays in the implementation of the Reduced Net Prices. Additionally, these remedies and the analysis conducted in their design in the Decision serve as guidance for similar future cases.

6.12.7 Conclusions

Based on the interviews with stakeholders, we find that overall, the remedies were well designed, their implementation was successful, and they had the intended effects on competition.

In particular, the establishment of the Supply Commitment and the Transitory Rebates as a complement to the price commitment was crucial in achieving the objectives of eliminating concerns of excessive pricing on the Products. Without the supply commitment, there would not have been a guarantee of availability of the Products in the Member States. Without the Transitory Rebate mechanism, consumers would have suffered the consequences of excessive pricing for a longer period due to potential delays in the implementation of the price commitment. Furthermore, we verified that the appointment of a monitoring trustee was critical for the proper and full implementation of the remedies, as well as the support provided by the Commission during the implementation process.

Finally, we do not identify any significant effects of the remedies apart from the intended effect on competition. We only highlight that the Commission's decision could have a deterrent effect on the pharmaceutical industry, as it established guidance for authorities to assess excessive pricing in this industry.

AT.40394 – *Aspen*

Summary

- An Article 9 decision was adopted to address the concern that Aspen may have imposed excessive prices on six prescription medicines for human use in the treatment of hematologic cancer, potentially infringing Article 102 TFEU.
- Aspen offered commitments that included price reductions, the early application of these reduced prices (starting from 1 October 2019) through a transitory rebate (reimbursing excess amounts paid by customers), and the guarantee of medicine supply during the commitments period.

Positive substantive and procedural aspects of remedy design and implementation

- The addition of a supply commitment and transitory rebates to the price commitment provided for security of supply and immediate relief.
- The appointment of a monitoring trustee to supervise a complex remedy.

Critical substantive and procedural aspects of remedy design and implementation

- The payment process for the transitory rebate was time-consuming. Some beneficiaries showed little interest in the payments or did not respond to communications, since the cost entailed by the payment process exceeded the amount of money they would have received.

Level of implementation

- Fully implemented (as of today). The commitments are ongoing. The commitments were implemented within a reasonable period, in particular in light of their complexity, since they were implemented across health authorities in multiple Member States.

Level of effectiveness

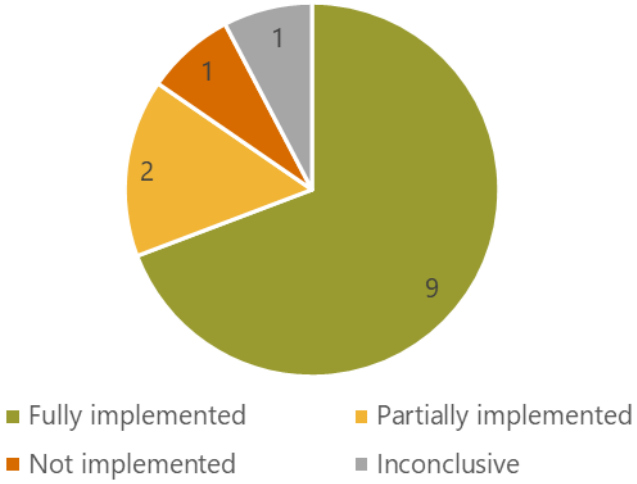
- Fully effective (as of today). Aspen's significant price reductions have been sufficient in eliminating excessive prices and profit margins. The supply commitment and the transitory rebate boosted the effectiveness of the price reductions.

6.13 Descriptive statistics on the ex post evaluation

This section reports the outcome of our retrospective analysis of the twelve selected cases. Because in case AT.37792 – *Microsoft I* two distinct competition concerns were addressed with two distinct remedies, we end up evaluating 13 remedies. Our retrospective analysis has good coverage, addressing approximately one in every five EU antitrust remedies cases of the last twenty years, and the case selection process has been thorough. At the same time, it is important to keep in mind that antitrust is a highly heterogeneous space, such that extrapolation from our statistics should be done with caution and in the context of the other evidence that has been collected in this Study.

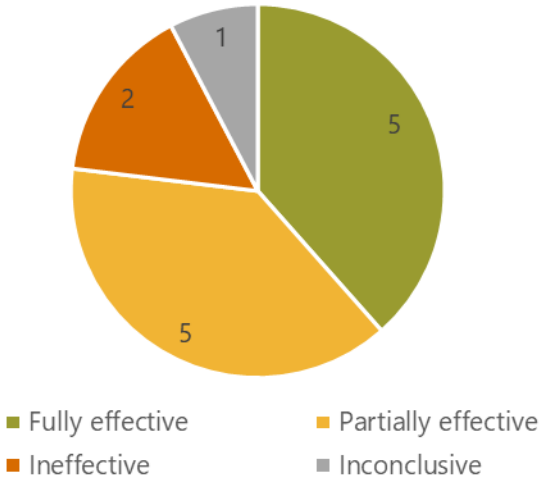
Figure 6.1 shows their level of implementation. Nine out of the 13 remedies were implemented fully, while two remedies (AT.37792 – *Microsoft I*, *interoperability* and AT.39596 – *BA/AA/IB)* were only partially implemented and one was not implemented at all (AT.34579 – *MasterCard I)*. The assessment of implementation of the remaining remedy (AT.40608 – *Broadcom*, where the remedy obligations are still ongoing) was inconclusive.

Figure 6.1: Ex post evaluation of implementation



The next figure, Figure 6.2, reports the effectiveness of the evaluated remedies. Five remedies were fully effective in achieving their intended objective, in five cases (AT.37792 – *Microsoft I, interoperability*, AT.38636 – *Rambus* and AT.39315 – *ENI,* AT.39847 – *E-books* and AT.39596 – *BA/AA/IB*) the remedies were only partially effective, and in two cases (AT.34579 – *MasterCard I*, AT.37792 – *Microsoft I, tying*) remedies were ineffective. As on the level of implementation, we could not conclude on the level of effectiveness of the remedies in the remaining case (AT.40608 – *Broadcom*).

Figure 6.2: Ex post evaluation of effectiveness



By comparing the results of implementation and effectiveness, we see that the record on effectiveness is weaker than the record on implementation, and in particular that there are four cases (AT.37792 – *Microsoft I, tying*, AT.38636 – *Rambus*, AT.39315 – *ENI* and AT.39847 – *E-books*) that were ineffective or only partially effective, despite implementation was full. This suggests that remedy design in these cases was not well-suited to the remedy's objective.

The following figures illustrate the implementation and effectiveness of the remedies separately for the prohibition and the commitments decisions. Overall, remedies that were imposed with prohibition decisions show more severe issues of implementation and effectiveness than remedies that were made binding on the concerned undertakings with commitments decisions. Disregarding the remedy with an inconclusive assessment, we observe that five Article 9 remedies were implemented fully except for one partially implemented remedy (AT.39596 – BA/AA/IB), while two of the six Article 7 remedies had implementation issues, as one was only partially implemented, and the other one was not implemented at all. Similarly, we observe that the two ineffective remedies that we assessed are both Article 7 remedies.

Figure 6.3: Ex post evaluation of implementation by decision type

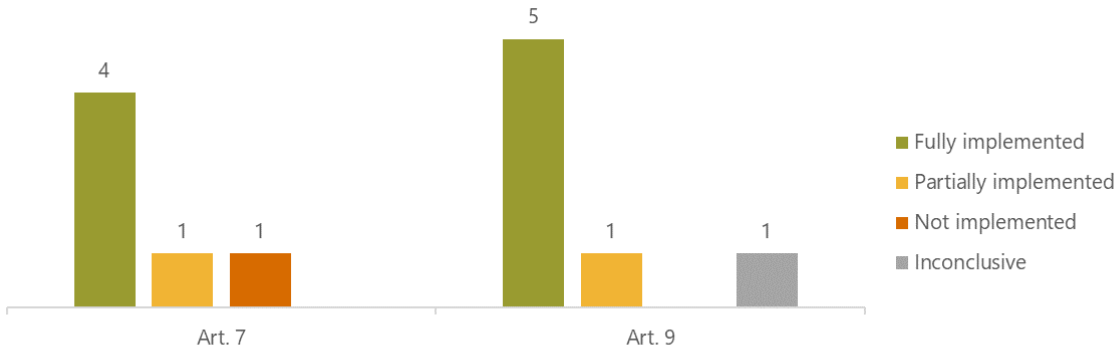
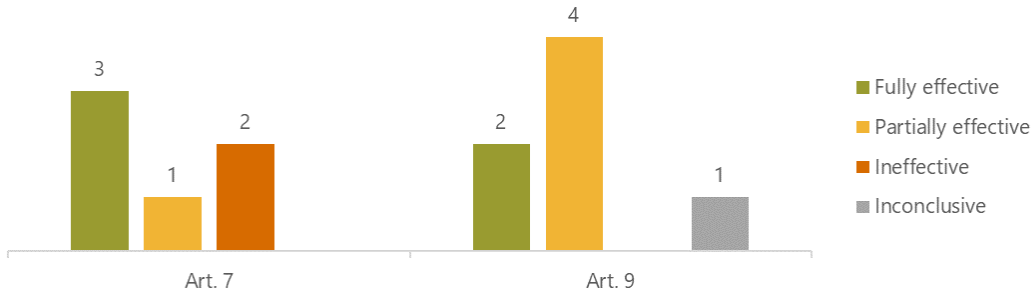


Figure 6.4: Ex post evaluation of effectiveness by decision type



In the following figures we show the results of our assessment of the implementation and effectiveness of remedies following commitments decisions depending on the appointment of a monitoring trustee. Figure 6.5 shows that the majority, three out of four, of the remedies monitored by independent trustees had no implementation issues, while one such remedy was only partially implemented. This may also be true for the three remedies without trustee involvement, but the assessment was inconclusive for one such remedy. The next figure (6.6) illustrates that remedies that were monitored by independent trustees had less effectiveness issues as the remedies that were not monitored by trustees. Overall, the figures do not allow for drawing general conclusions on the relationship between implementation and effectiveness of remedies and their monitoring by trustees, also since the ex post evaluation was inconclusive for one out of three remedies that were not monitored by trustees. We can nonetheless conclude that absent a monitoring trustee it is at least harder to assess implementation and effectiveness in the first place.

Figure 6.5: Ex post evaluation of implementation and appointment of a monitoring trustee in Article 9 decisions

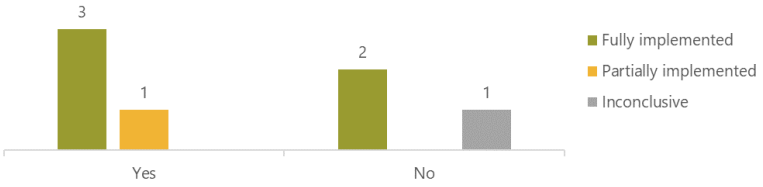
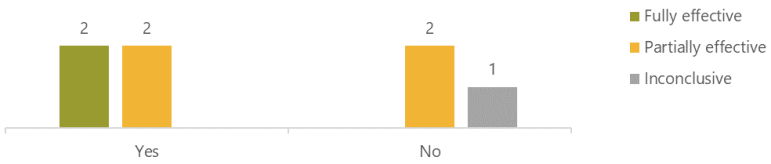


Figure 6.6: Ex post evaluation of effectiveness and appointment of a monitoring trustee in Article 9 decisions



Next, we turn to the implementation and effectiveness of the remedies based on their type, that is whether they are behavioural remedies, behavioural remedies with structural elements or structural remedies. As can be seen in Figure 6.7, structural remedies were implemented fully, while among the two behavioural remedies with structural elements one was fully implemented and only one was partially implemented. Among the nine behavioural remedies we identified one remedy that was not implemented and one remedy that was only partially implemented. The next figure, which shows effectiveness by remedy type, conveys a similar message. One can see that effectiveness issues were mostly encountered in purely behavioural remedies. The two ineffective remedies and three of the five partially effective remedies were of a purely behavioural nature.

Figure 6.7: Ex post evaluation of implementation and remedy type

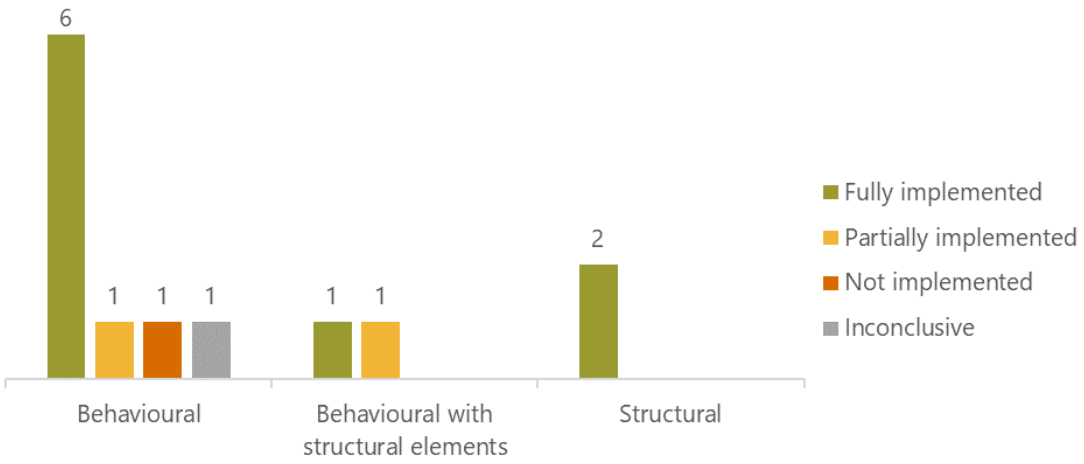
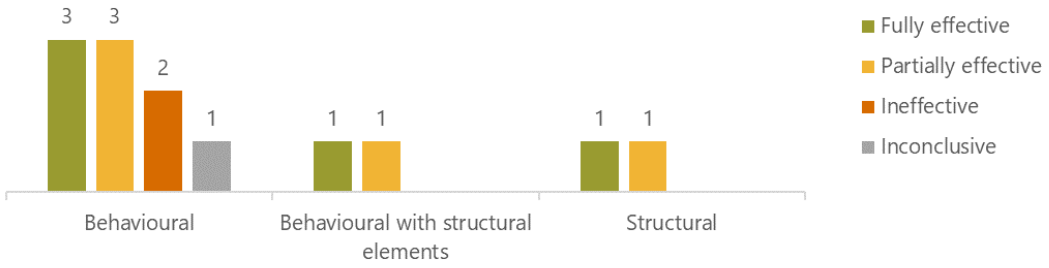


Figure 6.8: Ex post evaluation of effectiveness and remedy type



In the next two figures we chronologically order the cases from left to right and illustrate their level of implementation and effectiveness. Both figures show a similar pattern, according to which issues with implementation and effectiveness are found in earlier cases rather than in more recent cases. In the ex post assessment we do not find a remedy with implementation issues since AT.39596 – *BA/AA/IB*, and no remedy with an effectiveness issue after AT.39847 – *E-books*. Overall, this suggests that the remedy practice of the Commission has improved over time, increasingly leading to remedies that are implemented and effective in attaining their intended objectives.

Figure 6.9: Temporal evolution of implementation

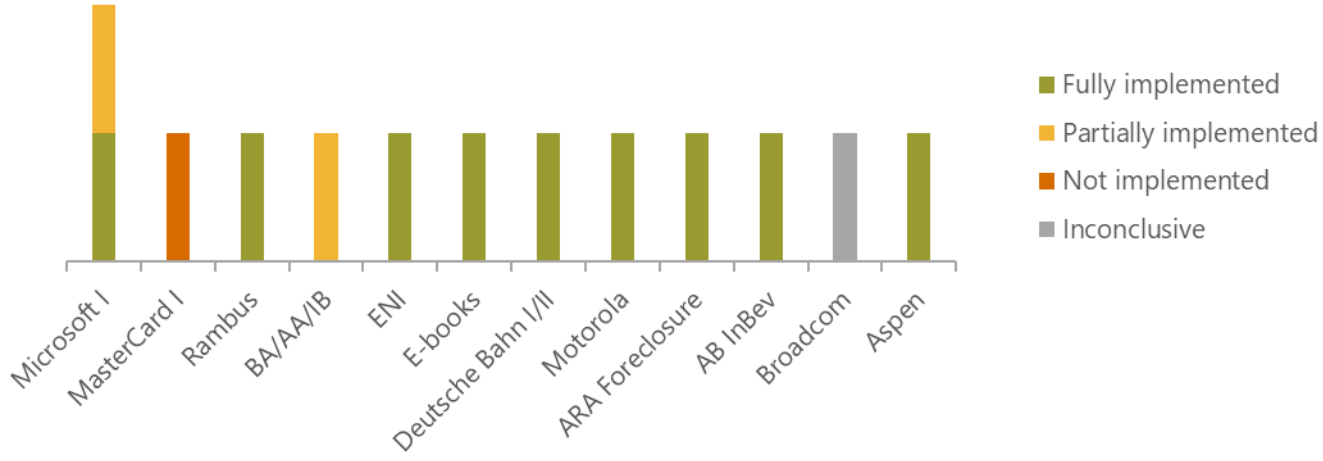
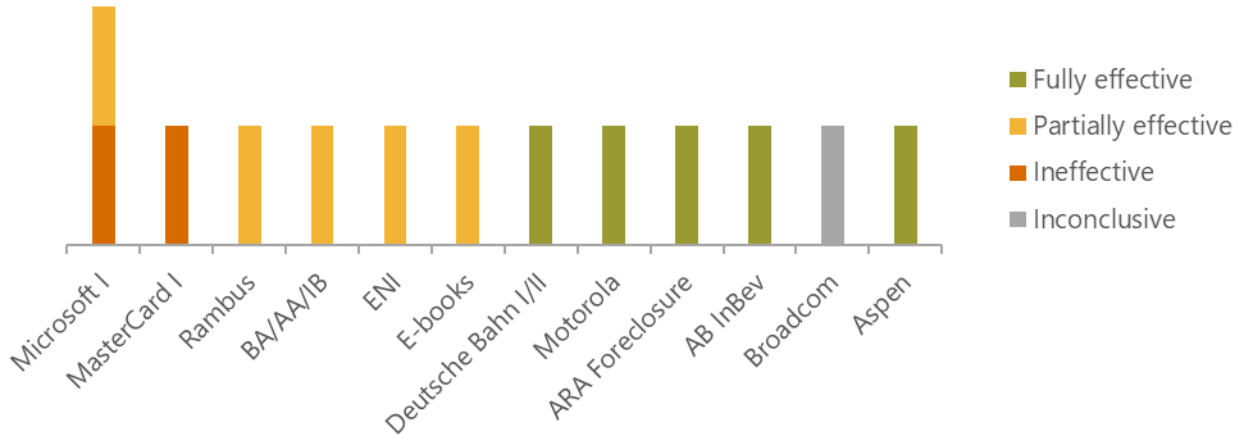


Figure 6.10: Temporal evolution of effectiveness



7. Lessons learned and recommendations

Over the course of this project, we benefited from a wide range of sources of evidence to retrospectively assess the implementation and effectiveness of antitrust remedies imposed by the European Commission over the last 20 years under Regulation 1/2003. In particular:

1. we reviewed the legal and the economic literature on antitrust remedies;

2. we conducted several interviews on the challenges in the design and implementation of remedies with case managers from DG Comp's antitrust units, case managers from DG Comp's merger units, officials from four other competition authorities (France's *Autorité de la concurrence*, Germany's *Bundeskartellamt*, and the United States' Antitrust Division of the DoJ and FTC), legal and economic scholars, as well as monitoring trustees;

3. we constructed a novel, detailed and comprehensive dataset of all antitrust decisions that the Commission adopted between the entry into force of Regulation 1/2003 on 24 January 2003 until 31 December 2022, and we undertook a statistical analysis of the competition concerns, the decision type and the remedy type emerging from them; and

4. most notably, we selected twelve significant EU antitrust remedy cases of the last 20 years based on a range of quantitative criteria, and we undertook a case study of each of them, where we collected oral and written input from case teams, decision addressees, market participants and OSINT, and we performed an ex post evaluation of remedy implementation and effectiveness, both individually and across the twelve cases.

To all of our interview partners we have granted anonymity and have ensured the protection of the business secrets of their employers or clients.

Based on these sources of evidence we have prepared, for the first time ever in the antitrust space, a comprehensive study on the design, implementation and effectiveness of the antitrust remedies imposed by the Commission under Regulation 1/2003. A similar exercise was undertaken by the Commission in the merger control area before, leading to the 2005 Merger Remedies Study. Ours is the first exercise of this scope in the antitrust area, if we exclude narrower studies such as the two sectoral studies, in respectively the energy and the telecommunication sectors, that were conducted on behalf of the Commission in 2015.[428] Naturally, the smaller number and the wider variety of antitrust cases make it harder to distil general learnings on antitrust remedies than on merger remedies, which is what our Study set out to do.[429]

From this evidence we have learned important lessons on the design, implementation and effectiveness of antitrust remedies in the EU and we have been asked to make recommendations for future enforcement practice and policy. In this section of the Study we summarise our conclusions.

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428 "The economic impact of enforcement of competition policies on the functioning of EU energy markets", 2015, report prepared by IFC Consultancy Services and DIW Berlin for DG Comp, including a case study on antitrust cases AT.39388 – *German electricity wholesale market* and AT.39389 – *German electricity balancing market*; "Economic impact of competition policy enforcement on the functioning of telecoms markets in the EU", 2015, report prepared by Lear, DIW Berlin and Analysys Mason for DG Comp, including a case study on (pure cease-and-desist) antitrust case AT.39525 Telekom Polska.

429 A cursory look at COMP Case Search suggests that over the period of time when there have been 108 antitrust decisions (of which 45 simple cease-and-desist orders) there have been around 2,500 merger decisions under the normal procedure, with 300 of them clearance decisions with conditions and obligations, that is remedies. Based on these figures, the ratio of merger to antitrust remedies is approximately 5 to 1.

7.1 Lessons learned

The legal framework of Regulation 1/2003, which has been in force since 24 January 2003, has modernised the law on the enforcement of Articles 101 and 102 TFEU, empowering the competition authorities and the courts of the Member States to apply EU antitrust law and enhancing the powers of the Commission in the same regard. In particular, Regulation 1/2003 has provided a valuable legal framework for the imposition of antitrust remedies in the EU. This has allowed the Commission to effectively intervene on key antitrust issues, often at the intersection with sector regulation and intellectual property law.

The aims of antitrust remedies namely *"removing the infringement and bringing it effectively to an end"*[430] have been enshrined in Regulation 1/2003 and remain a sound guiding principle for the design of antitrust remedies. These aims underline the fundamental role that antitrust remedies play in antitrust enforcement, in that they enable the effective resolution of a competition problem that was caused by the anticompetitive behaviour of the concerned undertakings.

Our Study has also brought to light a number of challenges that the application of Regulation 1/2003 entails. We discuss them below in terms of lessons learned, leading to recommendations to improve the design, implementation and effectiveness of antitrust remedies in the EU. This includes not only substantive issues in remedy design but also procedural issues in the application of the three legal instruments for the imposition of remedies and interim measures contained in Articles 7, 8 and 9 of Regulation 1/2003.

7.1.1 Statistics from the ex post evaluation

In our ex post evaluation of the twelve case studies we found that 9 out of 13 remedies were implemented fully, while two remedies were only partially implemented (AT.37792 – *Microsoft I*, *interoperability,* AT.39596 – *BA/AA/IB*) and one remedy was not implemented at all (AT.34579 – *MasterCard I*).[431] The evaluation of implementation of the remaining remedy was inconclusive due to lack of relevant evidence and the fact that obligations are ongoing (AT.40608 – *Broadcom*). The results of the effectiveness evaluation are less satisfactory, as only five remedies were found to have attained their intended objective fully. Five remedies were only partially effective (AT.37792 – *Microsoft I, interoperability*, AT.38636 – *Rambus* and AT.39315 – *ENI,* AT.39847 – *E-books,* AT.39596 – *BA/AA/IB*), and two remedies were ineffective (AT.34579 – *MasterCard I*, AT.37792 – *Microsoft I, tying*). Again, for the remaining remedy a conclusion on their level of effectiveness was not possible to draw. The less satisfactory results for effectiveness than for implementation are due to the fact that at times remedies were not fully implemented (AT.37792 – *Microsoft I interoperability*, AT.34579 – *MasterCard I*, AT.39596 – *BA/AA/IB*) but at other times remedies were ineffective or only partially effective despite being fully implemented (AT.37792 – *Microsoft I* tying, AT.38636 – *Rambus*, AT.39315 – *ENI,* AT.39847 – *E-books*), suggesting that the remedies that were designed in the latter cases were not well-suited to attain their intended objective in the first place.

Our ex post evaluation revealed that the implementation and effectiveness of remedies varies with the decision type, remedy type, and over time. Overall, remedies that were imposed with prohibition decisions show more issues of implementation and effectiveness compared to those that were made binding through commitments decisions. With respect to the remedy type, the ex post evaluation indicates that purely behavioural remedies were the least likely to be fully implemented and fully effective. On the other hand,

430 Judgment of the Court of Justice of 29 June 2010, *European Commission* v *Alrosa Company Ltd.*, Case C-441/07 P, ECLI:EU:C:2010:377, [39].
431 In case AT.37792 – *Microsoft I* two different competition concerns were addressed with two distinct remedies; therefore, we evaluated two remedies separately, resulting in a total of 13 evaluated remedies in twelve case studies.

one out of two behavioural remedies with structural elements that were assessed were found to be fully implemented and effective. Similarly, two of the assessed structural remedies were fully implemented, though one of them (AT.39315 – *ENI*) was only partially effective. Lastly, the assessment through our twelve case studies showed that the remedy practice of the Commission appears to have improved over time, as issues of implementation and effectiveness were found in older (most notably, AT.37792 – *Microsoft I* and AT.34579 – *MasterCard I*) cases rather than more recent cases.

7.1.2 Remedy objective and remedy effectiveness

Antitrust remedies are effective when they attain their intended objective.

Stopping the anticompetitive behaviour identified in an antitrust investigation is the most immediate objective of antitrust remedies. On many occasions, a simple cease-and-desist order (which itself can be interpreted as a particularly simple form of behavioural remedies) may be sufficient for this purpose. On other occasions, in particular in complex technology and network settings, where the competition concern may be about refusal to supply interoperability information or grant access to networks, (positive) remedies may be required, which specify in more detail than a simple cease-and-desist order the behaviour that the concerned undertaking will have to adopt going forward.

In some cases, the objective of antitrust remedies may go beyond stopping the anticompetitive behaviour, to also encompass preventing the behaviour´s repetition and the prohibition´s circumvention. The objective of antitrust remedies may go as far as removing the detrimental effects that the anticompetitive behaviour has had on the market, thereby restoring the conditions for and the outcomes under undistorted competition. Even in the case of a restorative objective, however, remedies are forward-looking and do not foresee the disgorgement/restitution of historical anticompetitive gains or the compensation of historical competitive harms.

All of the three remedy objectives mentioned above may involve imposing remedies that go above and beyond a simple cease-and-desist order. Stopping the anticompetitive behaviour may, for example, require the concerned undertaking to adopt a positive, specific, behaviour. Furthermore, preventing the repetition of the anticompetitive behaviour or the circumvention of the prohibition may, for example, require structural remedies that, by requiring the concerned undertaking to divest some of its assets, deprives it of the incentive to behave anticompetitively in the first place. Lastly, removing the detrimental effects of the anticompetitive behaviour may require, for example, behavioural remedies with the structural elements of providing market participants with a lasting incentive and ability to compete. The more ambitious the remedy objective, the more likely remedies are required and the broader their scope.

While going as far as removing the negative consequences that an anticompetitive behaviour has had on the market with the aim of restoring undistorted competition can be considered the overarching aspiration of antitrust enforcement, the imposition of remedies of this type may in practice, depending on market conditions, the anticompetitive behaviour at issue, and the timeliness of antitrust intervention, be unfeasible or undesirable. In that case, remedies that, short of bringing the market to the place in which it would have been absent the anticompetitive behaviour, create at least the conditions for the market to (more quickly) go in that direction may be a satisfactory alternative.

In the case of (prima facie) exploitative abuses, such as existed in AT.40394 – *Aspen* (one of our case studies), it has so far been possible to restore competition by specifying competitive outcomes through the imposition of remedies in the form of price caps and price rebates. Conversely, in the case of exclusionary abuses expert interviews indicated that restoring competition could possibly require measures such as the imposition of wide-ranging structural remedies or behavioural remedies with structural elements, which would be more

challenging to implement, possibly raising proportionality concerns, and in any case associated with a substantial risk of failure to restore competition. For these reasons, careful consideration needs to be given when specifying the remedy objective and designing the remedy to meet that objective.

Antitrust remedies can also have an impact that goes beyond their intended objective in the individual case. In particular, and besides the deterrent effect that prohibition decisions have, antitrust remedies can influence future hard and soft antitrust law, antitrust judgments and sector regulation.

As the joined cases AT.39678/AT.39731 – *Deutsche Bahn I/II* or case AT.39759 – *ARA foreclosure* taught us, antitrust remedies need not be a substitute but can be a complement to sector regulation. In several additional cases we reviewed, we observed that antitrust remedies eventually led to the development of sector regulation that transformed antitrust remedies (applicable ex post, following an antitrust investigation) into regulatory obligations (applicable ex ante, based on certain criteria). For example, case AT.34579 – *MasterCard I* on MIFs led to the revision of the existing legislation with the 2015 EU Interchange Fee Regulation, while cases AT.39985 – *Motorola* and AT.39939 – *Samsung* contributed to the framework for the licensing of Standard Essential Patents established by the Court of Justice in its *Huawei* v *ZTE judgment*. Finally, it is well-known that the ex ante obligations enshrined in Articles 5, 6 and 7 of the DMA have been informed by antitrust investigations of the Commission.[432]

Antitrust remedies generate benefits to the extent that they are effective in attaining their intended objective. Antitrust remedies entail costs as well, including the burden for the concerned undertakings to implement the remedy, the costs of monitoring implementation by the Commission and any monitoring trustee, and any side effects that the remedies may have on efficiencies and competition.

The proportionality principle, which reflects a fundamental principle of EU law,[433] ensures that, between two equally effective possible remedies, the Commission must choose the one that is less burdensome for the concerned undertakings to implement.[434] The proportionality principle can also inform the choice of remedy objective, where the objective of stopping the anticompetitive behaviour will be more likely to entail remedies that satisfy the principle than the objective of, in addition, preventing the repetition of the anticompetitive behaviour/the circumvention of the prohibition, or removing its detrimental effects on the market.

7.1.3 Remedy design

In order for remedies to be effective in attaining their intended objective, they need to be designed well and they need to be implemented fully. Furthermore, identifying quickly the competition problem and its solution can significantly contribute to remedy effectiveness.[435] Some of our case studies, such as AT.37792 – *Microsoft I*, *interoperability* and AT.34579 – *MasterCard I* have shown that significant delays in, respectively, designing and implementing remedies have undermined their effectiveness. In the first case, the Article 7 decision was issued by the Commission on 24 March 2004 against Microsoft for abusing its dominant position in certain relevant markets, but the investigations had started on 10 December 1998, when Sun Microsystems, a US company, made an application to the Commission. In the second case mentioned, the

432 See, for example, Hoehn, Menezes and Young, 2023.
433 The principle of proportionality is enshrined in Article 5(4) of the Treaty on European Union.
434 In this sense, see recital 37 and Article 10 of the ECN+ Directive.
435 Schweitzer and de Ridder (2024) emphasized how the increasing duration of (adversarial) Art. 102 TFEU proceedings before the Commission potentially translates into the inability to remedy the resulting harm to the competitive structure as well as a loss in the deterrence effect. (Schweitzer, H. and de Ridder, S., How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses, Journal of European Competition Law & Practice, 2024, Vol. 15(4), pp. 222-243).

Article 7 decision was issued on 19 December 2007, but the process that led to this decision commenced on 30 March 1992, with the complaint lodged by the British Retail Consortium.

Remedy design involves substantive aspects, which in turn relate to both the substantive steps that the concerned undertaking will need to take (such as remedy type and remedy scope) and the mechanisms in place (modalities and flanking measures such as reporting obligations and the appointment of a monitoring trustee) to ensure that the implementation of remedies is verified.

Depending on market conditions, the behaviour of concern, the remedy imposed and its visibility, market participants may well be in the position to detect and report to the competition authority if the remedies are not fully implemented. There are other circumstances, however, under which the verification of remedy implementation requires the reporting of information to the competition authority by the concerned undertakings themselves, or the appointment of monitoring trustees, who in turn may require access to technical expertise to effectively carry out their work. Appointing a monitoring trustee, or imposing obligations requiring the concerned undertakings to inform customers about the remedy adopted, are some of the so-called flanking measures that a remedy package can include in order to ensure full implementation.

Another set of flanking measures relates to the establishment of mechanisms for the resolution of disputes on the implementation of the remedies between the concerned undertakings and the remedy beneficiaries. At least in the merger control space, our research indicates that remedy implementation has increasingly given rise to disputes between the concerned undertakings and the remedy beneficiaries, with the Commission at least on certain occasions being reluctant to provide guidance on the remedy interpretation, the complainant unwilling to accept the solution proposed by the monitoring trustee, and the dispute ultimately submitted to lengthy and costly arbitration or litigation.

Flanking measures foreseeing review and early termination clauses, such as in joined cases AT.39678/AT.39731 – *Deutsche Bahn I/II*, can make remedies more future-proof and give the concerned undertakings an incentive to implement them promptly.

In addition to substantive aspects, remedy design also involves procedural aspects, such as whether they are imposed by the Commission or are offered by the concerned undertakings, and whether the proposed remedies are tested with market participants.

As discussed in Section 5 of the Study, a veritable mix of factors need to be considered by the Commission in aligning remedy design with remedy objective, ultimately contributing, together with implementation, to remedy effectiveness. More specifically, the alignment of design and objective involves consideration of the anticompetitive behaviour, the markets affected by it, the concerned undertakings' previous compliance record, etc.

The study also reveals that the effectiveness of all antitrust remedies depends on their enforceability and timeliness. Enforceability refers to the fact that a remedy should not be too complex to implement. Timeliness refers to the fact that the remedy should be effective in addressing the identified competition as soon as possible as the remedy is implemented. This last requirement is very important in particular in fast moving markets.

Some of our expert interviewees have pointed to the intrinsic limitation of the scope of antitrust remedies, which are case specific and target individual behaviours, suggesting the value of imposing broader, and possibly market-wide remedies following market investigations. This possibility was explored by the Commission in 2020 with the so-called New Competition Tool, whose development was halted in favour of a sector-specific regulation for large digital platforms, which would become the DMA. Our Study does not investigate the merits of such a tool as it is out of scope but notes that among competition authorities the views on the merits of this instrument are varied.

7.1.4 Remedy type and remedy scope

Moving beyond simple cease-and-desist orders (in their basic and more advanced "like-object-or-effect" form), a distinction is traditionally made between structural remedies and behavioural remedies. While no generally accepted definition of either remedy type is available, structural remedies are characterised by a transfer of ownership and control of a business or a set of assets to a new owner, as well as a "clean break" between the concerned undertakings, other firms, and the competition authority. Behavioural remedies, on the other hand, are characterised by specific obligations on the behaviour of the concerned undertakings going forward, which require ongoing monitoring.

At the same time, the literature acknowledges that in reality a continuum of remedy types exists, with some remedies falling between the structural type and the purely behavioural type. In the same vein, in our Study we establish an intermediate type of remedies which we call behavioural remedies with structural elements. These are behavioural remedies, such as certain types of access remedies that confer significant (non-property) rights to third parties, with the potential for a lasting effect on actual or potential market participants' incentive and ability to compete.

Accordingly, we consider that Article 7 and Article 9 allow for three types of remedies, in addition to pure cease-and-desist orders: (i) behavioural remedies, (ii) behavioural remedies with structural elements, such as certain types of access and interoperability remedies that confer significant (non-property) rights to third parties; and (iii) structural remedies.

Examples of structural remedies include the divestiture of businesses or assets, as in our case study on AT.39759 – *ARA Foreclosure*. Examples of purely behavioural remedies include obligations to respect certain price caps/conditions, as in our case study AT.40394 – *Aspen*. Examples of behavioural remedies with structural elements include directly enforceable access to infrastructure, as in our case study AT.39596 – *BA/AA/IB.*

The main advantage of structural remedies is that, when the anticompetitive behaviour is intrinsically linked to the structure of the concerned undertaking, structural remedies are likely to address the competition problem at its root. In the process, they also eliminate the need for ongoing monitoring. In this sense, structural remedies are perceived to be more "market friendly" than behavioural remedies, which force the concerned undertakings to abide by behavioural rules that a public authority has imposed on them and must monitor on an ongoing basis. On the other hand, for structural remedies to be effective, the scope of the divested assets needs to be well designed and the transfer of the assets need to be towards a "suitable buyer" that, also thanks to the assets it has received, will have the ability and the incentive to fiercely compete on the market. In addition, structural remedies are particularly likely to raise proportionality concerns (also in light of the specific legal requirements for structural remedies to be imposed under Article 7 of Regulation 1/2003), as well as concerns that the divestiture may break some of the efficiencies that the concerned undertaking had generated and reduce its ability and incentive to compete and innovate.

Whether a behavioural remedy is less burdensome to implement or less effective than a structural remedy varies from case to case. For example, an undertaking may find it more burdensome to comply with long-running behavioural obligations, possibly including the obligation to report information to the competition authority and to interact with a monitoring trustee, than to divest an asset whose competitive significance may have already diminished by the time of the antitrust decision. At the same time, a divestiture to an unsuitable buyer may be less effective than a well-designed access remedy. Indeed, our case study on AT.39315 – *ENI* suggests that the choice of the Italian state-controlled company as divestiture buyer may have lowered the effectiveness of the remedies imposed, as questions were raised in our research about the independence and lack of connection of the latter from the concerned undertaking.

Regarding remedy types, the ex post evaluation of remedy implementation and effectiveness reveals that purely behavioural remedies were the least likely to be fully implemented and effective among the three categories. Conversely, one out of two behavioural remedies with structural elements were fully implemented and effective. Similarly, the two evaluated structural remedies were fully implemented, although one (AT.39315 – *ENI*) was only partially effective.

7.1.5 Monitoring trustee and independent advisers

Our Study confirms that the appointment of a monitoring trustee (who oversees the implementation of the adopted remedy and reports on its implementation to the Commission) is particularly useful where remedies are complex and the verification of implementation is time-consuming and technically demanding. A monitoring trustee, supported with suitable technical and industry expertise, can act as the eyes and ears of the Commission, monitor compliance, and also be the initial contact of third parties to review any complaints, thus introducing procedural efficiencies and improving transparency. The study suggests that the appointment of a monitoring trustee should be standard practice in antitrust cases under Article 9 as is the case in conditional merger clearance decisions. However, given the sometimes potentially intrusive behavioural remedies and resource-intensive nature of monitoring it would seem appropriate to define the role and powers of the monitoring trustee having due regard to the judgment of the General Court in the *Microsoft* case.

In the case of structural remedies, monitoring is required at least until the divestiture has taken place, at which point in time a "clean break" will have occurred that removes the incentive and the ability of the concerned undertaking to behave anticompetitively in the first place. In the case of behavioural remedies, ongoing monitoring will be required at least for as long as market conditions have not changed to such an extent as to remove the incentive and the ability of the concerned undertaking to behave anticompetitively. In the case of behavioural remedies with structural elements, it will be the remedies themselves that accelerate this process.

The Study highlighted the importance of briefing and supporting the monitoring trustee in the early stages of monitoring (which are the critical point in time for remedy implementation), to ensure a clear understanding of the most salient points they need to oversee.

Among the lessons learned from interviews with officials, experts and experienced trustees, who typically rely on their wider experience including merger control, is the importance that the Commission be able to appoint a suitable monitoring trustee. In analogy with the steps envisaged in the Merger Remedies Notice, this requires having a selection process in place that gives the Commission the power to reject unsuitable monitoring trustee candidates and, as a measure of last resort, the ability to select and appoint a monitoring trustee of the Commission´s choosing.

Our Study has also revealed the value of having the ability to appoint independent advisers and technical experts available when designing remedies, if justified by the nature of the case. This is particularly important in the digital and tech sector, considering the importance that remedies be designed to reflect technological reality and anticipate technological change.[436]

436 For example see, on the one hand, the interoperability remedy in AT.37792 – *Microsoft I,* where the design did not fully account the technological reality, and, on the other hand, the price-cap remedy in AT.38636 – *Rambus*, where the remedy also covers upcoming standards, acknowledging that technologies included in the present standard influence the development of future standards.

In particular, independent advisers can help the Commission overcome information asymmetries with the concerned undertakings, as happens sometimes also in complex merger cases with upfront or fix-it first remedies. Case M.8084 – *Bayer/Monsanto* is an example where the commitments offered by Bayer and accepted by the Commission provided for the appointment of an *"Independent Adviser, in order to provide independent advice and assistance to the Commission in connection with the assessment of (1) the adequacy of the commitments to restore effective competition in the EEA following the completion of the Concentration, and (2) the suitability of the proposed purchasers for the divestment businesses"*.[437]

In the antitrust space, for example, the Commission explicitly stated in its prohibition decision in case AT.39740 – *Google Shopping* that it may *"use the services of one or several external technical expert(s)"* to evaluate the measures proposed by Google to comply with the decision.[438] In the merger control space, M.9660 – *Google/Fitbit* and M.10262 – *Meta/Kustomer* can additionally be mentioned as cases providing that the monitoring trustee be assisted by a technical expert.

7.1.6 Market testing

As confirmed by many experts and competition officials interviewed, and as exemplified by, among others, our case study on AT.40608 – *Broadcom*, market testing can be an important measure allowing the Commission to gauge the required remedy scope, content, and/or design, as well as to anticipate any problems that could occur in the remedy implementation, thereby allowing the Commission to take this valuable input into account already when designing the remedy.

Market testing is already a prominent feature in Article 9 cases (and merger control proceedings), while there does not seem to be a formal procedural framework for market testing under Article 7, although remedy design under both legal instruments would benefit from market testing. Crucial for effective market testing is that input is received from people with in-depth knowledge of the relevant technology and market conditions, based on a sufficiently detailed description of the proposed remedies that at the same time protects the concerned undertaking's business secrets. In this sense, a request for information addressed to key market participants may well be more expedient than a laborious publication of the proposed remedies in the Official Journal of the European Union and the associated translation requirements.

7.1.7 Remedy implementation and related monitoring

Antitrust remedies will only be effective if they are fully implemented. Given that implementing the remedies will presumably conflict with the concerned undertaking´s ordinary business objective, remedy design must ensure, that their implementation is verifiable and that mechanisms, through modalities and flanking measures such as reporting obligations and the appointment of a monitoring trustee, are in place in order for both compliance with a remedy and their effective implementation to be verified and confirmed.

The Commission must have the ability to monitor an undertaking's implementation of the remedies, and its compliance with the letter and the spirit of the decision with which they have been imposed. The precise extent of any monitoring and the best monitoring mechanism may depend, however, on the type of remedy adopted and market characteristics.

437 Recital 3086 of Commission Decision of 21.3.2018. See also Section F of the Commitments attached to the Decision.
438 See recital 705 of the decision.

With case teams having to split their time between monitoring the implementation of remedies in a completed case and making progress on ongoing cases, we have recorded among the market participants who have provided input for our Study a demand to make the implementation of remedies more rigorous and systematic, by more frequently imposing reporting obligations, possibly also regarding cease-and-desist orders under Article 7, and appointing a monitoring trustee.

Making the implementation of remedies more rigorous and systematic may even entail, according to some of our interview partners, setting up a dedicated remedies unit, analogous to the "remedies shop" present at the FTC in the United States. Members of this unit would join the investigation's case team once the design of remedies starts being discussed and would follow the implementation of remedies long after the antitrust decision has been issued. A complementary instrument to establish a more standardised and effective approach to remedy implementation is through the publication of soft-law documents, similar to the 2008 Merger Remedies Notice and the publication in 2013 of standard model texts for commitments and trustee mandates.

Appointing a monitoring trustee, or imposing obligations requiring the concerned undertakings to inform customers about the remedy adopted, are some of the flanking measures that a remedy package can include in order to ensure full implementation. Finally, remedy implementation requires that penalties are imposed if an undertaking is failing to comply with its remedy obligations, as happened in case AT.37792 – *Microsoft I*. Indeed, as a consequence of the considerable delay with which the undertaking implemented the interoperability remedy, the Commission imposed a significant amount of penalty. The interoperability remedy was finally implemented, 4 years after the issuance of the Decision.

7.1.8 Choice of legal instrument

Within the legal framework of Regulation 1/2003 we find that the adoption of remedies through either a prohibition decision or a commitments decision involves balancing the benefits of clear-cut legal outcomes and the deterrence effect on the one hand with the advantages of shorter proceedings and a more flexible remedy design on the other hand. In particular, prohibition decisions provide clarity on what behaviour constitutes a violation of Article 101 and Article 102 TFEU, prohibit such behaviour and deter the future repetition of the behaviour/the circumvention of the prohibition, including through the possible imposition of fines. In contrast, commitments decisions allow for quicker proceedings and more flexible solutions of the underlying competition problem, reducing the investigation burden on both the Commission and the concerned undertakings, and increasing the potential for remedy effectiveness.

The contrast between the two legal instruments is vividly illustrated by the two cases AT.39985 – *Motorola* (one of our case studies) and AT.39939 – *Samsung*. The Article 7 (prohibition) *Motorola* decision is very clearly focused on establishing the illegal conduct of Motorola when seeking injunctions for violation of its SEP against a willing licensee (Apple). In this case, the (positive) remedy consists in simply ordering that Motorola remove certain clauses from a contract that Apple had signed with it following the injunction, thereby removing the detrimental effect that Motorola's illegal conduct had already had on the market (in addition to a cease-and-desist order on Motorola not to seek injunctions). In the parallel *Samsung* case, where the Article 9 (commitments) decision was adopted on the same day as the *Motorola* decision, the remedy has a much broader scope and establishes a general competition law-compliant SEP licensing negotiation framework. In this sense, the *Samsung* remedy can be seen as highly complementary to the *Motorola* cease-and-desist order characterising the illegal conduct. While it did not find an infringement, the *Samsung* commitments decision established a more detailed framework for SEP licensing negotiations, which would have been harder to obtain with an Article 7 decision.

7.1.9 Article 7 remedies

The analysis of all decisions taken between 24 January 2003 and 31 December 2022 reveals that there are only 12 out of 57 Article 7 decisions (about 20%), in which the Commission imposed a remedy going beyond a cease-and-desist order, with eleven of them being behavioural remedies (for example in our case study AT.40134 – *AB InBev Beer Trade Restrictions*) and one being a structural remedy (in our case study AT.39759 – *ARA foreclosure*). In the 45 cease-and-desist orders that were issued, only seven are basic orders, while the remaining 38 are "like object or effect" orders, where the latter order type has become predominant over time.

The statistical paucity of remedies in Article 7 decisions can be interpreted in two ways. In a favourable interpretation, simple cease-and-desist orders are often considered sufficient to bring the infringement to an end. In a less favourable interpretation, remedies would also have a role to play in effectively bringing the infringement to an end, but the manifest and hidden constraints on their imposition make it difficult for the Commission to employ them. Indeed, our Study has identified several challenges around Article 7 remedies.

A distinctive feature of remedies under Article 7 is that they will never come alone, in that they will always be accompanied by the simple cease-and-desist order, which is intrinsic to a prohibition decision. In this context, Article 7 remedies will either expand the scope or the detail of the cease-and-desist order, in particular to make it more verifiable, to avoid circumvention, or to remove the detrimental effects that the anticompetitive behaviour has already had on the market. The relationship between the simple order and the remedies imposed by the Commission is thus a variable one. The Commission adopted preventive remedies which are "*aimed at preventing repetition of the infringement, or the circumvention of the behavioural prohibition*", dating back to, in particular, the *Commercial Solvents*, *Akzo*, and *Irish Sugar* cases (all predating the entry into force of Regulation 1/2003). In other circumstances, the Commission decided to impose restorative remedies, in order to remove the ongoing effects of an action that the concerned undertaking had taken in the past. For example, eliminating the consequences of the infringement is a further aim of the remedies contained in the *Akzo* case.

Moreover, the Study confirms that the power of the Commission to adopt antitrust remedy decisions under Article 7 of Regulation 1/2003 is wide but not unlimited, because it is clearly constrained by the principle of proportionality. The condition laid down in the provision of Article 7, according to which the corrective measures must be proportionate to the infringement committed, means that the burden imposed on the undertakings concerned in order to bring an antitrust infringement to an end must not exceed what is appropriate and necessary to attain the objective sought, namely the re-establishment of compliance with the rules infringed.

7.1.9.1 Statutory subordination of structural to behavioural remedies

When it comes to remedy type, the text of Article 7 provides an expressed obligation for the Commission to consider behavioural remedies before considering structural remedies. More specifically, the requirement is that *"structural remedies can only be imposed either where there is no equally effective behavioural remedy, or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy"*. This statutory requirement is considered by several commentators and experts interviewed in this Study to be an excessive hurdle, and one which should be considered to be removed in

any future revision of Regulation 1/2003.[439] These views are in fact already reflected in the language of the ECN+ Directive, which does not foresee any subordination of structural to behavioural remedies and leave the choice of remedy type to the application of the principles of effectiveness and proportionality.[440]

7.1.9.2 Scope for external monitoring of compliance

In addition, as the General Court has held (T-201/04 – *Microsoft* v *Commission*), the Commission has no authority to compel an infringing undertaking *"to grant to an independent monitoring trustee powers which the Commission is not itself authorised to confer on a third party"*.

Moreover, the Commission is not empowered under Regulation 1/2003 to require an undertaking to bear the costs that are incurred by the Commission in monitoring whether remedies are implemented. It is for the Commission, in its capacity as authority responsible for applying the Community competition rules, to pursue the implementation of infringement decisions. It would indeed be incompatible with its responsibility in that regard for the effective implementation of Union law to depend on or be influenced by the willingness or the capacity of the addressee of the decision to bear such costs.

This means that the Commission has to take into account the monitoring costs of any remedy (whether they are internal resource costs or the costs of an external monitor or expert) when balancing the options of pursing an Article 7 or Article 9 decision.

In this context, our systematic review of all antitrust decisions taken by the Commission over the last 20 years shows that a monitoring trustee has never been appointed again with an Article 7 decision since AT.37792 – *Microsoft I*. Some experts that we interviewed for our Study have questioned whether it would be appropriate to review this very restrictive practice both from a *de lege lata* perspective, allowing some degree of external monitoring and reporting on compliance with antitrust remedies under Article 7, or from a *de lege ferenda* perspective, consider incorporating an explicit provision in Regulation 1/2003 to allow the Commission to require an undertaking to carry the costs of monitoring and reporting on compliance also for a monitoring trustee.

7.1.9.3 Duration of coercive procedures and scope for cooperation procedure

The Study highlights, furthermore, the excessive length of several antitrust proceedings, such as the AT.34579 –*Mastercard I* and AT.37792 – *Microsoft I* cases. In addition to the overly long duration, which is emphasised by among others Schweitzer and Ridder (2024), our interviews with experts and market participants have suggested a number of deficiencies around remedies under Article 7, such as the lack an obligation to conduct a market test of the remedies considered and the lack of publicity about the remedies ultimately imposed. These observations have clear implications for remedy effectiveness, since the slower the intervention, the more difficult remedies will be able to remove the detrimental effects of the anticompetitive behaviour. In addition, remedies that are not market tested may reveal design flaws that it is no longer possible to fix (as for example in AT.34579 – *Mastercard I* or AT.37792 – *Microsoft I*, tying). Finally, publicity around remedies,

439 In this sense, see Friso Bostoen, David van Wamel, Antitrust Remedies: From Caution to Creativity, *Journal of European Competition Law & Practice*, Volume 14, Issue 8, December 2023, pp. 540.

440 On this point, see Article 10 of the ECN+ Directive, where no criteria other than the principles of effectiveness and proportionality are mentioned for the purpose of selecting the appropriate remedy. See also recital 37 of the ECN+ Directive, which acknowledges that structural remedies tend to be more burdensome than behavioural remedies but can be more effective depending on the circumstances.

while protecting the business secrets of the concerned undertaking, would increase the likelihood that remedy implementation is monitored and deviations are detected.

Over the years, a cooperation procedure has emerged under Article 7 also for non-cartel cases, leading to shorter proceedings and a reduction of the fine, when applicable. The cooperation procedure is a relative new practice of the Commission that allows undertakings involved in a competition infringement to benefit from fine reductions as a reward for their cooperation.

In the AT.39759 – *ARA foreclosure* case of 2016 (one of our case studies), the Commission made use of this new cooperation procedure in non-cartel cases for the first time. In the subsequent case AT.40134 – *AB InBev Beer Trade Restrictions* (another of our case studies), the cooperation procedure was also used, for the design of remedies once the SO had been issued.

The Commission Notice on the conduct of settlement procedures (2008/C 167/01) has inspired the non-cartel cooperation procedure, albeit the latter follows a less formal process and does not limit fine reductions to 10%. The cooperative procedure has some similarities with the Leniency procedure (2006/C 298/11) as well.

The analysis shows that the cooperation procedure could help to be more flexible in the design of the remedies, in particular structural remedies, reducing at the same time the risk of judicial challenges, maintaining nevertheless clarity on what behaviour is prohibited and thus the deterrence effect.

7.1.10 Article 9 remedies

The provision of Article 9, which is based on considerations of procedural economy and remedy design flexibility, introduces a mechanism to ensure that the competition rules are applied effectively, through the adoption of decisions making binding on the concerned undertaking commitments that it proposed and that the Commission considered appropriate in order to meet the competition concerns identified in a preliminary assessment, without proceeding by making a formal finding of an infringement.

The Commission has "*a wide discretion*" on whether to accept, and make binding, an undertaking's proposed commitments or to reject them.

A decision adopted on the basis of Article 9 is binding only on undertakings which have offered a commitment within the meaning of that provision and cannot have the object or the effect of making such a commitment binding on operators who did not offer it and who have not subscribed to it.

In accordance with the settled case law, although Article 9 – unlike Article 7 – does not expressly refer to proportionality, the principle of proportionality, as a general principle of EU law, is nonetheless a criterion for the lawfulness of commitments decisions taken by the Commission.[441]

The Article 9 route is generally viewed favourably both by remedies experts, authors and case team members of the Commission,[442] since it has given the Commission the opportunity to engage in the design of remedies with the undertaking concerned more flexibly than under the Article 7 route. Furthermore, the Article 9 route

441 Judgment of the Court of Justice of 29 June 2010, *European Commission* v *Alrosa Company Ltd.*, Case C-441/07 P, ECLI:EU:C:2010:377, [36, 41], and Judgement of the Court of Justice of 9 December 2020, *Group Canal +*, Case C-132/19 P, ECLI:EU:C:2020:1007, [104, 105].

442 See Wils W., "Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003", World Competition, 29(3); P. Marden "The Emperor's Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law", CPI Antitrust Chronicle, 2013; M. Wathelet, "Commitment Decisions and the Paucity of Precedent", Journal of European Competition Law & Practice, Volume 6, 2015. The result of interview confirmed that there is merit in an Article 9(1) commitment decision in terms of shortening and simplifying the process of the Commission because a full-fledged investigation is no longer needed. In particular, commitment decisions allow for quicker resolution, reducing resource burden and disruption. Consequently, in appropriate cases, commitments may be a good option for fast moving and innovative markets, where speed of enforcement is crucial.

entails other procedural advantages, because it is a speedier and less resource intensive tool to address any identified competition concerns, as commitments decisions require fewer procedural steps in their adoption.

Article 9 decisions usually include provisions to monitor remedy implementation. The Commission has availed itself in more than a half of Article 9 cases (and four of the seven Article 9 cases in our ex post evaluation) of the services of a monitoring trustee paid for by the concerned undertakings.

7.1.11 Article 8 interim measures

With case AT.40608 – *Broadcom*, the Commission made use of interim measures for the first time since the entry into force of Regulation 1/2003. In addition to the stated advantage of intervening quickly in urgent cases with the risk of serious and irreparable damage to competition, interim measures also have the advantage of altering the "bargaining" situation between the concerned undertakings and the Commission in such a way as to speed up the subsequent phase of finding a more lasting solution to the competition problem. Indeed, by stopping the prima facie anticompetitive behaviour, interim measures deprive the concerned undertakings of an incentive they may have to protract the subsequent investigation. By altering the behaviour of the concerned undertakings already in the status quo, interim measures make it arguably also easier to design and implement effective remedies that may be subsequently imposed, because the Commission has already been able to observe the change in behaviour and now is left with the arguably simpler task to monitor the preservation of the existing behaviour.[443]

At the same time, our Study highlighted the challenges for the Commission to meet the substantive legal standard that the imposition of interim measures demands. Considering these challenges, it would appear as if priority in the application of interim measures should be given to those cases where they have the potential to a have a good substantive and procedural fit with the remedies that may be ultimately imposed. Substantively, this would be the case with purely behavioural remedies under Article 9, since purely behavioural remedies would build on the interim measures. Procedurally, the preliminary assessment in the Article 9 procedure would build on the SO and the decision in the preceding Article 8 procedure.

The procedure for adopting interim measures is, in addition, considered burdensome as it follows the exact same procedure as for prohibition decisions. In the same perspective, several interviewees, including a law practitioner and a Commission case manager, pointed out that the bar of "*serious and irreparable harm to competition*" is too high or excessively burdensome to prove. In particular, the standard of proof for interim measures in EU proceedings is higher than national proceedings in France and Belgium, where interim measures are more frequently used. In France, the lower and broader standard of proof for imposing an interim measure in antitrust proceedings simply requires that "*the infringement may cause serious and immediate harm to the sector, consumers or the undertakings concerned*". In Belgium, the light legal standard for interim measures is that "*it would not be manifestly unreasonable to think that there might be an infringement*".

443 For similar reasons, the Commission may be more comfortable in accepting interoperability remedies in a case, such as merger case *M.9660 Google/Fitbit*, in which APIs were publicly available already before the merger. On this and other merger cases in digital and tech markets, including a discussion of remedies, see the Commission's competition policy brief 02/2022.

7.2 Recommendations

The lessons that we learned in carrying out this Study led us to make the following recommendations to improve the implementation and effectiveness of antitrust remedies. Some of these recommendations can already be implemented within the existing legal framework (*de lege lata*), whereas other recommendations might require changes to the legal framework (*de lege ferenda*).

7.2.1 General recommendations

1. Remedy objective. The aspiration of antitrust remedies should always be to stop the anticompetitive behaviour, prevent the behaviour´s repetition/the prohibition´s circumvention, and remove the detrimental effects that the behaviour has had on the market. In practice, however, market conditions, the anticompetitive behaviour and the timing of the antitrust intervention may be such that actually achieving the aim of restoring undistorted competition is not feasible or desirable, in particular if it violates the principle of proportionality.

2. Principle of effectiveness**.** Our ex post evaluation of the twelve case studies shows that EU antitrust remedies have not always been fully effective, even when they were fully implemented. In light of this lesson learned we recommend that, in line with the existing legal framework, the principle of effectiveness should at all times be taken as the fundamental guiding principle in the design of antitrust remedies.

3. Importance of timely antitrust intervention. For remedies to be effective, it is important that antitrust intervention is timely. Our ex post evaluation of the twelve case studies shows that the overall duration of the proceedings, in particular in certain cases under Article 7, is particularly long, with the average duration of commitments proceedings lasting 26 months and the average duration of prohibition proceedings lasting 45 months. This would suggest benefits in terms of the effectiveness of antitrust remedies to introducing measures to streamline antitrust proceedings.

7.2.2 Article 7 remedies

The imposition of remedies under Article 7 appears to us to be an area where some improvements could be envisaged.

4. Article 7 and removal of the statutory subordination of structural to behavioural antitrust remedies. We recommend the removal of the subordination of structural to behavioural remedies from the text of Article 7, leaving it to the general principles of effectiveness and proportionality to inform the most suitable remedy in the individual case, in line with Article 10 (and recital 37) of the ECN+ Directive (2019): *"When choosing between two equally effective remedies, national competition authorities shall choose the remedy that is least burdensome for the undertaking, in line with the principle of proportionality"*.[444]

5. Article 7 and the cost allocation for monitoring trustees**.** As the General Court has already held in *Microsoft* judgment (T-201/04 – *Microsoft* v *Commission*), the Commission is not explicitly empowered by Regulation 1/2003 to require an undertaking to bear the costs that are incurred by the appointment of a monitoring trustee. This makes the appointment of a monitoring trustee more difficult in practice in

444 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019. See in particular Article 10.

Article 7 cases compared to Article 9 cases. We recommend that the Commission be enabled to require an addressee of an infringement decision to bear the costs of monitoring the implementation of remedies, making the appointment of a monitoring trustee practically easier in Article 7 cases.

6. Article 7 and separation of infringement and remedy decision**.** As advocated in some of the expert interviews, if justified by the complexities of a particular remedy or investigation, the separation of the infringement decision from the remedy decision under Article 7 is an option that the Commission should consider. This measure would have the advantage of providing a clear focus on remedy design in the remedy decision. While this is not currently happening,[445] this measure will also create the opportunity for more market testing of the remedies under consideration[446] and more market transparency on the remedies that have ultimately been imposed.

7. Article 7 and market testing. The benefits of the practice of market testing remedies, which is required in the framework of Article 9, extend to Article 7 remedies. Accordingly, this practice should be encouraged, to the extent possible, also when designing or considering Article 7 remedies, with appropriate adaptations to the different legal framework, as it allows for a better design of remedies, in particular in complex cases.

8. Article 7 and cooperation procedure. We recommend the formalisation of the cooperation procedure in non-cartel antitrust cases under Article 7, ensuring more certainty for the concerned undertakings regarding conditions and benefits related to this procedure. The seminal case AT.39759 – *ARA foreclosure* and the subsequent AT.40134 – *AB InBev Beer Trade Restrictions* show how the cooperation procedure encourages the concerned undertaking to contribute not only to the establishment of the infringement but also to the flexible design of the remedies to it.

7.2.3 Article 9 remedies

9. Article 9 use. In suitable cases, the Commission should encourage the use of the Article 9 procedure, as it provides for shorter proceedings, more flexibility in the design of remedies, better monitoring of implementation, and lower risk of judicial challenges, albeit at the cost of a smaller contribution to case precedent and deterrence.

10. Simplification of market testing under Article 9. While market testing is greatly useful, formalities around it, such as the publication of the proposed remedies in the EU Official Journal and related translation requirements, could be simplified in the interest of speed. In addition to streamlined publication procedures, targeted requests for information to key market participants are likely to be more effective in eliciting the relevant feedback while protecting the business secrets of the concerned undertakings.

7.2.4 Article 8 interim measures

11. Article 8 use**.** In urgent cases of serious and irreparable damage to competition, the Commission should further the adoption of Article 8 interim measures, in particular when the substantive and procedural

445 A case in point is AT.39813 – *Baltic Rail*, where the decision simply asks the addressee to propose specific structural or behavioural measures to comply with the decision. No information is available on COMP Case Search on whether and what measures have been ultimately proposed and accepted. It is only from the press ("Rebuilding of Renge track in Lithuania completed", 30 December 2019, The Baltic Times) that we can learn what has happened.

446 That is because the Commission could market test a remedy proposed by the concerned undertaking the infringement decision. A market test in an Article 7 case after issuing a Statement of Objections may also be possible, but it would be based only on preliminary findings of an infringement.

synergies between the interim measures and the subsequent remedies are the strongest. This can relate in particular to cases where: (i) the interim measures, which can be considered a form of short-lived, purely-behavioural remedies could be naturally extended to become the remedies; and (ii) the prima facie finding of an infringement for the purposes of the Article 8 decision can become the preliminary assessment for the purposes of an Article 9 decision.

7.2.5 Recommendations on modalities and flanking measures

12. Reporting obligations. Since the implementation of remedies needs to be verifiable and mechanisms need to also be in place for its actual verification, the Commission should make the inclusion of reporting obligations standard practice in remedy decision. Article 7 decision could additionally benefit from including obligations to report on the measures taken by the concerned undertakings to comply with cease-and-desist-orders, such as compliance training, internal staff and management communication, and external communication with clients and suppliers.

13. Monitoring trustee and Technical expert. The Commission should make the appointment of a monitoring trustee standard practice for Article 7 and Article 9 cases, unless there are compelling reasons against it. In the process, the role of the Commission in the appointment of the monitoring trustee could be strengthened in that the Commission could for example: (i) have the option to ask that more than one monitoring trustee be proposed; (ii) have the final word on the selected monitoring trustee; (iii) have the ability to quickly replace the monitoring trustee during their mandate in case of any issues, including suspected conflicts; (iv) define appropriate limits to the powers of the monitoring trustee; (v) allow for the appointment of technical experts; and (vi) establish suitable governance system in complex cases which require resource intensive monitoring efforts.

7.2.6 Further recommendations

14. Independent advisors. In appropriate cases, for example where the design of remedies may require technical expertise or their implementation may be particularly complex, the Commission should consider the possibility for the appointment of an independent advisor to the Commission during the phase of remedy design, before a decision is adopted, to ensure that remedies are well designed and can be effectively implemented in the specific market sector and or industries.[447]

15. Antitrust remedy guidance. The publication of guidance on antitrust remedies, similar to the Merger Remedies Notice (2008) and the Commission's model text for the trustee mandate under EU merger control (2013), would in our view provide significant benefits to all parties, speeding up the remedy design process, and enhancing remedy implementation and effectiveness.

16. Ex post evaluation. The Commission should boost the ex post evaluation of its antitrust enforcement by collecting from the concerned undertakings and market participants relevant market information (such as market shares) at the conclusion of each antitrust case.[448] In the case of a simple cease-and-desist order, this could happen sometime (say 2 years) after the decision was issued. In remedy cases, this could happen sometime after the remedy obligations have expired. The exercise could include follow-ups at regular intervals and assist in the development of an antitrust remedies notice in due course.

447 The independent advisor would thus be a kind of ex officio technical advisor, supporting the Commission in drafting remedies, whose opinion in any case is not binding.

448 A recommendation in the same direction is also made by Mario Draghi in his report on "The future of European competitiveness – In-depth analysis and recommendations", 2024, p. 303, point 8.

17. Synergies. The Commission should continue to exploit synergies between antitrust remedies adopted in different decisions (e.g. AT.39985 – *Motorola* and AT.39939 – *Samsung*), and to use the experience and market knowledge gathered from antitrust remedies to inform and procompetitively enhance sector regulation (e.g. AT.34579 – *MasterCard I* or the cases that have informed the DMA), whilst respecting the legal limits of Regulation 1/2003.

18. Remedies unit. The Commission might consider setting up a dedicated unit to support the case teams on remedy design, implementation and effectiveness across all relevant EU competition policy areas (antitrust, merger control, State aid, DMA and Foreign Subsidies Regulation). In the individual case, having such a unit could allow for more adaptive and complex remedies, and more timely intervention in cases of non-compliance or ineffectiveness. Across cases and practice areas, it could improve the accumulation of best practices and common challenges, thereby improving remedy design in all areas of enforcement. Given these and other potential benefits but at the same time the likely high costs associated with such a unit, a careful cost-benefit analysis for its establishment is recommended. At the very least, a knowledge repository on remedies, encompassing all policy areas, should be put in place.

Appendix

Dataset of all EU (non-cartel) antitrust decisions (24.01.2003 – 31.12.2022)

No	Case name	Decision type	Year	High-level remedy type	Legal status (as of 31 October 2023)
1	AT.37451 Price squeeze local loop Germany	Art. 7	2003	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
2	AT.37578 TeleBel+7/DT+Deutschland	Art. 7	2003	Cease-and-desist order (like object or effect)	
3	AT.37579 Ewe Tel+5/DT+Deutschland	Art. 7	2003	Cease-and-desist order (like object or effect)	
4	AT.37975 PO/YAMAHA	Art. 7	2003	Cease-and-desist order (basic)	
5	AT.38233 Wanadoo	Art. 7	2003	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
6	AT.37685 Georg/Ferrovie	Art. 7	2003	Behavioural	
7	AT.37792 Microsoft I	Art. 7	2004	Behavioural	Completed with decision entirely or broadly upheld
8	AT.37980 Souris Bleue/TOPPS + Nintendo	Art. 7	2004	Behavioural	
9	AT.38096 PO/Clearstream (Clearing and Settlement)	Art. 7	2004	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
10	AT.38549 Barême d'honoraires de l'Ordre des Architectes belges		2004	Cease-and-desist order (basic)	
11	AT.38662 GDF	Art. 7	2004	Cease-and-desist order (basic)	
12	AT.37214 DFB	Art. 9	2005	Behavioural	
13	AT.37507 Generics/Astra Zeneca	Art. 7	2005	Cease-and-desist order (basic)	Completed with decision entirely or broadly upheld
14	AT.39116 Coca-Cola	Art. 9	2005	Behavioural	
15	AT.36623 SEP et autres/Automobiles Peugeot SA	Art. 7	2005	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
16	AT.36820 SEP et autres/Automobiles Peugeot SA	Art. 7	2005	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
17	AT.37275 SEP et autres/Automobiles Peugeot SA	Art. 7	2005	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
18	AT.38381 ALROSA + DBCAG (part of de Beers group) + City and West East (part of de Beers group)	Art. 9	2006	Behavioural	Completed with decision entirely or broadly upheld
19	AT.38173 The Football Association Premier League Limited	Art. 9	2006	Behavioural	
20	AT.38113 Prokent/Tomra	Art. 7	2006	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
21	AT.38348 REPSOL C.P.P. SA - Distribution de Carburants et Combustibles	Art. 9	2006	Behavioural	
22	AT.38681 Cannes Agreement	Art. 9	2006	Behavioural	
23	AT.38784 Telefonica S.A. (broadband)	Art. 7	2007	Cease-and-desist order (basic)	Completed with decision entirely or broadly upheld
24	AT.39140 DaimlerChrysler - Access to technical information	Art. 9	2007	Behavioural	

No	Case name	Decision type	Year	High-level remedy type	Legal status (as of 31 October 2023)
25	AT.39141 Fiat - Access to technical information	Art. 9	2007	Behavioural	
26	AT.39142 Toyota Motor Europe - Access to technical information	Art. 9	2007	Behavioural	
27	AT.39143 Opel - Access to technical information	Art. 9	2007	Behavioural	
28	AT.37860 Morgan Stanley Dean Witter/Visa	Art. 7	2007	Cease-and-desist order (basic)	Completed with decision entirely or broadly upheld
29	AT.37966 Distrigaz	Art. 9	2007	Behavioural	
30	AT.38606 Groupement de Cartes Bancaires "CB"	Art. 7	2007	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
31	AT.34579 MasterCard I	Art. 7	2007	Behavioural	Completed with decision entirely or broadly upheld
32	AT.38698 CISAC Agreement	Art. 7	2008	Behavioural	Completed with decision entirely or broadly annulled
33	AT.39388 German electricity wholesale market	Art. 9	2008	Structural	
34	AT.39389 German electricity balancing market	Art. 9	2008	Structural	
35	AT.39402 RWE gas foreclosure	Art. 9	2009	Structural	
36	AT.37990 Intel	Art. 7	2009	Cease-and-desist order (like object or effect)	Ongoing review
37	AT.39416 Ship Classification	Art. 9	2009	Behavioural	
38	AT.39316 GDF foreclosure	Art. 9	2009	Behavioural with structural elements	
39	AT.38636 Rambus	Art. 9	2009	Behavioural	
40	AT.39530 Microsoft II (Tying)	Art. 9	2009	Behavioural	
41	AT.39386 Long-term electricity contracts in France	Art. 9	2010	Behavioural	
42	AT.39351 Swedish Interconnectors	Art. 9	2010	Behavioural with structural elements	
43	AT.39317 E.On gas foreclosure	Art. 9	2010	Behavioural with structural elements	
44	AT.39596 BA/AA/IB	Art. 9	2010	Behavioural with structural elements	
45	AT.39315 ENI	Art. 9	2010	Structural	
46	AT.39398 Visa MIF	Art. 9	2010	Behavioural	
47	AT.39510 Ordre National des Pharmaciens en France (ONP)	Art. 7	2010	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
48	AT.39525 Telekom Polska	Art. 7	2011	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
49	AT.39592 Standard and Poor's	Art. 9	2011	Behavioural	
50	AT.39692 Maintenance services	Art. 9	2011	Behavioural	
51	AT.39736 SIEMENS/AREVA	Art. 9	2012	Behavioural	
52	AT.39847 E-books	Art. 9	2012	Behavioural	
53	AT.39230 Rio Tinto Alcan	Art. 9	2012	Behavioural	
54	AT.39654 Reuters Instrument Codes	Art. 9	2012	Behavioural	Completed with decision entirely or broadly upheld
55	AT.39839 Telefónica and Portugal Telecom	Art. 7	2013	Cease-and-desist order (basic)	Ongoing review
56	AT.39727 CEZ	Art. 9	2013	Structural	

No	Case name	Decision type	Year	High-level remedy type	Legal status (as of 31 October 2023)
57	AT.39595 Continental/United/Lufthansa/Air Canada	Art. 9	2013	Behavioural with structural elements	
58	AT.39226 Lundbeck	Art. 7	2013	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
59	AT.39685 Fentanyl	Art. 7	2013	Cease-and-desist order (like object or effect)	
60	AT.39678/AT.39731 Deutsche Bahn I/II	Art. 9	2013	Behavioural with structural elements	
61	AT.39984 OPCOM / Romanian Power Exchange	Art. 7	2014	Cease-and-desist order (like object or effect)	
62	AT.39939 Samsung - Enforcement of UMTS standard essential patents	Art. 9	2014	Behavioural	
63	AT.39985 Motorola - Enforcement of GPRS standard essential patents	Art. 7	2014	Behavioural	
64	AT.39612 Perindopril (Servier)	Art. 7	2014	Cease-and-desist order (like object or effect)	Ongoing review
65	AT.39523 Slovak Telekom	Art. 7	2014	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly upheld
66	AT.39964 AF-KL/DL/AZ	Art. 9	2015	Behavioural with structural elements	
67	AT.39767 BEH Electricity	Art. 9	2015	Structural	
68	AT.39850 Container Shipping	Art. 9	2016	Behavioural	
69	AT.39745 CDS - Information market	Art. 9	2016	Behavioural	
70	AT.39745 CDS - Information market	Art. 9	2016	Behavioural	
71	AT.40023 Cross-border access to pay-TV	Art. 9	2016	Behavioural	Completed with decision entirely or broadly annulled
72	AT.39759 ARA foreclosure	Art. 7	2016	Structural	
73	AT.40153 E-book MFNs and related matters (Amazon)	Art. 9	2017	Behavioural	
74	AT.39740 Google Search (Shopping)	Art. 7	2017	Behavioural	Ongoing review
75	AT.39813 Baltic rail	Art. 7	2017	Cease-and-desist order [with order to make a remedy] proposal.] (like object or effect)	Completed with decision entirely or broadly upheld
76	AT.40208 International Skating Union's Eligibility Rules	Art. 7	2017	Behavioural	Ongoing review
77	AT.40220 Qualcomm (exclusivity payments)	Art. 7	2018	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly annulled
78	AT.39816 Upstream gas supplies in Central and Eastern Europe	Art. 9	2018	Behavioural	Ongoing review
79	AT.40099 Google Android	Art. 7	2018	Behavioural	Ongoing review
80	AT.40181 Philips (vertical restraints)	Art. 7	2018	Cease-and-desist order (like object or effect)	
81	AT.40182 Pioneer (vertical restraints)	Art. 7	2018	Cease-and-desist order (like object or effect)	
82	AT.40465 Asus (Vertical restraints)	Art. 7	2018	Cease-and-desist order (like object or effect)	

No	Case name	Decision type	Year	High-level remedy type	Legal status (as of 31 October 2023)
83	AT.40469 Denon & Marantz (Vertical restraints)	Art. 7	2018	Cease-and-desist order (like object or effect)	
84	AT.40461 DE/DK Interconnector	Art. 9	2018	Behavioural	
85	AT.39849 BEH gas	Art. 7	2018	Cease-and-desist order (like object or effect)	Completed with decision entirely or broadly annulled
86	AT.40428 Guess	Art. 7	2018	Cease-and-desist order (like object or effect)	
87	AT.40049 MasterCard II (Inter-regional interchange fees leg)	Art. 7	2019	Cease-and-desist order (like object or effect)	
88	AT.40411 Google Search (AdSense)	Art. 7	2019	Behavioural	Ongoing review
89	AT.40436 Ancillary Sports Merchandise	Art. 7	2019	Cease-and-desist order (like object or effect)	
90	AT.40049 MasterCard II (Inter-regional interchange fees leg)	Art. 9	2019	Behavioural	
91	AT.40134 AB InBev Beer Trade Restrictions	Art. 7	2019	Behavioural	
92	AT.40432 Character merchandise	Art. 7	2019	Cease-and-desist order (like object or effect)	
93	AT.39711 Qualcomm (predation)	Art. 7	2019	Cease-and-desist order (like object or effect)	Ongoing review
94	AT.40433 Film merchandise	Art. 7	2020	Cease-and-desist order (like object or effect)	
95	AT.40528 Melia (Holiday Pricing)	Art. 7	2020	Cease-and-desist order (like object or effect)	
96	AT.40335 Romanian gas interconnectors	Art. 9	2020	Behavioural	
97	AT.40608 Broadcom	Art. 9	2020	Behavioural	
98	AT.39686 Cephalon	Art. 7	2020	Cease-and-desist order (like object or effect)	Ongoing review
99	AT.40413 Focus Home - Video Games	Art. 7	2021	Cease-and-desist order (like object or effect)	Ongoing review
100	AT.40414 Koch Media - Video Games	Art. 7	2021	Cease-and-desist order (like object or effect)	Ongoing review
101	AT.40420 Zenimax - Video Games	Art. 7	2021	Cease-and-desist order (like object or effect)	Ongoing review
102	AT.40422 Bandai Namco - Video Games	Art. 7	2021	Cease-and-desist order (like object or effect)	Ongoing review
103	AT.40424 Capcom - Video Games	Art. 7	2021	Cease-and-desist order (like object or effect)	Ongoing review
104	AT.40394 Aspen	Art. 9	2021	Behavioural	
105	AT.40511 Insurance Ireland - Insurance claims database and conditions of access	Art. 9	2022	Behavioural	
106	AT.40305 Network sharing - Czech Republic	Art. 9	2022	Behavioural	
107	AT.40462 Amazon - Marketplace	Art. 9	2022	Behavioural	
108	AT.40703 Amazon - Buy Box	Art. 9	2022	Behavioural	

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