Coalition for APP FAIRNESS

6 October 2022

The Coalition for App Fairness's comments on the public consultation launched by the European Commission on the evaluation of Regulation 1/2003

The Coalition for App Fairness ("CAF") is pleased to submit these comments in response to the public consultation launched by the European Commission (the "Commission") on the evaluation of the procedural rules,[1] which have governed the Commission's antitrust investigations under European Union ("EU") law since the adoption of Council Regulation (EC) No 1/2003 ("Regulation 1").[2]

CAF is an independent non-profit organization founded to advocate for freedom of choice for app developers and consumers and fair competition across the app ecosystem.[3] CAF's vision is to ensure a level playing field for businesses relying on platforms like the Apple App Store to reach consumers, and a consistent standard of conduct across the app ecosystem. CAF comprises over 70 members, large and small, which have developed valuable apps to mobile device users.

CAF would first like to congratulate the Commission for its relentless efforts to protect competition in digital markets and its pioneering decisions in this area. There is no question that the Commission has become the world's leading antitrust enforcer of competition law in digital markets, and is showing the way to other competition authorities around the world.

While the Digital Markets Act ("DMA") will provide new tools to the Commission to ensure the fairness and contestability of digital markets, the enforcement of EU competition rules remain important, as not all possible anticompetitive conducts will be captured by the DMA. Vibrant enforcement of competition rules therefore remains critical for app developers whose ability to thrive depends on having undistorted access to the services provided by the large digital platforms on which they rely.

It is with this in mind that CAF provides some suggestions as to how the procedural rules regarding the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") can be further improved in particular with respect to these provisions' application to digital markets.

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1 See https://competition-policy.ec.europa.eu/public-consultations_en

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, January 4, 2003.

3 https://appfairness.org/

A. Introduction

From a general standpoint, Regulation 1 has proven successful in ensuring the effective and uniform application of Articles 101 and 102 TFEU, and creating a framework for the parallel enforcement of these provisions by the Commission and the national competition authorities ("NCAs").

However, since the adoption of Regulation 1 in 2003, major economic developments have taken place. An assessment of the effectiveness of this Regulation is therefore timely and necessary. Among such developments, the growth of digital platforms on which a large number of business operators depend to provide their product and services, such as search engines, social networks and app stores, is particularly significant.

As the Competition Policy for the Digital Era report illustrates,[4] such markets share several characteristics that should inform competition law enforcement. First, these markets are characterized by large economies of scale and very strong network effects, which tend to lead to market concentration. Second, digital markets tend to tip with one company gaining a quasi-monopoly, which may be hard to dislodge subsequently. Third, some large platforms have become essential gateways between businesses and their users, and thus enjoy gatekeeping power. That is for instance, the case of the Apple App Store and the Google Play Store, which enjoy the monopoly of apps distribution in their respective mobile ecosystems. Finally, because of the complexity of digital markets it is often hard for competition authorities to design effective remedies.

B. Timeless and transparency

Two criticisms that have often been made regarding the enforcement of EU competition law in the context of digital markets are that (i) antitrust investigations tend to take a large amount of time with decisions being adopted when the market in question has already tipped or the practices in question are no longer relevant, and that (ii) investigations may lack sufficient transparency.

- ***Timeliness.*** The fact that investigations take time is neither surprising nor unique to EU competition law. The Commission bears the burden of proof, and its decisions are subject to strict judicial review by the EU courts, which means that it must pursue an extremely thorough analysis of the conducts in question. Digital markets also tend to be complex and the effects of conducts in such markets are not easy to assess. Finally, the Commission has limited resources.

  As to this last point, the DMA should reduce the number of complaints that the Commission receives, and it should free up some resources that can be used to handle competition cases. That may have a positive impact on the speed with which investigations are conducted. Yet, one way to ensure that investigations are conducted in a timely manner

[4] https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en

would be to set statutory time limits for the different phases of these investigations. While such time limits would impose constraints on the Commission, they would offer better guarantees that investigations progress at a steady pace, which is desirable in fast moving markets. Statutory time limits would not be novel as they already apply in merger control.

- ***Transparency.*** Setting time limits would also offer greater transparency to both complainants and defendants as to the progress made in the investigation, which is often hard to predict. Even if the Commission was not subject to strict time limits, it should regularly provide updates on the next stages of its investigations as does the UK Competition and Markets Authority ("CMA"). For example, the CMA publishes its case timetable and publicly updates it if the timings change. The timetable states when the internal "stop/go" decisions are taken and gives an indication of when to expect a statement of objections.

  Besides setting time limits, there should be greater transparency as to the way the Commission handles complaints. It appears there are instances where the Commission does not provide much feedback to the complainant as to the treatment of its complaint. Once again there may be some merits in setting a time limit by which the Commission should formally indicate whether it intends to pursue an investigation on the basis of the complaint or reject it.

C. Commission decisions

Regulation 1 gives the Commission the possibility to adopt infringement and commitment decisions, as well as decisions ordering interim measures.

Infringement decisions

Article 7 of Regulation 1 provides that the Commission may impose on undertakings that have breached Articles 101 and/or 102 TFEU any

> "behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end."

It also provides that:

> "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 digital markets where self-preferencing strategies are rife and where monitoring may often be difficult given the nature of the services provided, structural remedies will often be more effective

than behavioural ones. Structural remedies can take different forms, including functional separation or divestments.

More importantly, we believe that Article 7 should make clear that the Commission has the power to impose restorative remedies.[5] Such remedies would go beyond mere "cease-and-desist" orders and aim at restoring the competition that would have existed but for the infringement.[6] Indeed, in circumstances where the market has "tipped" in favour of a digital platform, the latter may well cease its anticompetitive conduct and still enjoy the fruits of its past conduct in the form of market power. In such cases, *ex post* enforcement can remedy the firm's wrongdoing only through restorative remedies. Such remedies would have the immediate goal of lowering barriers to entry, thus facilitating competition "for" the market. In digital markets, a promising remedy would comprise measures to establish interoperability between the digital platform and (existing or potential) rivals, which may help mitigate the network effects shielding the incumbent operator. Restorative remedies could also take the form of data separation measures (data silo obligations), or measures granting advantages to rivals or sharing data resources with rivals.

Commitments decisions

Commitments decisions are attractive in digital markets as it may often be preferable for businesses that are subject to anticompetitive conduct to see such anticompetitive to be brought to an end as rapidly and effectively as possible. In that context, commitments decisions may present the advantage of speed, provided that the infringer does not use negotiations over commitments to delay processes. With that in mind, it may make sense to subject discussions between the Commission and investigated companies to time limits.

Interim measures

Article 8 of Regulation 1 gives the Commission authority to impose interim measures. To do so, the Commission must follow a two-pronged test: (1) there must be a *prima facie* violation of the EU antitrust laws, and (2) the risk of serious and irreparable harm to competition must be urgent. If those two requirements are satisfied, the Commission may impose interim measures, which must be proportional to the aim that the Commission seeks to achieve.

Interim measures can play an important role in digital markets where businesses are often heavily dependent on gaining and/or maintaining unimpeded access to gatekeeper platforms – and by

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[5] While there is support in the case-law for the proposition that remedies under Regulation 1 can be restorative in nature, an explicit recognition of the Commission's power to impose restorative remedies would have the benefit of providing clarity and dispelling any doubts.

[6] See also the Competition Policy for the digital era report, page 67 (arguing in favour of remedies including a "restitutive element"); Report by the Commission 'Competition Law 4.0', A new competition framework for the digital economy, German Federal Ministry for Economic Affairs and Energy, September 2019, available at https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3, page 73 (arguing in favour of remedies restoring competition),

corollary, where gatekeeper platforms can seal the fate of dependent businesses overnight. For instance, without access to the Apple App Store and the Google Play Store an app developer will be unable to deliver its products and services to the users of these platforms. In such circumstances, the ability to obtain interim relief can be vital for an app developer to maintain its business alive.

It is subject to question, however, whether the "serious and irreparable" harm test that needs to be met for obtaining interim relief is not excessively demanding as illustrated by the Commission's very infrequent use of interim measures. In this respect, the test in the UK was lowered in order to make interim measures more likely to be used. The CMA now has the power to give interim measures if the CMA considers that it is necessary for it to act as a matter of urgency for the purpose of preventing significant damage to a particular person or category of person, or protecting the public interest. The phrase "significant damage" is intended to be easier to prove than "irreparable harm". It is arguable that even this change has not been sufficient because the CMA has only once used its interim measures powers (although it has successfully used the threat of them in other cases). The next step might be to reduce the onerous access to file requirements, which dissuade the CMA from using its powers without materially adding to the undertaking's ability to defend itself.

D. Fines

While fines may have a deterrent effect on many companies, it is trite to say fines have so far failed to deter large gatekeeper platforms from engaging in anticompetitive behaviour. Because these companies are so cash rich, to be deterrent fines may have to be set at unprecedented levels.

Besides the fact that fines may not have a deterrent effect, they also do little to help those companies that have suffered from anticompetitive conduct. That is why the focus of the Commission should be to adopt remedies that bring the infringement to an end, can be easily monitored (and when that is not the case, remedies should be structural), and are restorative in nature.

E. Cooperation with NCAs

Cooperation between the Commission and national competition authorities ("NCAs") has generally been effective in promoting the uniform application of European competition law, in particular through the European Competition Network on the basis of the Commission Notice on cooperation within the Network of Competition Authorities.[7]

One important development as regards digital markets is that some NCAs, in particular those with significant resources, have taken an aggressive approach to the enforcement of EU competition rules against gatekeepers. This has led to some degree of work sharing between the Commission and these authorities. While the active participation of NCAs in enforcing competition in digital

[7] [2004] OJ C 101/03.

markets creates significant benefits, it comes with a downside linked to the lack of effective recognition of the decisions of NCAs beyond their national borders. For instance, if the French competition authority adopts a decision, the effect of this decision will be limited to France, while the conduct in question has often a pan-European scope. This means that in practice, the victim of the anticompetitive conduct needs to (i) convince other competition authorities to follow in the footsteps of the NCA which has adopted the decision by, for instance, threatening the infringer to start an investigation unless they extend the remedy to the jurisdiction in question or (ii) go to a national court. That represents a significant burden. In that context, it would be desirable that Regulation 1, in its next iteration, contained a procedure allowing the decision of an NCA to be extended to another Member State when the conduct is pan-European and the factual pattern is similar in other Member States.

F. Conclusion

Over the two decades since the adoption of regulation 1, the Commission has done a remarkable job in enforcing Articles 101 and 102 TFEU, in particular in the digital markets where it has taken the global lead.

Yet, some of the characteristics of digital markets have raised significant challenges in the enforcement of competition rules. While the DMA will help the Commission to address these challenges, the enforcement of competition rules will remain of critical importance and thus the assessment of Regulation 1 provides an excellent opportunity to make sure the procedural rules remain fit for purpose in the digital era.

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