Market and Competition Law Review / VOLUME V / No. 2 / OCTOBER 2021

The Adoption of Remedies under Regulation 1/2003: Between Success and Coherence*

*Rita Leandro Vasconcelos***

ABSTRACT: Regulation 1/2003 allows the European Commission to adopt structural and behavioural remedies when it finds that an undertaking has abused its dominant position. Notwithstanding, the Regulation lacks sufficient rules to guide the institution's decision-making activity or to help undertakings predict the consequences of their behaviour.

This article's purpose is to take stock of the Commission's practice in imposing or accepting remedies so far, by discussing the limits to the Commission's activity and the paths it may take when adopting remedies in antitrust cases.

The first part will be the introduction to the topic.

In the second part, it will be proposed that the main drivers of the Commission when adopting remedies are three-fold: the goals of EU competition law; the general objectives of EU competition law enforcement; and the specific objectives to be pursued by the remedy vis-à-vis the infringement, which will largely depend on the circumstances of the case, the market and the type of abuse.

In the third part, it will be submitted that the Commission's activity is limited by the requirements that must govern the decision of adopting remedies: effectiveness, proportionality, timeliness and legal certainty.

In the fourth part, it will be submitted that the actual choice of remedies depends on the type of infringement, procedure (whether article 7 or article 9 of Regulation 1/2003) and the market. The focus will be on energy and digital markets: the former to illustrate cases of commitment decisions, the latter to figure out the adequacy of the application of remedies in dynamic markets.

---

* Date of reception: 30 June 2021. Date of acceptance: 27 July 2021.
DOI: https://doi.org/10.34632/mclawreview.2021.10308.

** Invited Assistant Professor at Católica Porto Business School. Partner at Cruz Vilaça Advogados, rlv@cruzvilaca.eu. ORCID ID: 0000-0002-9414-3939.

In the fifth part, the article will consider whether the current legal framework is suited to the adoption of remedies in a continuous changing environment or some changes are required.
The sixth part will be the conclusion.

KEYWORDS: Dominance; abuse; remedies; proportionality; effectiveness.

1. Introduction

Article 7 of Regulation No. 1/2003[1] allows the European Commission ("Commission")[2] to impose on undertakings structural and behavioural remedies[3] to the infringement committed and necessary to bring the infringement effectively to an end. Article 9 sets forth that the Commission may make binding commitments offered by the undertaking to meet the concerns expressed by the Commission in a preliminary assessment[4].

---

[1] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1/1, 4.1.2003). When no indication is given, the reference to "Articles" respects Regulation 1/2003.

[2] For the purpose of this article, the term "remedies" includes measures that are adopted either under Article 7 or Article 9. In the latter case, they may be designated "commitments" because they are voluntarily proposed by the undertaking. This is consistent with the language used in competition law, where the commitments proposed by undertakings under merger control rules are also designated merger remedies (European Commission, *Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004*, OJ C 267/1, 22.10.200). See also Benjamin Loertscher and Frank Maier-Rigaud, "On the consistency of the European Commission's remedies practice", in *Remedies in EU competition law: Substance, process and policy*, ed. Damien Gerard and Assimakis Komninos, (Alphen aan den Rijn: Kluwer Law International, 2020): 54. In this text, we also distinguish remedies from fines and from cease-and-desist orders. It should be noted that a different categorisation could be made, notably by including cease-and-desist orders. For instance, Pablo Ibañez Colomo distinguishes between antitrust and regulatory remedies, see Pablo Ibañez Colomo, "'Regulatory' and 'antitrust' remedies in EU competition law", in *Remedies in EU competition law: Substance, process and policy*, ed. Damien Gerard and Assimakis Komninos (Alphen aan den Rijn: Kluwer Law International, 2020): 74; and Loertscher and Maier-Rigaud, "On the consistency", 54, include cease-and-desist orders.

[3] For a distinction, see Loertscher and Maier-Rigaud, "On the consistency", 59-64. The authors also distinguish access remedies, which we believe may be called "quasi-structural" remedies. It is not the purpose of this article to explore this distinction.

[4] We may also point out the "cooperation procedure", which has no specific legal basis but is rooted on Article 7 of Regulation 1/2003 and paragraph 37 of the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210/2, 1.9.2006. See Niamh Dunne, "From coercion to cooperation: Settlement within EU competition

The quality and effectiveness of competition law enforcement depend not only on thorough investigations and adequate fines, but also on the correct implementation of the Commission's decisions, of which the remedies are a crucial part[5].

Notwithstanding the importance of remedies in the enforcement of competition law, there does not seem to be sufficient analysis and theory to underpin a coherent practice from the Commission.

In this article, we propose an analytical framework to the adoption of remedies by the Commission rooted on the idea that remedies pursue a three-level set of goals and are limited by certain requirements.

This article is set out as follows. First, we will try to identify the main goals of remedies. It is submitted that these are three-fold: the goals of European Union ("EU") competition law; the general objectives of EU competition law enforcement; and the specific objectives to be pursued by the remedy. Second, we will try to show that the Commission's activity is limited by certain requirements that must govern the decision of adopting remedies: proportionality, effectiveness, timeliness and legal certainty. Third, we will enquire whether the type of infringement, the type of procedure and the type of market bear importance in the design of the remedy. Then, we will take stock on whether there is room for improvement, and end the article with some concluding thoughts.

2. What are the main goals of remedies?

The adoption of remedies is set out in Regulation 1/2003. Articles 7 and 9 of Regulation 1/2003 state that decisions are adopted with a view to require undertakings to bring an infringement to an end[6]. For this purpose, the decision may impose behavioural or structural remedies or make binding on undertakings commitments offered to meet the Commission's concerns. Before Regulation 1/2003, the Court of Justice of the European

law", in *Remedies in EU competition law: Substance, process and policy*, ed. Damien Gerard and Assimakis Komninos (Alphen aan den Rijn: Kluwer Law International, 2020): 195-196.

[5] Frank Maier-Rigaud, "Behavioural versus structural remedies in EU competition law", in *European competition law annual 2013: Effective and legitimate enforcement of competition law*, ed. Philip Lowe, Mel Marquis and Giorgio Monti (Oxford and Portland, Oregon: Hart Publishing, 2016), 207.

[6] According to Lowe and Maier-Rigaud, the test under Article 9, although worded differently, is not of a different nature. See Philip Lowe and Maier-Rigaud, "Quo vadis antitrust remedies", in *International antitrust law & policy: 2007 Fordham Competition Law Institute*, ed. Barry Hawk (Huntington: Juris Publishing, 2008), 600.

Union ("CJEU") had already ruled that the Commission could impose an order to provide certain acts, provide certain advantages or prohibit the continuation of certain actions on infringing undertakings to bring an infringement to an end[7].

We may, thus, conclude that remedies exist to bring an infringement to an end. But what does this mean exactly? How can the Commission perceive what are the right measures to bring the infringement to an end? And how can an undertaking anticipate those measures?

We believe that the adoption of remedies should be oriented by a set of goals. These goals are three-fold: the goals of EU competition law; the general objectives of EU competition law enforcement; and the specific objectives to be pursued by the remedy vis-à-vis the infringement (the latter will largely depend on the circumstances of the case, the market and the type of abuse). If the Commission follows these guiding goals in its decisions, it will bring coherence to its practice, which will increase the predictability of its action and legal certainty.

2.1. The first set of goals – goals of EU competition law

The goals of EU competition law are the first set of goals of remedies. These are not specific to the remedial practice of the Commission. Instead, they are present in the competitive analysis in each and every decision, whether or not imposing / accepting remedies. EU competition law rules aim at protecting certain values, which will ultimately influence the operational criteria to distinguish lawful from unlawful conducts[8].

Although an ancient one, the discussion on the goals of EU competition law could not be timelier. In fact, competition law is a discipline in constant evolution and permeable to changes in society[9].

In essence, there are traditionally two views: one defending that competition law protects a competitive market structure and the competitive process as such, and one believing that competition law protects economic

---

[7] Judgment of the Court 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission*, 6 and 7/73, EU:C:1974:18, paragraphs 45 and 46.

[8] Sofia Oliveira Pais, "Considerações de lealdade e equidade no direito da concorrência da União: Breves reflexões", *Revista de Concorrência e Regulação*, IX, no. 35 (2018): 131; Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union law* (Cambridge: Cambridge University Press, 2014): 952.

[9] Ariel Ezrachi, "Sponge", *Journal of Antitrust Enforcement* 5, no. 1 (2017): 51 and 59.

efficiency (either total welfare[10] or consumer welfare[11]). The consumer welfare standard is generally more accepted than the total welfare one, given that it is rooted on the idea that a fair share of that welfare is transferred to consumers[12]. We may then discuss what consumer welfare is and what it entails – whether it is short-term low prices (narrow consumer welfare) or also considerations on quality and innovation (broad consumer welfare) – but it seems rather clear that EU competition law advocates for the latter[13]. More recently, some voices have been advocating for the inclusion of other kinds of values, such as equity or fairness, into competition law[14].

Besides this theoretical discussion, we should look at the sources of EU competition law for an answer, notably the Treaty on European Union ("TEU") and in the Treaty on the Functioning of the European Union ("TFEU")[15]. For example, Article 3, paragraph 3, TEU sets forth as aim of the EU the establishment of an internal market and of "a highly competitive social market economy, aiming at full employment and social progress". Protocol 27 adds that the internal market, as set out in Article 3 TEU, includes a system ensuring that competition is not distorted. The CJEU has confirmed that although the reference to the internal market is

[10] The sum of producer surplus and consumer surplus. For basic notions, see Alison Jones, Brenda Sufrin and Niamh Dunne, *EU competition law: Text, cases and materials* (Oxford: Oxford University Press, 2019), 11.

[11] In the sense that "antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low". Herbert Hovenkamp, "Is antitrust's consumer welfare principle imperiled?", *The Journal of Corporation Law* 45, no. 1 (2019): 102.

[12] Niamh Dunne, *Competition law and economic regulation: Making and managing markets* (Cambridge: Cambridge University Press, 2015), 28; Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU competition law and economics* (Oxford: Oxford University Press, 2012), 22; Luc Peeperkorn, "Coherence in the application of Articles 101 and 102: A realistic prospect or an elusive goal?", *World Competition Law and Economic Review* 39, no. 3 (2016): 392; Adrian Majumdar and Iyestin Williams, "Anchoring competition policy: Keep consumer welfare and carry on", in Richard Whish QC (Hon), *Taking competition law outside the box – Liber amicorum*, ed. Nicholas Charbit and Sonia Ahmad (New York: Concurrences, 2020), 26-28.

[13] See, for instance, Majumdar and Williams, "Anchoring competition policy", 29.

[14] For instance, Lina Khan, "The new Brandeis movement: America's antimonopoly debate", *Journal of European Competition Law and Practice* 9, no. 3 (2018): 131-132, but note that the discussion takes a different meaning on the other side of the Atlantic.

[15] Wouter P. J. Wils, "The judgment of the EU General Court in Intel and the so-called more economic approach to abuse of dominance", *World Competition Law and Economic Review* 37, no. 4 (2014): 417; Renato Nazzini, *The foundations of European Union competition law, The objectives and principles of Article 102* (Oxford: Oxford University Press, 2011), 11.

now in a Protocol it remains an objective of EU competition law[16]. Article 101, paragraph 3, TFEU allows for the exemption of restrictive agreements where, *inter alia*, they allow consumers a fair share of the resulting benefit. Article 102, letter (a), TFEU expressly prohibits "unfair trading conditions", while letter (b) emphasises "the prejudice of consumers".

We should also seek guidance from the case law of the CJEU. Although some earlier judgments seemed to give more weight to the protection of the competitive process[17], more recent rulings emphasise the role of consumer welfare[18].

The goal of protecting the competitive process cannot be disregarded taking into account the Treaties and the case law. However, it seems that the competitive process is not an end in and of itself, but a means to enhance consumer welfare[19]. Notably, it is settled case law that competition rules do not exist to protect competitors[20].

It is not the purpose of this article to delve into a detailed discussion on the current competition law goals. However, some considerations should be made. Where we stand, or where the Commission stands, has major consequences to competition law enforcement. Embracing more and wider

---

[16] Judgment of the Court of 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 20 and 21.

[17] Judgment of the Court of 13 February 1979, *Hoffmann-La Roche v. Commission*, 85/76, EU:C:1979:36, paragraph 91; Judgment of the Court of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v. Commission*, 322/81, EU:C:1983:313, paragraph 57.

[18] Judgment of the Court 27 March 2012, *Post Danmark A/S v. Konkurrencerådet* (*Post Danmark I*), C-209/10, EU:C:2012:172, paragraph 44; judgment of the Court 6 October 2015, *Post Danmark A/S v. Konkurrencerådet* (*Post Danmark II*), C-23/14, EU:C:2015:651, paragraph 69; judgment of the Court of 6 September 2017, *Intel Corp v. Commission*, C-413/14 P, EU:C:2017:632, paragraph 140. But see, for example, judgment of the Court of 25 March 2021, *Deutsche Telekom AG v. Commission*, C-152/19 P, EU:C:2021:238, paragraph 41.

[19] Dunne, *Competition law and economic regulation*, 29, states that protecting competitors is a highly controversial role for antitrust. Luc Peeperkorn, "Coherence in the application of Articles 101 and 102", 396, 397. See also Richard Whish and David Bailey, *Competition law* (Oxford: Oxford University Press, 2018), 19 and 203.

[20] Judgment of the Court of 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 43; Judgment of the Court of 27 March 2012, *Post Danmark A/S v. Konkurrencerådet* (*Post Danmark I*), C-209/10, EU:C:2012:172, paragraph 21; judgment of the Court of 6 September 2017, *Intel Corp v. Commission*, C-413/14 P, EU:C:2017:632, paragraph 133; judgment of the Court 19 April 2018, *MEO v. Autoridade da Concorrência*, C-525/16, EU:C:2018:270, paragraph 31. See also José Luís da Cruz Vilaça, "The intensity of judicial review in complex economic matters – recent competition law judgments of the Court of Justice of the EU", *Journal of Antitrust Enforcement* 6, no. 2 (2018): 183.

goals leads to a stronger enforcement[21] of competition law, which naturally influences the adoption of remedies. We do not set aside the importance of the competitive process, economic freedom, or even a consideration that competition must be fair in the sense of competition on the merits[22]. Notwithstanding, and although the discussion is useful, we should reflect on how to give those values an objective content[23] so that they may be turned into practical rules. In this regard, we should not overlook that much of this discussion is influenced by the issues raised by big tech companies, the digitalisation of the economy and markets, and the challenges faced by competition law enforcement in this landscape. It seems that protecting competition in the interest of consumers (encompassing not only prices, but also quality and innovation), based on competition on the merits, is still the best approach[24] (not disregarding the achievement of the internal market).

2.2. The second set of goals – the general objectives of EU competition law enforcement

The second set of guiding goals of remedies are the general objectives of EU competition law enforcement. In this regard, we should start by recalling that remedies are part of the competition law enforcement system. This system seeks to attain several objectives that are instrumental to the fulfilment of the goals of EU competition law. Those objectives are the functions of the competition law enforcement system.

There is no univocal view on the functions of competition law enforcement. Notwithstanding, it seems fairly clear that some objectives / functions are attributed to competition law enforcement[25]. Firstly, we may find the injunctive function / objective, which mainly corresponds to the obligation to bring the infringement to an end, including its effects. This may

---

[21] Chalmers et al., *European Union law*, 955.

[22] Alfonso Lamadrid, "Competition law as fairness", *Journal of European Competition & Practice* 8, no. 3 (2017): 147.

[23] Oliveira Pais, "Considerações de lealdade e equidade no direito da concorrência da União", 131; Sandra Marco Colino, "The antitrust F word: Fairness considerations in competition law", The Chinese University of Hong Kong, Research Paper no. 2018-09, 2018, https://ssrn.com//abstract=3245865: 18-21.

[24] Majumdar and Williams, "Anchoring competition policy", 34.

[25] See, for example, Ioannis Lianos, "Competition law remedies: In search of a theory", in *The global limits of competition law* , ed. Ioannis Lianos and Daniel Sokol (Stanford, California: Stanford University Press 2012), 189-191.

be carried out by a cease-and-desist order[26] or a declaration of nullity of an agreement[27], and does not necessarily need the adoption of a specific remedy. Secondly, competition law enforcement pursues a punitive function also aimed at disincentivising undertakings from adopting similar behaviour in the future[28]. This is mainly the task of the fines[29]-[30]. Then, competition law enforcement also aims at compensating victims, which is especially pursued by private enforcement[31]-[32]. Finally, we can identify the restorative function/objective, which is primarily achieved through remedies[33].

The objective of restoring competition to the market through the adoption of a remedy is arguably the most difficult one to attain. This is because the authority needs to make a forward-looking judgment as to how the

---

[26] Judgment of the Court of First Instance, 17 September 2007, *Microsoft Corp v. Commission*, T-201/04, EU:T:2007:289, paragraph 1256.

[27] Article 101, paragraph 2, TFEU.

[28] See Cyril Ritter, "How far can the Commission go when imposing remedies for antitrust infringements?" *Journal of European Competition Law & Practice* 7, no. 9 (2016): 588.

[29] Michael J. Frese, *Sanctions in EU competition law: Principles and practice* (Oxford and Portland: Hart Publishing, 2016), 170, 186 and 187. See also Giorgio Monti, "Behavioural remedies for antitrust infringements – Opportunities and limitations", in *European competition law annual 2013: Effective and legitimate enforcement of competition law*, ed. Philip Lowe, Mel Marquis and Giorgio Monti. (Oxford and Portland, Oregon: Hart Publishing, 2016), 190; Per Hellstrom, Frank Maier-Rigaud and Friedrich Wenzel Bulst, "Remedies in European antitrust law", *Antitrust Law Journal* 76, no. 1 (2009): 50. Wouter P.J. Wils, "Optimal antitrust fines: Theory and practice", *World Competition Law and Economic Review* 29, no. 2 (2006), 187.

[30] We may also add periodic penalty payments under Article 24 of Regulation 1/2003.

[31] Judgment of the Court 20 September 2001, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and others*, C-453/99, EU:C:2001:465, paragraphs 25, 26; judgment of the Court 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatic Assicurazioni SpA, etc.*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 60, 61. Rafael Allendesalazar, "Remedies and sanctions for unlawful unilateral practices, with particular reference to exclusionary abuses", in *International antitrust law & policy: 2007 Fordham Competition Law Institute*, ed. Barry Hawk (Huntington: Juris Publishing, 2008), 516.

[32] We should note that in the Deutsche Bahn cases the Commission ordered the one-time payment of a sum to railway undertakings as compensation for the abuse of dominance. Commission Decision of 18 December 2013, *Deutsche Bahn I and II*, 39.678, 39.731, paragraphs 91-93. See also, Maria Ioannidou, "The application of Article 102 TFEU in the EU energy sector: A critical evaluation of commitments", in *Abusive practices in competition law*, ed. Fabiana di Porto and Robert Podszun (Cheltenham and Northampton: Edward Elgar Publishing, 2018), 152.

[33] There are other ways of classifying the tasks of antitrust enforcement. For example, Wils proposes clarifying and developing antitrust prohibitions, deterrence and punishment and the pursuit of corrective justice through compensation. See, Wouter P.J. Wils, "The relationship between public antitrust enforcement and private actions for damages", *World Competition Law and Economic Review* 32, no. 1(2009): 3-26.

remedy will operate and how the market will evolve[34]. In this regard, one may ask whether the Commission should limit itself to restoring the competition that existed on the market prior to the infringement or if it should render the market more competitive than it would have been in case there had been no infringement[35]. We believe that the Commission should not seek to make the market more competitive than it was before the infringement[36], because we defend that there should be a connection between the infringement and the remedy (driven by the third set of goals, as explained below). Notwithstanding, the level of competition on the market cannot be a limit to the Commission's activity. In fact, since the adoption of remedies is prospective, it is impossible to predict with exact certainty the effect of the remedy on the market. Therefore, we believe that the answer to this question lies on the principle of proportionality and the procedure used to impose or accept the remedy: Article 7 or Article 9 of Regulation 1/2003 (as better seen below).

This is also linked to a certain regulatory aspect of competition law enforcement. Regulation and competition (antitrust) have close but somewhat different purposes (promoting competition v. correcting a restriction) and applications (*ex ante* v. *ex post*) which justify more intervention under regulation[37]. Notwithstanding, it is undeniable that the adoption of remedies can come close to regulating a market, because they are designed to apply to the future. The key is, again, a sound application of the proportionality principle, the control of the legality for the misuse of powers[38], and the respect for the rights of the undertakings concerned.

---

[34] Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for competition lawyers* (Oxford: Oxford University Press, 2016), 361, alert to the risk of competition authorities being caught up in a regulatory web.

[35] Lianos, "Competition law remedies", 190.

[36] Ritter, "How far can the Commission go when imposing remedies for antitrust infringements?", 589 - 590.

[37] Niamh Dunne, *Competition law and economic regulation: Making and managing markets* (Cambridge: Cambridge University Press, 2015), 323 and 328-329.

[38] Ioannis Lianos, "The principle of effectiveness, competition law remedies and the limits of adjudication", in *European competition law annual 2013: Effective and legitimate enforcement*, ed. Philip Lowe, Mel Marquis and Giorgio Monti (Oxford: Hart Publishing, 2016), 123.

2.3. The third set of goals – the specific objectives of the remedy – and a preliminary conclusion

The third driver of the Commission when adopting remedies is the specific objectives to be pursued by the remedy vis-à-vis the infringement, which include the expected results. There is no "catalogue" of specific objectives, as they depend on the case. These may encompass the erosion of barriers to entry, elimination of switching costs, maintenance of market contestability[39], elimination of conflict of interests inherent to vertical relationship[40], capacity release[41], actively sponsor entry[42], system interoperability[43], among others. The specific objectives to the design of remedies will naturally depend on the type of abuse and the market and will be closely influenced by type of procedure. If these drivers are legitimate, then, the actual remedies should be linked to a theory of harm[44]. This is often a good test of the theory of harm's soundness and of the need to intervene[45].

It is submitted that these three sets of goals should determine the choice and design of the remedy. The goals of EU competition law being well identified and respected, it becomes clearer what the purpose of the adoption of remedies is (the functions / objectives they aim to achieve in the system of competition law enforcement), as well as the specific objective to be attained by a particular remedy (i.e. the solution for the competition problem). The application of this analytical framework, together with the limits that will be discussed in the next section, brings coherence to the adoption of remedies.

---

[39] Commission decision of 24 March 2004, *Microsoft I*, 37.792, paragraph 979.

[40] Commission decision of 18 March 2009, *RWE – Gas Foreclosure*, 39.402, paragraph 50; Commission decision of 29 September 2010, *ENI*, 39.315, paragraph 91.

[41] Commission decision of 3 December 2009, *GDF foreclosure*, 39.316, paragraphs 67-84; Commission decision of 4 May 2010, *E.ON Gas foreclosure*, 39.317, paragraphs 44-49 and 59.

[42] Commission decision of 10 April 2013, *CEZ*, 39.727, paragraphs 39 and 80.

[43] Commission decision of 24 March 2004, *Microsoft I*, 37.792, paragraphs 561 and 565-577. Commission decision of 15 April 2015, *Google Android*, 40.099, paragraphs 524, 1023 and 1030.

[44] Ioannis Lianos, "Competition law remedies in Europe: Which limits for remedial discretion?", in *Handbook on European competition law: Enforcement and procedure*, ed. Ioannis Lianos and Damien Geradin (Cheltenham and Northampton: Edward Elgar Publishing, 2013), 386.

[45] Robert O'Donoghue and Jorge Padilla, *The law and economics of Article 102 TFEU* (Oxford and Portland, Oregon: Hart Publishing, 2020), 1180; Ian Forrester, "On remedies, abuses and the links between", in *Current developments in European and international competition law: 15th St. Gallen International Competition Law Forum ICF 2008*, ed. Carl Baudenbacher (Basel: Helbing Lichtenhahn, 2009), 337.

3. What are the main limits to the Commission's activity when adopting remedies?

The adoption of remedies may interfere with rights of the undertakings[46], such as the right to property and freedom to pursue a trade or freedom to conduct business[47], and must be subject to limits[48]. Notably, restrictions must have a legal basis, seek objectives of general interest pursued by the Union, and obey to the proportionality principle (they cannot be a disproportionate and intolerable interference, impairing the very substance of the right)[49]. This principle, which plays a central role in the definition of remedies, does not bear the same content if the remedies are proposed by the undertaking (commitments) as it does when the remedies are imposed by the Commission. We submit that the Commission's activity is limited by the requirements that must govern the decision of adopting remedies: proportionality, effectiveness, timeliness and legal certainty[50].

3.1. Proportionality

Proportionality is a general principle of EU law[51] that is applicable to competition law[52]. As a rule, the measures adopted by EU institutions must be bound by the principle of proportionality and must not exceed what is

---

[46] Takis Tridimas, *The general principles of EU law* (New York: Oxford University Press, 2006), 313.

[47] Articles 17 and 16 of the Charter of Fundamental Rights of the European Union ("Charter"), respectively. Please note that the interference is greater when the Commission is using Article 7 of Regulation 1/2003 rather than the commitments procedure under Article 9.

[48] Opinion of Advocate-General Melchior Whatelet of 20 November 2014, *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmH*, C-170/13, EU:C:2014:2391, paragraph 63. Arianna Andreangeli, "Between economic freedom and effective competition enforcement: The impact of the antitrust remedies provided by the modernisation regulation in investigated parties freedom to contract and to enjoy property", *Competition Law Review*, 6, no. 2 (2010), 230.

[49] Arianna Andreangeli, "Competition law and human rights: Striking a balance between business freedom and regulatory intervention", in *The global limits of competition law*, ed. Ioannis Lianos and Daniel Sokol (Stanford: Stanford University Press, 2012), 30; Tridimas, *The general principles of EU law*, 313. See for instance, judgment of the Court of 5 October 1994, *Germany v. Council (Bananas)*, C-208/93, EU:C:1994:367, paragraph 78.

[50] Loertscher and Maier-Rigaud, "On the consistency", 57, submit that the requirements are effectiveness and proportionality.

[51] Tridimas, *The general principles of EU law*, 136 et seq.; Nicholas Economides and Ioannis Lianos, "A critical appraisal of remedies in the EU Microsoft cases", *Columbia Business Law Review* 2, (2010): 413.

[52] Wolf Sauter, "Proportionality in EU competition law", *European Competition Law Review* 35, no. 7 (2014): 328.

appropriate and necessary to attain the objective pursued by such measure[53]. The adoption of remedies is no exception.

In truth, a decision to adopt remedies will bear a restriction on the undertakings' rights and property[54]. Structural remedies clash with undertakings' property rights, while behavioural remedies directly affect undertakings' economic freedom and business autonomy. The principle of proportionality requires that the burden imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought[55]. Where there is more than one possible solution, the Commission should choose the least burdensome[56]. Proportionality is thus a balancing exercise between the intrusiveness of the remedy and the importance of addressing the infringement[57]-[58].

The proportionality principle acts as a limit to the Commission's powers to impose remedies and is set out in Article 7(1) of Regulation 1/2003. In case of a prohibition decision, the burden imposed on the undertakings cannot exceed what is necessary to reach the functions / objectives of bringing an infringement to an end and restoring competition to the market and must be adequate to the attainment of such objectives. Also, according to Recital 12 of Regulation 1/2003, structural remedies are subsidiary in relation to behavioural ones. This has led some authors to state that there is a presumption that structural remedies are disproportionate in nature, and that they are only proportionate when there is no suitable

---

[53] Tridimas, *The general principles of EU Law*, 139. See judgment of the Court of First Instance of 23 October 2003, *Van Bergh Foods v. Commission*, T-65/98, EU:T:2003:281, paragraph 201.

[54] Adriana Andreangeli, "The public enforcement of Articles 101 and 102 TFEU under Council Regulation 1/2003: Due process considerations", in *Handbook on European Competition law: Enforcement and procedure*, ed. Ioannis Lianos and Damien Geradin (Cheltenham and Northampton: Edward Elgar Publishing, 2013), 142 and 163.

[55] Judgment of the General Court of 24 May 2012, *Mastercard, Inc. and others v. Commission*, T-111/08, EU:T:2012:260, paragraphs 323-324; judgment of the Court of First Instance, 17 September 2007, *Microsoft Corp v. Commission*, T-201/04, EU:T:2007:289, paragraph 1276. See also judgment of the Court of 6 April 1995, *Radio Telefís Éireann and Independent Television Publications (RTE and ITV) v. Commission,* C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 93.

[56] Judgment of the Court of 13 November 1990, *The Queen v. Minister of Agric., Fisheries and Food ex parte Fedesa*, Case C-331/88, EU:C:1990:391, paragraph 13. Economides and Lianos, "A critical appraisal of remedies in the EU Microsoft cases", 413.

[57] O'Donoghue and Padilla, *The law and economics of Article 102 TFEU*, 1133.

[58] It can be discussed whether the principle of proportionality bears two or three elements (see Sauter, "Proportionality in EU competition law", 327-332; Tridimas, *The general principles of EU law*, 139), but that is not relevant for the purpose of this article.

behavioural alternative[59]. In our view, structural remedies may be theoretically proportionate, but it is certainly more difficult to meet an adequate proportionality standard to impose structural remedies under Article 7[60].

Additionally, in the event that there are several equally effective and proportionate ways of terminating an infringement, it is necessary to understand whether the Commission may choose which solution to pursue[61]. In principle, the Commission does not have the ability to impose on the undertakings a specific obligation from among all various potential courses of action in conformity with the Treaty[62]. One possible solution would be to ask the undertaking to present alternatives, as it seems to be the most recent practice of the Commission[63]. This position, although seemingly attractive, brings about legal certainty issues, as discussed below. There is no underlying structured procedure for the Commission to accompany the undertaking in its choice and often the decisions do not provide more guidance than a set of general principles[64]. This means that an undertaking may be subject to a fine for not complying with the Commission's decision where it has a different understanding of the remedy[65]. Additionally, the position of third parties does not seem to be adequately taken into account.

Article 9 of Regulation 1/2003 does not expressly refer to the proportionality principle. However, the CJEU has considered that, as a general principle of EU law, proportionality is a general criterion for the lawfulness of any act of an institution, albeit its scope is more limited when the solutions

---

[59] O'Donoghue and Padilla, *The law and economics of Article 102 TFEU*, 1134.

[60] Ritter, "How far can the Commission go when imposing remedies for antitrust infringements?", 597.

[61] Erling Hjelmeng, "Competition law remedies: Striving for coherence or finding new ways?", *Common Market Law Review* 50, no. 4 (2013): 1012-1013

[62] Judgment of the Court of First Instance of 18 September 1992, *Automec v. Commission*, T-24/90, EU:T:1992:97, paragraph 52; judgment of the General Court of 27 June 2012, *Microsoft Corp v. Commission*, T-167/08, EU:T:2012:323, paragraph 95. See, Hjelmeng, "Competition law remedies: Striving for coherence or finding new ways?", 1013 – although the judgment concerned Article 101, it may still be applicable to Article 102 cases.

[63] Commission decision of 30 November 2010, *Google Search (Shopping)*, 39.740; Commission decision of 15 April 2015, *Google Android*, 40.099.

[64] Jacques Derenne, Ciara Barbu-O'Connor and Catalina Chilaru, "Remedies in State aid", in *Remedies in EU competition law: Substance, process and policy*, ed. Damien Gerard and Assimakis Komninos (Alphen aan den Rijn: Kluwer Law International, 2020), 114.

[65] Bo Vesterdorf and Kyriakos Fountoukakos, "An appraisal of the remedy in the Comission's Google Search (Shopping) decision and a guide to its interpretation in light of an analytical reading of the case law", *Journal of European Competition Law and Practice* 9, no. 1 (2018): 8.

are proposed by the undertaking under an Article 9 procedure[66]. Under this procedure, the commitments accepted must address the competition concerns developed in the Commission's preliminary assessment. The proportionality principle is fulfilled when the Commission verifies that the undertaking did not offer a less burdensome commitment, but does not impose the obligation on the Commission to look actively for the less onerous solution[67]. The main justifications for this solution are the different nature of the proceedings and considerations of procedural economy[68]. In fact, under this procedure, not only does not the undertaking suffer from the consequences of an infringement procedure, notably the imposition of a fine, but it is also involved in the preparation of the remedy[69].

Notwithstanding the apparently sound arguments, commentators have criticised this position, mainly for the following reasons. In Article 9 decisions, the Commission does not need to underpin the reasoning on a solid theory of harm, being enough to present competition concerns[70]. This means that the analysis is less thorough. In addition, given the voluntary nature of the process and the involvement of the undertaking, the grounds and the willingness to challenge it in court are more limited[71], thus lessening the opportunities for the European Courts to review such decisions[72].

---

[66] Judgment of the Court of 29 June 2010, *Commission v. Alrosa*, C-441/07 P, EU:C:2010:377, paragraphs 35 and 36.

[67] Judgment of the Court of 29 June 2010, *Commission v. Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 41; judgment of the General Court of 15 September 2016, *Morningstar Inc. v. Commission*, T-76/14, EU:T:2016:481, paragraphs 86 and 89; judgment of the Court of 9 December 2020, *Groupe Canal + v. Commission*, C-132/19 P, EU:C:2020:1007, paragraph 105.

[68] Judgment of the Court of 29 June 2010, *Commission v. Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 35; judgment of the General Court of 15 September 2016, *Morningstar Inc v. Commission*, T-76/14, EU:T:2016:481, paragraph 39.

[69] Judgment of the Court of 29 June 2010, *Commission v. Alrosa*, C-441/07 P, EU:C:2010:377, paragraphs 35 and 48; judgment of the General Court of 15 September 2016, *Morningstar Inc v. Commission*, T-76/14, EU:T:2016:481, paragraph 39. See Niamh Dunne, "Commitment decisions in EU competition law", *Journal of Competition Law and Economics* 10, no. 2 (2014), 434.

[70] Commitment decisions are also typically shorter. Ian Forrester, "Creating new rules or closing easy cases", in *European competition law annual 2008*, ed. Claus-Dieter Ehlermann and Mel Marquis (Oxford: Hart Publishing, 2010), 637.

[71] Frederic Jenny, "Worst decision of the EU Court of Justice: The Alrosa judgment in context and the future of commitment decisions", *Fordham International Law Journal* 38, no. 3 (2015): 723.

[72] But see judgment of the Court 23 November 2017, *Gasorba SL and Others v. Repsol Comercial de Productos Petrolíferos SA*, C-547/16, EU:C:2017:891, paragraph 30, where the Court ruled that commitment decisions concerning certain agreements between undertakings, adopted by the Commission under Article 9, do not preclude national courts from examining whether those agreements comply with the competition rules and, if necessary, declaring those agreements

This diminishes the opportunities for the development of precedents, which is especially problematic in novel cases[73]. Additionally, this discretion of the Commission is more troublesome if one bears in mind that the Commission maintains the possibility to adopt a formal infringement decision, which pressures the undertakings, questioning the true voluntary nature of the commitments[74].

Therefore, the proportionality requirements are subject to a lower standard in commitment decisions[75], and the potential scope of the remedies is wider in Article 9 decisions than in Article 7 decisions[76].

3.2. Effectiveness, timeliness and legal certainty

Article 7 of Regulation 1/2003 sets out not only that remedies must be proportionate, but also that the Commission can only choose remedies that effectively end the infringement[77]. The Commission's activity should be, thus, oriented to find the most effective solution to bring the infringement to an end, including its effects[78]. This requirement relates to the capacity of the remedy to safeguard the *effet utile* of competition rules[79]. This also derives from the proportionality principle, in the sense that a remedy must be adequate to respond to the competition concern. Effectiveness is achieved when the remedies are adequately defined, notably through the correct identification of the three sets of goals, which will provide a link with a theory of harm. At this juncture, the Commission will need to consider the likely effects of the remedy.

Under an Article 9 proceeding, the Commission does not need to carry out a full-fledged investigation. Nevertheless, there are effectiveness

---

void pursuant to Article 101(2) TFEU; and judgment of the Court of 9 December 2020, *Groupe Canal + v. Commission*, C-132/19 P, EU:C:2020:1007, paragraphs 105-106 and 115-116, where the Court stated that the intervention of the national judge was not sufficient to remedy the effects of Paramount's commitments on the contractual rights of third parties.

[73] Dunne, "From coercion to cooperation", 184.

[74] Dunne, "From coercion to cooperation", 201-203.

[75] Wolf Sauter, *Coherence in EU competition law* (New York: Oxford University Press, 2016), 114.

[76] Hjelmeng, "Competition law remedies: striving for coherence or finding new ways?", 1028-1030.

[77] Maier-Rigaud, "Behavioural versus structural remedies", 214.

[78] See judgment of the Court of 4 March 1999, *Union française de l'express (UFEX), formerly syndicat français de l'express international (SFEI), DHL International and Service CRIE v. Commission*, C-119/97, EU:C:1999:116, paragraphs 93 et seq. See, also, Lowe and Maier-Rigaud, "Quo vadis antitrust remedies", 599-600.

[79] Lianos, "The principle of effectiveness", 109.

considerations to take into account. The measures must effectively address the Commission's preliminary concerns[80].

Additionally, the effectiveness of a remedy relates to the ability of a remedy to be enforceable. Remedies should not be extremely costly and complex to implement[81]. In conclusion, an effective remedy is the one that is correctly defined and easy to execute[82].

Another guiding requirement is timeliness[83]. While investigations are time consuming, markets evolve. Thus, the remedies that might have been effective at a certain moment in time might not be effective at the time of their adoption because of the evolution of the market conditions[84]. The importance of this requirement is manifold. In fact, changes in market conditions may render solutions unadjusted to the goal of restoring competition to the market. Therefore, not only must remedies be adopted on time, but they must also be implemented on time[85]. In addition, those same changes in the market may render the remedies obsolete. Where the remedies are no longer necessary, there should be a means to declare their expiry[86].

Last but not least, we find the principle of legal certainty, which is also a fundamental principle of EU law[87]. This principle's relevance for competition law in general and for remedies in particular is paramount, given

---

[80] Judgment of the Court of 29 June 2010, *Commission v. Alrosa*, C-441/07 P, EU:C:2010:377, paragraphs 35 and 40; judgment of the General Court of 15 September 2016, *Morningstar Inc v. Commission*, T-76/14, EU:T:2016:481, paragraph 39; judgment of the Court of 9 December 2020, *Groupe Canal + v. Commission*, C-132/19 P, EU:C:2020:1007, paragraph 105.

[81] Eddy De Smijter and Ailsa Sinclair, "The enforcement system under Regulation 1/2003", in *The EU law of competition*, ed. Jonathan Faull and Ali Nikpay (New York: Oxford University Press, 2014), 124.

[82] Amelia Fletcher and David Hansen, "The role of demand side remedies in resolving competition concerns", in *Remedies in EU competition law: Substance, process and policy*, ed. Damien Gerard and Assimakis Komninos (Alphen aan den Rijn: Kluwer Law International, 2020): 32-36.

[83] Lowe and Maier-Rigaud, "Quo vadis antitrust remedies", 597.

[84] This is especially true when we are facing dynamic and fast changing markets such as the digital ones.

[85] See by analogy *Commission notice on remedies acceptable under the Merger Regulation*, paragraph 9.

[86] Monti, "Behavioural remedies", 202. In case we are facing an Article 9 proceeding, the undertaking may ask for a revision based on change of circumstances (Article 9 (2) Regulation 1/2003). The same does not happen in Article 7 decisions, but the Commission may include a revision clause such as in *Hilti* (Commission decision of 22 December 1987, *Hilti*, 30.787, Annex, paragraph 3).

[87] Judgment of the Court of 14 October 2010, *Deutsche Telekom AG v. Commission*, C-280/08 P, EU:C:2010:603, paragraph 202.

the vagueness of the rules[88]. Its manifestation is two-fold. On the one hand, undertakings should be able to anticipate the remedies that may be imposed on them or that they need to negotiate in case they breach competition law. On the other hand, remedies must be described in a sufficiently clear way[89], so that undertakings know what to do and the community can be sure that the goals of the remedy are effectively pursued. Nevertheless, the case law does not impose that remedies be specifically described in the decision. The operative part of the Commission's decision must be read and interpreted in the light of the grounds of that decision. This is good for Article 7[90], as well as for Article 9 decisions. However, it is only natural that legal certainty issues arise mainly in relation to the former procedure, since in the latter the undertaking takes a decisive part in the design of the remedy.

As mentioned above, in a prohibition decision, where there are several equally effective ways to bring an infringement to an end, it is not up to the Commission to choose the path[91]. This seems to have been followed by the Commission, notably on the recent *Google* cases[92], but we can also see it in some older cases[93].

If we take the recent *Google* cases, for instance, we may observe that the Commission did not specify the remedies. It rather set some vague

---

[88] Ian Forrester, "Article 82: Remedies in search of theories?", *Fordham International Law Journal* 28, no. 4 (2004): 922.

[89] Judgment of the General Court of 29 November 2012, *Groupement des Cartes Bancaires (CB) v. Commission*, T-491/07, EU:T:2012:633, paragraphs 443 and 444; Article 27(1) Regulation 1/2003; Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, paragraph 83 (OJ C/6, 20.10.2011).

[90] Judgment of the Court of First Instance of 17 September 2007, *Microsoft Corp v. Commission*, T-201/04, EU:T:2007:289, paragraph 1258; judgment of the General Court of 29 November 2012, *Groupement des Cartes Bancaires (CB) v. Commission*, T-491/07, EU:T:2012:633, paragraph 440; judgment of the General Court of 27 June 2012, *Microsoft Corp v. Commission*, T-167/08, EU:T:2012:323, paragraph 85.

[91] Judgment of the Court of First Instance of 18 September 1992, *Automec v. Commission*, T-24/90, EU:T:1992:97, paragraph 52; judgment of the General Court of 27 June 2012, *Microsoft Corp. v. Commission*, T-167/08, EU:T:2012:323. See also judgment of the Court of 6 April 1995, *Radio Telefís Éireann and Independent Television Publications (RTE and ITV) v. Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 91.

[92] Commission decision of 30 November 2010, *Google Search (Shopping)*, 39.740, paragraphs 699 and 700; Commission decision of 15 April 2015, *Google Android*, 40.099, paragraphs 1393 et seq.

[93] Commission decision of 24 March 2004, *Microsoft*, 37.792, Article 7.

principles that the remedies should pursue[94]. In *Microsoft*, the Commission gave the undertaking little guidance on what conditions to provide the required information to competitors[95]. Likewise, in *Mastercard*, although the Commission did not require the undertaking to withdraw the contested multilateral interchange fee[96], the guidance was not sufficient to present a remedy on time, and the undertaking fell compelled to repeal the fee temporarily in order to have time to discuss the appropriate remedy with the Commission[97].

This open-ended approach led some authors to criticise the Commission for not affording sufficient legal certainty to its decisions[98]. First, a mere indication of the principles to which the remedies should obey can bring about doubts on what kind of remedy to implement (for instance, whether structural or behavioural), which can have an impact on the reasoning and proportionality[99]. Second, this can also increase litigation as to the implementation of the remedy, which can both reduce its effectiveness[100] and put the undertaking in the unfortunate position of being subject to penalty payments for not having grasped the Commission's intention[101]. Despite the criticisms, we can also find commentators advocating for this solution, provided the Commission grants certainty to the undertaking about the compliance of its proposed remedy with the decision[102]. In fact, an open approach to remedies allows more freedom to the undertaking in the definition of the remedy, and the proportionality principle is better achieved[103]. In the last section, we will develop this proposal.

---

[94] Commission decision of 30 November 2010, *Google Search (Shopping)*, 39.740, paragraphs 699 and 700; Commission decision of 15 April 2015, *Google Android*, 40.099, paragraphs 1393 et seq.

[95] Commission decision of 24 March 2004, *Microsoft I*, 37.792, paragraphs 1003 and 1008, Articles 2 and 5.

[96] Commission decision of 19 December 2007, *Mastercard*, COMP/34.579, Article 3.

[97] Vesterdorf and Fountoukakos, "An appraisal of the remedy in the Commission's Google Search (Shopping) decision", 6.

[98] Pinar Akman, "A preliminary assessment of the European Commission's Google Search decision", *CPI Antitrust Chronicle* 1, no. 3 (2017): 4; Ian Forrester, "On remedies, abuses and the links between", 341.

[99] Akman, "A preliminary assessment", 4.

[100] Forrester, "On remedies, abuses and the links between", 341.

[101] Article 24(1)(c) of Regulation 1/2003.

[102] Vesterdorf and Fountoukakos, "An appraisal of the remedy in the Comission's Google Search (Shopping) decision", 7.

[103] Ritter, "How far can the Commission go when imposing remedies for antitrust infringements?", 591-592.

4. The design of remedies in each case

As stated above, the success of competition law enforcement depends not only on the correctness of the analysis during the investigation, but also on the robustness of the solutions. In this regard, the design of remedies assumes a fundamental relevance, since it bears the decision of intervening in a market (although *ex post* after the finding of an infringement). Due to the necessary adaptation to the case (the infringement and the theory of harm), there is no list of remedies that may be imposed on an undertaking or accepted as a commitment. Also, the design of remedies is made in a forward-looking analysis, which inevitably brings about some uncertainty[104]. Notwithstanding, remedies are an interference with the rights of the undertakings.

The choice of the right remedy is, therefore, a complex exercise that must factor in several considerations. On the one hand, the solution must be adequate and sufficient to bring the infringement to an end and restore competition to the market, focusing on the best result for consumers or the relevant competition law goal, which may include quality and innovation considerations[105]. This choice will influence the determination of the specific objectives of remedies that in turn will bear direct influence on the choice of the actual solution. On the other hand, the adoption of the solution must abide by certain principles and requirements, so that it is not arbitrary. Also, the Commission's decisions should be taken bearing in mind that they will serve as precedent or at least guidance to future cases[106]. Therefore, the type of infringement, the type of procedure and the type of market will be fundamental aspects to take into account in the design of the right remedy.

---

[104] Lianos, "The principle of effectiveness", 122, points out that the adoption of remedies bears some similarities with the adoption of remedies in merger control.

[105] Majumdar and Williams, "Anchoring competition policy", 29.

[106] We may discuss the value of commitment decisions as precedent, notably because they do not entail a thorough investigation, but rather a preliminary assessment, and rarely lead to judicial appeal. See Jones, Sufrin and Dunne, *EU competition law*, 942; Jenny, "Worst decision of the EU Court of Justice", 763. However, we must accept their influence in future cases as an implicit safe harbour or guidance. See Miguel de la Mano, Renato Nazzini and Hans Zenger, "Article 102", in *The EU law of competition*, ed. Jonathan Faull and Ali Nikpay (New York: Oxford University Press, 2014), 342; Damien Gerard, "Negotiated remedies in the modernisation era: The limits of effectiveness", in *European competition law annual 2013: Effective and legitimate enforcement of competition law*, ed. Philip Lowe, Mel Marquis and Giorgio Monti. (Oxford and Portland: Hart Publishing, 2016), 165-168.

4.1. Type of infringement

There are types of infringements that are more prone to the imposition of proactive remedies than others. In case of a cartel, a mere cease-and-desist order is in principle sufficient to bring the infringement to an end. To bring infringements such as exclusivity obligations (either abuses or vertical restraints) to an end, it is usually also sufficient to declare a cease-and-desist order. Abuses based on prices (such as predatory pricing or fidelity rebates) may not be the best suited for a proactive remedy either, since it is not the Commission's mission to define the price of the products / services and such an attitude could be close to regulating the price. In these cases, a cease-and-desist order accompanied by reporting obligations should be sufficient[107], but we can find examples of imposition of more specific measures, such as *Akzo/ECS*, where the undertaking was forbidden from targeting ECS's former customers with lower prices[108].

Other types of infringements seem more adequate to be dealt with proactive remedies. These are tying and bundling[109], where the most natural remedy would be to sell the products independently[110] and, probably, the *ex libris* case: refusal to deal, where the most natural remedy would be either to order the supply of the indispensable input (on non-discriminatory and

[107] Commission decision of 16 July 2003, *France Telecom (Wanadoo)*, 38.233, Articles 2 and 3; Commission decision of 29 March 2006, *Tomra Systems*, 38.113, Article 3; Commission decision of 13 May 2009, *Intel*, 37.990, paragraphs 1754-1756 and Article 3; Commission decision of 4 July 2007, *Telefónica*, 38.784, Article 2; Commission decision of 15 October 2014, *Slovak Telekom*, 39.523, paragraph 1485 and Article 3; Commission decision of 24 January 2018, *Qualcomm (exclusivity payments)*, 40.220, paragraphs 568-570; Commission decision of 18 July 2019, *Qualcomm (predation)*, 39.711, paragraphs 1219-1221, Article 3.

[108] Commission decision of 14 December 1985, *ECS/AKZO*, 30.698, paragraphs 100 and 101, Articles 3 and 4.

[109] Commission decision of 15 April 2015, *Google Android*, 40.099, paragraphs 1394-1397; Commission decision of 24 March 2004, *Microsoft I*, 37.792, paragraphs 545, 792, 796, 1011 et seq. (although adopted under Regulation 17 the principles apply); Commission decision of 16 December 2009, *Microsoft II*, 39.530, paragraph 72. In the latter case, however, the chosen remedy was a must-carry obligation, typical of refusal to supply and not exactly of a tying case. This led some authors to criticise the solution (Pablo Ibañez Colomo, *The shaping of EU competition law* (Cambridge: Cambridge University Press, 2018) 212; Jones, Sufrin and Dunne, *EU competition law*, 531-533; Renato Nazzini, "*Google* and the (ever-stretching) boundaries of Article 102 TFEU", *Journal of European Competition Law and Practice* 6, no. 5 (2015), 309.

[110] In case of contractual tying, something close to a cease-and-desist order may suffice. Commission decision of 22 December 1987, *Hilti*, 30.787, Articles 1 and 3; Commission decision of 24 July 1991, *Tetra Pak II*, 31.043, Articles 1 and 3.

reasonable commercial terms) or a must-carry obligation[111]. These cases encompass the access to an essential facility[112] and even the access to intellectual property rights[113]. We may also add margin squeeze cases[114]-[115] where, given the existence of vertical foreclosure, the imposition of remedies may be justified[116]. The fact that a remedy may be an obvious solution does not mean that there are no challenges in its definition. For example, what should the price for the supply be? What is the solution in case of technical tying?

4.2. Type of procedure

The procedure is also a factor of great relevance and bears direct influence with the more or less interventive attitude of the Commission. This has been discussed above under the principle of proportionality. In fact, even in cases where a certain remedy would not be the evident approach, the Commission has accepted commitments from undertakings. As an example, we can take the recent *Aspen* case, where the Commission, facing a

[111] Vesterdorf and Fountoukakos, "An appraisal of the remedy in the Commission's Google Search (Shopping) decision", 8-10. See judgment of the Court of 25 March 2021, *Deutsche Telekom AG v. Commission*, C-152/19 P, EU:C:2021:238, paragraph 46, and judgment of the Court of 25 March 2021, *Slovak Telekom a.s. v. Commission*, C-165/19 P, EU:C:2021:239, paragraph 46.

[112] Commission decision of 4 May 2010, *E.ON Gas foreclosure*, 39.317, paragraphs 32-35, and Commission decision of 3 December 2009, *GDF foreclosure*, 39.316, paragraphs 26, 30, 36, 40; Commission decision of 20 September 2016, *ARA foreclosure*, 39.759, paragraphs 102 and 144, where the Commission used the cooperation procedure.

[113] Judgment of the Court of 6 April 1995, *Radio Telefís Éireann and Independent Television Publications (RTE and ITV) v. Commission,* C-241/91 P and C-242/91 P, EU:C:1995:98, paragraphs 50 and 52; judgment of the Court of 26 November 1998, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co, KG et al*., C-7/97, EU:C:1998:569, paragraphs 28 and 41; judgment of the Court of 29 April 2004, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*., C-418/01, EU:C:2004:257, paragraph 49. For the Commission, for example, Commission decision of 21 December 2012, *Reuters Instruments Codes*, 39.654.

[114] Judgment of the Court of 14 October 2010, *Deutsche Telekom AG v. Commission*, C-280/08 P, EU:C:2010:603, paragraphs 233-237. Regulatory obligations are taken into account both for the decision on the legal test and for the remedies. See judgment of the Court of 25 March 2021, *Slovak Telekom a.s. v. Commission*, C-165/19 P, EU:C:2021:239, paragraphs 57-59.

[115] It is not irrelevant that the discussion whether margin squeeze should be treated autonomously (as the CJEU does, see judgment of the Court of 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09, EU:C:2011:83, paragraphs 56-59) or as a constructive refusal to supply. Nazzini, *The foundations*, 273-275.

[116] Ritter, "How far can the Commission go when imposing remedies for antitrust infringements?", 597.

presumably exploitative abuse of excessive pricing, accepted binding commitments from the undertaking[117].

4.3. Type of market

This leads us to the next step: are remedies influenced by the market? And the answer could not be other than yes, with the paramount examples of energy and digital sectors. The strongest remedies were adopted in regulated sectors, such as the energy sector, where the Commission adopted solutions with the clear intent of opening up the markets, aimed especially at facilitating market access and the liberalisation process,[118] thus going much further than simply mirroring the abuse. Since it used mostly commitment decisions, some of the cases included structural remedies[119] or strong behavioural remedies of capacity releasing[120]. A good example is the *CEZ* case, where although there was no vertical integration (as in the *RWE* and *ENI* cases) the Commission did not settle for less than a structural remedy[121]. The far-reaching remedies were thus used to overcome the shortcomings of the liberalisation process[122] and the construction of the internal market (one of the goals of EU competition law)[123].

These solutions are open to criticism. It is debatable whether this can happen in different markets. In regulated markets, one can question whether the Commission may impose remedies that go further than the obligations the Commission itself imposes through its Directives, and whether they

---

[117] Commission decision of 10 February 2020, *Aspen*, 40.394. Recital 13 of Regulation 1/2003 does not clearly clarify when to opt for one or the other, but states that the Commission may accept binding commitments when it does not intend to impose a fine, for example in hard core cartels. Given that excessive prices are as prejudicial to consumers as cartels, it is possible to question whether the commitment procedure was adequately chosen by the Commission in this case.

[118] Niels, Jenkins, and Kavanagh, *Economics for competition lawyers*, 369.

[119] Commission decision of 18 March 2009, *RWE – Gas Foreclosure*, 39.402, paragraph 50, Commission decision of 29 September 2010, *ENI*, 39.315, paragraphs 91, 92, 93 and Commission decision of 10 April 2013, *CEZ*, 39.727, paragraph 80.

[120] Commission decision of 3 December 2009, *GDF foreclosure*, 39.316, paragraphs 67-84 and Commission decision of 4 May 2010, *E.ON Gas foreclosure*, 39.317, paragraphs 44 et seq.

[121] *CEZ* was allegedly reserving capacity on the electricity grid, which it did not control, with a view to preventing competing entry in the generation market (since a generator could not start producing without securing transmission capacity). The undertaking's commitment was to divest generation assets in order to compensate for having prevented or at least significantly delayed the emergence of a generation competitor.

[122] Niels, Jenkins, and Kavanagh, *Economics for competition lawyers*, 369.

[123] Commission decision of 14 April 2010, *Swedish interconnectors*, 39.351, paragraph 44 or Commission decision of 17 December 2018, *BEH Gas*, 39.849, paragraph 643, for example.

are proportional in the context of the fact that regulatory reforms may change the likelihood of repetition of the infringement[124]. Finally, a more regulatory position with the use of commitments may lead to problems of legitimacy or the risk of politicization[125], and deserves the critic that competition law should not act as fine-tuning of the competitive process[126].

The digital sector seems to have had a somewhat different treatment, although not less harsh. The very special characteristics of these markets, such as concentration levels, "winner takes all", network effects and disruptive services, use of algorithms or massive use of data, increasing returns to scale and network externalities, *inter alia*, may give rise to market failures, such as high switching costs, technical barriers to entry or information asymmetries, which in turn can be responsible for competitive damage, such as higher prices, less quality or less innovation[127]. The dynamic and fast changing nature of these markets may deserve a different treatment and may merit the pursuit of wider goals, such as the need to maintain market contestability, which may justify adaptation of the tools of competition policy and the adoption of stronger remedies[128].

However, the outcome of a more interventionist policy is yet to be seen. In fact, in fast changing markets, the results of the solutions adopted are more uncertain. Thus, remedies should be cautiously adopted, so that they do not render themselves disproportionate. On the one hand, if one looks at the most recent practice, we note that the Commission is stretching the scope of the TFEU prohibitions in, for example, the *Google Shopping (Search)* case, with the concept of self-preferencing,[129] or in the still on-

---

[124] Céline Gauer and Lars Kjølbye, "Energy", in *The EU law of competition*, ed. Jonathan Faull and Ali Nikpay (New York: Oxford University Press, 2014), 1632. This occurred in the *RWE* and *ENI* cases. The commentators believe that the Commission's action was justified in the cases, because the effects were too uncertain to be considered.

[125] Dunne, "Commitment decisions in EU competition law", 434.

[126] Pablo Ibañez Colomo, "On the application of competition law as regulation: Elements for a theory", in *Yearbook of European Law*, ed. Takis Tridimas and Piet Eckhout (Oxford: Oxford University Press, 2010), 305. Dunne, *Competition law and economic regulation*, 323 and 327-329; See also Jones, Sufrin and Dunne, *EU competition law*, 430.

[127] Jason Furman et al., *Unlocking digital competition: Report of the Digital Competition Expert Panel*, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, 31-41.

[128] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era*, 2019, 7, 15, 23, 67 or 68, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[129] Christian Bergqvist, "Google and the search for a theory of harm", *European Competition Law Review* 39, no. 4 (2018): 150.

going *Amazon* case[130]. On the other hand, the remedies that are being discussed are far-reaching. On the effectiveness side, not only must the Commission act swiftly so that the remedies attain the objective pursued, but it must also address the right theory of harm so that the specific objectives are well defined and the remedy well designed. One good example is the unfortunate Windows-N remedy, whereby Microsoft had to sell one version of Windows not carrying Windows Media Player that had virtually no demand[131]. The on-going discussion on how to treat platforms, notably whether structural remedies are needed[132], is also a good example of the challenge of adopting remedies in this sector. Although structural remedies may seem attractive because of the size of the undertakings, the fact is that they may bring more harm than good, given that the undertaking would lose the benefit of vertical effects and it would be possible that consumers would choose one of the platforms[133], leading to the same effect. Also, there can be less restrictive remedies, like ensuring that platforms treat competitors no less favourably than their own subsidiary services[134] (if and when justified by the facts of the case).

This can also have negative consequences in the willingness of the undertakings to innovate[135]. Additionally, given that these markets are very dynamic, the timeliness requirement assumes great relevance. This may deserve the adoption of interim measures under Article 8 of Regulation 1/2003, as we have seen in the *Broadcom* case[136]. Additionally, the use of the commitments' procedure may overcome the issues described[137], but entail the perils that we have noted, especially when we are facing novel

[130] Pablo Ibañez Colomo, "The Commission sends Amazon an SO: The rise of common carrier antitrust", *Chillin'Competition*, 2020, https://chillingcompetition.com/2020/11/10/the-commission-sends-amazon-an-so-the-rise-of-common-carrier-antitrust/.

[131] Nicholas Economides and Ioannis Lianos, "The quest for appropriate remedies in the EC Microsoft cases: A comparative appraisal", in *Microsoft on trial: Legal and economic analysis of a transatlantic antitrust case*, ed. Luca Rubini (Cheltenham and Northampton: Edward Elgar Publishing, 2010), 430.

[132] For the debate, for example, Lina Khan, "The separation of platforms and commerce", *Columbia Law Review* 119, no. 4 (2019): 973-1093; Tim Wu, *The curse of bigness: Antitrust in the new gilded age* (New York: Columbia Global Reports, 2018), 132-133.

[133] Carl Shapiro, "Antitrust in a time of populism", *International Journal of Industrial Organization*, 61 (2018): 744.

[134] Crémer, de Montjoye, and Schweitzer, *Competition policy for the digital era*, 67-68.

[135] Ibañez Colomo, "On the application of competition law as regulation", 296.

[136] Commission decision of 16 October 2019, *Broadcom*, 40.608.

[137] Marco Botta and Klaus Wiedemann, "Exploitative conducts in digital markets: Time for a discussion after the Facebook decision", *Journal of Antitrust Enforcement* 10, no. 8 (2019): 473.

theories of harm. Finally, the open approach to remedies may prove correct, but improvements are welcome, as will be detailed below.

One of the great issues with the adoption of remedies in this kind of markets (and virtually in every market) is the need to separate the adoption of remedies (which should have clear specific objectives) from market regulation. This is why we defend that remedies should be closely linked to a theory of harm. This also encompasses the question of whether enforcing competition law is the best approach to solve the problem, or legislation / regulation should be adopted[138]. In this regard, we believe that the recent proposals from the Commission regarding digital markets adopt a regulatory intention instead of simply enlarging the scope of competition law[139]-[140]. Notwithstanding, the inclusion of the market investigation tool is more debatable[141], and it is yet to be seen – if the proposals are enacted – how the Commission will use its new powers.

5. Need for improvement?

At this juncture, after taking stock of the Commission's remedial practice, we may propose some methodological improvements, bearing in mind the different nature of prohibition and commitment decisions.

Firstly, it is important to determine the right moment to identify the specific objectives within the procedure. As mentioned above, when adopting a remedy (something other than a cease-and-desist order and a fine), the Commission shall determine the specific objectives to be attained with the remedy (which include the expected outcome) within the framework of global EU competition law goals, and the second set of goals, which

---

[138] Dunne, *Competition law and economic regulation*, 319; Lowe and Maier-Rigaud, "Quo vadis antitrust remedies", 597.

[139] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the Digital Sector (Digital Markets Acts)*, COM(2020) 842 final, December 15, 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en; European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, COM/2020/825 final, December 15, 2020, https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN.

[140] See, for example, Agustín Reyna, "Why the DMA is much more than competition law (and should not be treated as such)", *Chillin'Competition*, 2021, https://chillingcompetition.com/2021/06/16/why-the-dma-is-much-more-than-competition-law-and-should-not-be-treated-as-such-by-agustin-reyna/.

[141] It is inspired in the market investigations mechanism of the United Kingdom, although more limited in scope.

largely correspond to the function of restoring competition to the market. The importance of the specific objectives is thus paramount. In fact, a broad idea that a market is not working well is not sufficient to intervene with the adoption of remedies and does not provide sound grounds for the design of a specific remedy[142]. Therefore, the Commission should resist the idea of achieving a certain market outcome. In order to do so, the specific objectives to be attained through the remedies should be identified very clearly in the procedure and as early as possible, but not before an initial competitive assessment is undertaken. Adopting these organised steps will not only allow effective solutions – because the right competition problem is identified – but also proportionate solutions – because these will not overcome the necessary ones to tackle such problem. Also, the expected outcome of the remedy should be spelled out in the decision. It is a fact that the Commission cannot foresee the exact result of a remedy. We know that market conditions evolve and that there are factors that are not in the undertakings' control. Nevertheless, a remedy can only be adopted with a specific outcome in mind. This clear identification enhances legal certainty both for the undertakings that are subject to the remedies and for the third parties that may fulfil the conditions to appeal the decision. For the reasons just described, the duty to state reasons plays a fundamental role here.

Secondly, it is submitted that the undertakings should be involved in the solution. This is achieved in the commitments' procedure (and more recently in the "cooperation" procedure). However, there is room for improvement when the Commission adopts a prohibition decision. In this case, the open-ended approach seems workable as long as more certainty is attached to the procedure. It is a fact that an open approach to remedies carries some uncertainty. However, we believe that where the three sets of objectives, especially the specific objectives, are clearly defined, this can be a good approach, notably because there are information asymmetries between the Commission and the undertakings and the latter may be better positioned to define the most effective remedies. Nevertheless, we also believe that some procedural changes could improve the process. Besides describing the specific objectives more clearly, the Commission could provide a schedule defining the most important milestones for the implementation of the remedies. During this period, discussions ought to be held and

[142] Fletcher and Hansen, "The role of demand side remedies in resolving competition concerns", 33.

the Commission should adopt a position, so that the undertaking does not end up being imposed a penalty for non-compliance[143]. This solution would ensure proportionality of the remedy and legal certainty. As a consequence, it would diminish the likelihood of the Commission bringing infringement procedures and imposing penalty payments on the undertakings when these have a different interpretation of the remedy or the timing.

Thirdly, market testing could be introduced in Article 7 proceedings[144]. The Commission must ensure that the objective of restoring competition to the market is not frustrated to the detriment of consumers. In this regard, market testing would bring about transparency by allowing other players to manifest their views and would ensure that third parties' interests are also taken into account. Gathering these views empowers the Commission with more information, which enables it to adopt more accurate and effective solutions. How to reconcile market testing with an open-ended approach is not obvious. A possible solution would be to have market testing occur during the timing set forth in the decision for implementation of the remedy.

Fourthly, it also seems positive to have the possibility to use third party independent monitoring[145] to ensure implementation of the remedy and compliance with the Commission's decision. This possibility is set forth in the Commission's proposal for digital markets[146] and would enhance effectiveness and timeliness of the remedies.

Fifthly, when the implementation of a remedy cannot be clearly determined in time (which is the case of behavioural remedies), the

---

[143] For a somewhat close proposal, see Vesterdorf and Fountoukakos, "An appraisal of the remedy in the Commission's Google Search (Shopping) decision", 7, which stress the importance of the principle of sound administration.

[144] Monti, "Behavioural remedies", 199. Fletcher and Hansen, "The role of demand side remedies in resolving competition concerns", 34-35, also stress the importance of testing remedies. In this case, they were referring to demand-side remedies, but we believe that the analogous considerations also apply to supply-side remedies. See, *a fortiori*, Maria Ioannidou, "The application of Article 102 TFEU in the EU energy sector", 155, advocating for the need to improve market testing in commitments decisions. See also Competition & Markets Authority ("CMA"), *Market studies and market investigations: Supplemental guidance on the CMA's approach*, January 2014 (revised July 2017), 38, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf#page42.

[145] We should recall that the Commission has limitations in using third party monitoring in Article 7 proceedings since the General Court's judgment in *Microsoft I*. Judgment of the Court of First Instance, 17 September 2007, *Microsoft Corp v. Commission*, T-201/04, EU:T:2007:289, paragraphs 1260-1279.

[146] European Commission, *Proposal for a Digital Markets Act*, Article 24.

Commission could include sunset clauses or clauses to periodically review the remedies[147].

Finally, regular *ex post* evaluation would be helpful to provide a reflection upon how the practice is being developed and, notably, upon the effectiveness of the adopted remedies[148]. These lessons could be used in subsequent cases.

5. Conclusion

Both the quality and the effectiveness of competition law enforcement depend on the correct definition of remedies as well. In this regard, we propose the adoption of an analytical framework to bring coherence to the remedial action of the Commission. In particular, we submit that its action should be guided by three sets of goals: the goals of EU competition law; the general objectives of EU competition law enforcement; and the specific objectives to be pursued by the remedy vis-à-vis the infringement. As for the Commission's action, it is also limited by certain requirements aimed at curtailing its discretion. Where this framework is adopted, it may bring more legal certainty to the undertakings by rendering the Commission's practice more predictable. Nonetheless, some procedural improvements would be welcome.

Bibliography

Akman, Pinar. "A preliminary assessment of the European Commission's Google Search Decision". *CPI Antitrust Chronicle* 1, no. 3 (2017): 4.

Allendesalazar, Rafael. "Remedies and sanctions for unlawful unilateral practices, with particular reference to exclusionary abuses". In *International Antitrust Law & Policy: 2007 Fordham Competition Law Institute,* edited by Barry Hawk, 509-521. Huntington: Juris Publishing, 2008.

Andreangeli, Arianna. "Between Economic freedom and effective competition enforcement: The impact of the antitrust remedies provided by the modernisation regulation in investigated parties freedom to contract and to enjoy property". *Competition Law Review* 6, no. 2 (2010): 225-257.

Andreangeli, Arianna. "Competition law and human rights: Striking a balance between business freedom and regulatory intervention". In *The Global Limits of Competition*

[147] See, for example, CMA, *Market studies and market investigations*, 41-44.

[148] Fletcher and Hansen, "The role of demand side remedies in resolving competition concerns", 36.

Law, edited by Ioannis Lianos and Daniel D. Sokol, 22-36. Stanford: Stanford University Press, 2012.

Andreangeli, Arianna. "The public enforcement of Articles 101 and 102 TFEU under Council Regulation 1/2003: due process considerations". In *Handbook on European Competition Law: Enforcement and Procedure,* edited by Ioannis Lianos and Damien Geradin, 138-180. Cheltenham and Northampton: Edward Elgar Publishing, 2013.

Bergqvist, Christian. "Google and the search for a theory of harm". *European Competition Law Review* 39, no. 4 (2018): 149-151.

Botta, Marco and Klaus Wiedemann. "Exploitative conducts in digital markets: Time for a dicussion after the Facebook Decision". *Journal of European Competition Law & Practice* 10, no. 8 (2019): 465-478.

Chalmers, Damien, Davies Gareth and Giorgio Monti. *European Union Law*. Cambridge: Cambridge University Press, 2014.

Crémer, Jacques, Yves-Alexandre de Montoye and Heike Schweitzer. *Competition Policy for the Digital Era*, 2019. Accessed June 27, 2021. https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

Da Cruz Vilaça, José Luís. "The intensity of judicial review in complex economic matters – recent competition law judgments of the Court of Justice of the EU". *Journal of Antitrust Enforcement* 6, no. 2 (2018): 173-188.

De la Mano, Miguel, Renato Nazzini and Hans Zenger. "Article 102". In *The EU law of competition*, edited by Jonathan Faull and Ali Nikpay, 329-538. New York: Oxford University Press, 2014.

De Smijter, Eddy and Ailsa Sinclair. "The enforcement system under Regulation 1/2003". In *The EU law of competition*, edited by Jonathan Faull and Ali Nikpay, 91-182. New York: Oxford University Press, 2014.

Derenne, Jacques, Ciara Barbu-O'Connor and Catalina Chilaru. "Remedies in State aid". In *Remedies in EU competition law: Substance, process and policy*, edited by Damien Gerard Damien and Assimakis Komninos, 95-118. Alphen aan den Rijn: Kluwer Law International, 2020.

Dunne, Niamh. "Commitment decisions in EU competition law". *Journal of Competition Law & Economics* 10, no. 2 (2014): 399-444.

Dunne, Niamh. *Competition law and economic regulation: Making and managing markets*. Cambridge: Cambridge University Press, 2015.

Dunne, Niamh. "From coercion to cooperation: Settlement within EU competition law". In *Remedies in EU competition law: Substance, process and policy*, edited by Damien Gerard and Assimakis Komninos, 175-212. Alphen aan den Rijn: Kluwer Law International, 2020.

Economides, Nicholas and Ioannis Lianos. "A critical appraisal of remedies in the EU Microsoft cases". *Columbia Business Law Review,* 2 (2010): 346-420.

Economides, Nicholas and Ioannis Lianos. "The quest for appropriate remedies in the EC Microsoft cases: A comparative appraisal". In *Microsoft on trial: Legal and economic analysis of a transatlantic antitrust case* edited by L. Rubini, 393-462. Cheltenham and Northampton: Edward Elgar Publishing, 2010.

Ezrachi, Ariel. "Sponge". *Journal of Antitrust Enforcement* 5, no. 1 (2017): 49-75.

Fletcher, Amelia and David Hansen. "The role of demand side remedies in resolving compeition concerns". In *Remedies in EU competition law: Substance, process and policy*, edited by Damien Gerard and Assimakis Komninos, 32-36. Alphen aan den Rijn: Kluwer Law International, 2020.

Forrester, Ian. "Article 82: Remedies in search of theories?". *Fordham International Law Journal* 28, no. 4 (2004): 919-951.

Forrester, Ian. "Creating new rules or closing easy cases". In *European competition law annual 2008*, edited by Claus-Dieter Ehlermann and Mel Marquis, 637-660. Oxford: Hart Publishing, 2010.

Forrester, Ian. "On remedies, abuses and the links between". In *Current developments in European and international competition law: 15th St. Gallen International Competition Law Forum ICF 2008,* edited by Carl Baudenbacher, 325-342. Basel: Helbing Lichtenhahn, 2009.

Frese, Michael J. Sanctio*ns in EU competition law: Principles and practice.* Oxford and Portland: Hart Publishing, 2016.

Furman, Jason, Diane Coyle, Amelia Fletcher, Philip Marsden, and Derek McAuley. *Unlocking digital competition: Report of the digital competition expert panel,* 2019. Accessed June 27, 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachm

Gauer, Céline and Lars Kjølbye, "Energy". In *The EU law of competition* edited by Jonathan Faull and Ali Nikpay, 1581-1646. New York: Oxford University Press, 2014.

Geradin, Damien, Anne Layne-Farrar and Nicolas Petit. *EU competition law and economics.* Oxford: Oxford University Press, 2012.

Gerard, Damien. "Negotiated remedies in the modernisation era: The limits of effectiveness". In *European competition law annual 2013: Effective and legitimate enforcement,* edited by Philip Lowe, Mel Marquis and Giorgio Monti, 137-184. Oxford, Portland: Hart Publishing, 2016.

Hellstrom, Per, Frank Maier-Rigaud and Friedrich Wenzel Bulst,. "Remedies in European antitrust law". *Antitrust Law Journal*, 76, no. 1 (2009): 43-63.

Hjelmeng, Erling. "Competition law remedies: striving for coherence or finding new ways?". *Common Market Law Review* 50, no. 4 (2013): 1007-1038.

Hovenkamp, Herbert. "Is antitrust's consumer welfare principle imperiled?". *The Journal of Corporation Law* 45, no. 1 (2019): 101-130.

Ibañez Colomo, Pablo "On the application of competition law as regulation: Elements for a theory". In *Yearbook of European law* 29, edited by Piet Eeckhout and Takis Tridimas, 261-306. Oxford: Oxford University Press, 2010.

Ibañez Colomo, Pablo. "'Regulatory' and 'antitrust' remedies in EU competition law". In *Remedies in EU competition law: Substance, process and policy*, edited by Damien Gerard and Assimakis Komninos, 73-93. Alphen aan den Rijn: Kluwer Law International, 2020.

Ibañez Colomo, Pablo. "The Commission sends Amazon an SO: the rise of common carrier antitrust". *Chillin'Competition*, November 10, 2020. Accessed June 27, 2021. https://chillingcompetition.com/2020/11/10/the-commission-sends-amazon-an-so-the-rise-of-common-carrier-antitrust/.

Ibañez Colomo, Pablo. *The shaping of EU competition law*. Cambridge: Cambridge University Press, 2018.

Ioannidou, Maria. "The application of Article 102 TFEU in the EU energy sector: A critical evaluation of commitments". In *Abusive practices in competition law,* edited by Fabiana Di Porto and Robert Podszun, 129-155. Cheltenham and Northampton: Edward Elgar Publishing, 2018.

Jenny, Frederic. "Worst decision of the EU Court of Justice: The Alrosa Judgment in context and the future of commitment decisions". *Fordham International Law Journal* 38, no. 3 (2015): 701-770.

Jones, Alison, Brenda Sufrin and Niamh Dunne. *EU competition law: Text, cases and materials*. 7th edition. Oxford: Oxford University Press, 2019.

Khan, Lina. "The new brandeis movement: America's antimonopoly debate". *Journal of European Competition Law & Practice* 9, no. 3 (2018): 131-132.

Khan, Lina. "The separation of platforms and commerce". *Columbia Law Review* 119, no. 4 (2019): 973-1093.

Lamadrid, Alfonso. "Competition law as fairness". *Journal of European Competition & Practice* 8, no. 3 (2017): 147-148.

Lianos, Ioannis. "Competition law remedies: In search of a theory". In *The global limits of competition law,* edited by Ioannis Lianos and Daniel D. Sokol, 177-201. Stanford: Stanford University Press, 2012.

Lianos, Ioannis. "Competition law remedies in Europe: Which limits for remedial discretion?". In *Handbook on European competition law: Enforcement and procedure,* edited by Ioannis Lianos and Damien Geradin, 362-455. Cheltenham and Northampton: Edward Elgar Publishing, 2013.

Lianos, Ioannis. "The principle of effectiveness, competition law remedies and the limits of adjudication". In *European competition law annual 2013: Effective and legitimate enforcement* edited by Philip Lowe, Mel Marquis and Giorgio Monti, 105-136. Oxford, Portland: Hart Publishing, 2016.

Loertscher, Benjamin and Frank Maier-Rigaud. "On the consistency of the European Commission's remedies practice". In *Remedies in EU competition law: Substance, process and policy*, edited by Damien Gerard and Assimakis Komninos, 53-72. Alphen aan den Rijn: Kluwer Law International, 2020.

Lowe, Philip and Frank Maier-Rigaud. (2008). "Quo vadis antitrust remedies". In *International antitrust law & policy: 2007 Fordham Competition Law Institute* edited by Barry Hawk, 597-611. Huntington: Juris Publishing, 2008.

Maier-Rigaud, Frank. "Behavioural versus structural remedies in EU competition law". In *European competition law annual 2013: Effective and legitimate enforcement* edited by Philip Lowe, Mel Marquis and Giorgio Monti, 105-136. Oxford, Portland: Hart Publishing, 2016.

Majumdar, Adrian and Williams, Iyestin. "Anchoring competition policy: Keep consumer welfare and carry on". In *Richard Whish QC (Hon), Taking competition law outside the box – Liber amicorum*, edited by Nicholas Charbit and Sonia Ahmad, 17-34. New York: Concurrences, 2020.

Marco Colino, Sandra "The antitrust F word: Fairness considerations in competition law". *The Chinese University of Hong Kong, Research Paper no. 2018-09*, 2018. Accessed on February 6, 2020, https://ssrn.com//abstract=3245865.

Monti, Giorgio. "Behavioural remedies for antitrust infringements – Opportunities and limitations". In *European competition law annual 2013: Effective and legitimate enforcement* edited by Philip Lowe, Mel Marquis and Giorgio Monti, 185-206. Oxford, Portland: Hart Publishing, 2016.

Nazzini, Renato. "*Google* and the (ever-stretching) boundaries of Article 102 TFEU". *Journal of European Competition Law & Practice* 6, no. 5 (2015): 301-314.

Nazzini, Renato. *The foundations of European Union competition law, The objectives and principles of Article 102.* Oxford: Oxford University Press, 2011.

O'Donoghue, Robert and Jorge Padilla. *The law and economics of Article 102 TFEU.* 3rd edition. Oxford and Portland: Hart Publishing, 2020.

Oliveira Pais, Sofia. "Considerações de lealdade e equidade no direito da concorrência da União: breves reflexões". *Revista de Concorrência e Regulação* IX, no. 35 (2018): 123-148.

Peeperkorn, Luc. "Coherence in the application of Articles 101 and 102: A realistic prospect or an elusive goal?". *World Competition Law and Economic Review*, 39, no. 3 (2016): 389-412.

Reyna, Agustín. "Why the DMA is much more than competition law (and should not be treated as such)". *Chillin'Competition*, June 16, 2021. Accessed June 27, 2021. https://chillingcompetition.com/2021/06/16/why-the-dma-is-much-more-than-competition-law-and-should-not-be-treated-as-such-by-agustin-reyna/.

Ritter, Cyril. "How far can the Commission go when imposing remedies for antitrust infringements?". *Journal of European Competition Law & Practice* 7, no. 9 (2016): 587-598.

Sauter, Wolf. *Coherence in EU competition law.* New York: Oxford University Press, 2016.

Sauter, Wolf. "Proportionality in EU competition law". *European Competition Law Review* 35, no. 7 (2014): 327-332.

Shapiro, Carl. "Antitrust in a time of populism". *International Journal of Industrial Organization* 61 (2018): 714-748.

Tridimas, Takis. *The general principles of EU Law.* 2nd edition. New York: Oxford University Press, 2006.

Vesterdorf, Bo and Kyriakos Fountoukakos. "An appraisal of the remedy in the Comission's *Google Search (Shopping)* decision and a guide to its interpretation in light of an analytical reading of the case law". *Journal of European Competition Law & Practice* 9, no. 1 (2018), 3-18.

Whish, Richard and David Bailey. *Competition law.* 9th edition. Oxford: Oxford University Press, 2018.

Wils, Wouter P.J. "Optimal antitrust fines: Theory and practice". *World Competition Law and Economic Review* 29, no. 2 (2006): 183-208.

Wils, Wouter P.J. "The judgment of the EU General Court in Intel and the so-called more economic approach to abuse of dominance". *World Competition Law and Economic Review* 37, no. 4 (2014): 405-434.

Wils, Wouter P.J. "The relationship betwen public antitrust enforcement and private actions for damages". *World Competition Law and Economic Review* 32, no. 1 (2009): 3-26.

Wu, Tim. *The curse of bigness: Antitrust in the new gilded age.* New York: Columbia Global Reports, 2018.