60 YEARS YOUNG YEARS STRONG

BEUC The European Consumer Organisation

The Consumer Voice in Europe

EVALUATION OF THE FRAMEWORK FOR ANTITRUST ENFORCEMENT OF ARTICLES 101 AND 102 TFEU

BEUC's response to the public consultation in relation to the evaluation of Regulation 1/2003

Contact: Vanessa Turner and Agustín Reyna – competition@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • www.beuc.eu
EC register for interest representatives: identification number 9505781573-45

Co-funded by the European Union

Ref: BEUC-X-2022-102 – 06/10/2022

Why it matters to consumers

Consumers need more immediate results from antitrust enforcement where companies have broken the law. They need effective and swift restoration of well-functioning markets that offer choice, competitive prices and innovation, and restitution for harm suffered. The current review of Regulation 1/2003 offers the opportunity to make EU competition law enforcement more effective and to make it more tangible to consumers, who are ultimately intended to be the key beneficiaries of this law. Follow-on damages actions have not yet proven to be the answer to consumer harm resulting from anticompetitive conduct by companies. Improving and strengthening the antitrust procedural framework (in ways discussed in this paper) is essential to tackle the challenges in today's markets and to ensure a better protection of consumers against the anticompetitive practices of companies that can easily and very often do take advantage of the way consumers behave to sell their products and steer consumer choice.

Summary

Regulation (EC) No 1/2003 and its implementing act, Regulation (EC) No 773/2004, set out the current procedural framework for antitrust enforcement by the European Commission (the Commission) in case of infringements of Article 101 (agreements between companies restricting competition) and Article 102 (abuse of a dominant position) of the Treaty on the Functioning of the European Union (TFEU). These antitrust procedural regulations set out, for example, the Commission's investigatory tools, remedies and sanctions, the types of possible decisions, as well as third parties' rights to intervene and to be heard.

The present review of the antitrust procedural regulations provides the Commission with the opportunity to strengthen the effectiveness of its competition law enforcement by changing, in certain respects, the way that EU competition law is enforced. Having up-to-date rules and procedures is essential to keep pace with the changes happening in the global economic landscape today. There is no need, however, for the review to attempt to change or to widen the European consumer welfare standard to ostensibly accommodate current political priorities such as industrial policy or to serve vested interests, be they European or other.[1]

This position paper sets out BEUC's suggestions on how to ensure efficient enforcement of EU competition law from the consumer perspective:

- There is a need to accelerate investigations and decisions which would create more immediate effects for consumers and other market participants, both in "traditional" and digital markets.
- Designing appropriate remedies is essential to ensure proper enforcement of EU competition law. The level of fines imposed should be effective enough to serve as a deterrent mechanism also for the largest companies.
- A revised Regulation 1/2003 must ensure that the evidence-gathering practices, tools and procedures are equipped and up-to-date to tackle today's challenges, in

[1] BEUC, 'The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era' (2019), p. 12; European Commission, 'XXIInd Report on Competition Policy' (1992) 13.

particular digitalization, and to make use of behavioural insights in competition law enforcement in consumer-facing markets. It should also add coordination mechanisms with other regulators.

- A revised Regulation 1/2003 should include restitution mechanisms for consumers who have been harmed by anticompetitive conduct where cases are closed with commitments or settlements.
- In parallel, a fund that would finance competition law enforcement projects of direct benefit to consumers should be established.
- In addition to the review of the competition law enforcement framework, the Commission should revise the EU Damages Directive[2] to enhance the ability of consumers to bring damages actions through representative actions.

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014., p. 1–19.

BEUC The European Consumer Organisation

Table of Contents

1. Introduction / General remarks 4

2. The scope and standard of EU competition law: the European consumer welfare standard 4

3. Antitrust enforcement - an analysis from the consumer perspective 5

3.1. Faster enforcement 5

3.1.1. Rebuttable presumptions 5

3.1.2. Commitments 5

3.2. Fines 6

3.3. Effective remedies 6

3.3.1. Reviewing remedies' effectiveness 6

3.3.2. Systematic consultation of third parties 6

3.3.3. Behavioural economics 7

3.3.4. Restorative remedies 7

3.4. Restitution for consumers under commitment decisions and settlement procedures. 7

3.4.1. Commitment decisions 8

3.4.2. Settlement procedures 8

3.4.3. Restitution mechanism under a new Regulation 1/2003 9

3.5. Fines – benefit to consumers 9

3.6. Private actions for damages 10

3.6.1. Collective redress 10

3.6.2. Interaction between damages claims and leniency 11

3.7. Upgrading evidence-gathering 11

3.7.1. Consumer behavioural insights 11

3.7.2. Requests for information 12

3.7.3. Evidence from consumer representatives 12

3.7.4. Financial evidence 12

3.7.5. Co-operation with other regulators 13

3.7.6. The "New Competition Tool" 13

4. Conclusion 14

1. Introduction / General remarks

BEUC welcomes the opportunity to contribute to the review of antitrust enforcement procedures and tools in Regulation 1/2003 and its implementing act, Regulation 773/2004, on how to apply EU antitrust rules in a uniform and effective way when companies enter agreements that restrict competition (Article 101 TFEU) or abuse a dominant position (Article 102 TFEU).

Whilst the current framework has provided numerous positive results over the last 20 years, it is nevertheless necessary to update this framework to tackle changes in the global economic landscape, in particular digitalization, and their impact on the way antitrust rules should be enforced.

In the following, BEUC sets out its views on both the revision of the procedural regulations and on how these could be applied more effectively in practice to optimize the benefits of competition law enforcement for consumers.[3] Before this, however, we briefly comment on the foundations of EU competition law. Having the right foundations – goals, scope and standards - is an essential prerequisite for the effective enforcement of competition law.

2. The scope and standard of EU competition law: the European consumer welfare standard

EU competition law protects the interest of consumers and competitors, and also competition as such.[4] Although the consumer welfare standard is not itself set out in the TFEU, the word "consumer" appears in the Treaty and in numerous other documents.[5] The Guidelines on the application of Article 101(3) TFEU[6] use the expression "consumer welfare", noting that the enhancement of consumer welfare and ensuring an efficient allocation of resources is at the core of EU competition law and policy.[7] The consumer welfare standard in the EU has been developed through case law, including cases emphasizing that "*the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers… Competition law and competition policy… have an undeniable impact on the specific economic interests of final customers who purchase goods or services*."[8]

Naturally, no law can be pursued in isolation and without also reference to the legal, economic, political and social context. Tackling changes in the global economic landscape today, however, does not mean that the consumer welfare standard should be replaced. EU competition law with this standard has the necessary adaptability to deal with today's context.[9] The European consumer welfare standard that has been developed over time is flexible enough to address different market failures and priorities, and is, much more so

[3] Reference is generally made to Articles in Regulation 1/2003. However, any changes would also need to be tracked through into a revised Regulation 773/2004 (and the Decision on the function and terms of reference of the hearing officer in certain competition proceedings) where relevant, and/or in DG Competition's Best Practices and Manual of Procedures.
[4] Case C-501/06 P *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I-9291, para. 63; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paras. 31, 36, 38-39.
[5] For example, in the Treaty itself under Article 101(3) TFEU "[…] *allowing consumers a fair share of the resulting benefit";* Commission guidelines and guidance papers note the importance of the consumer's interest.
[6] European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97.
[7] European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para. 13, 33; Svend Albæk, 'Consumer Welfare in EU Competition Policy' (2013), p. 70.
[8] Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, para. 115.
[9] BEUC, 'The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era' (2019), p. 12; European Commission, 'XXIInd Report on Competition Policy' (1992) 13.

than the US antitrust law standard, equipped to cater also for non-price issues such as quality and innovation. There is therefore no need, and it would rather be counterproductive, to attempt to change or widen this tried and tested standard to ostensibly accommodate current political priorities such as industrial policy or to serve vested interests, be they European or other.

What should however be changed in certain respects is the way that competition law is enforced to strengthen its effectiveness. The remainder of this paper sets out (1) how the review of the provisions of Regulation 1/2003 could contribute to this; and (2) how enforcement practices could be improved to improve results for consumers.

3. Antitrust enforcement - an analysis from the consumer perspective

The following sections set out BEUC's suggestions on how to ensure efficient enforcement of EU competition law from the consumer perspective.

3.1. Faster enforcement

The time taken to ensure termination of competition law infringements and the consequent harms today is not fit for purpose. There is a clear need to accelerate antitrust investigations and decisions creating more immediate effects for consumers and other market participants, by restoring more swiftly competitive and functioning markets that offer choice, competitive prices, and innovation.

This applies both in "traditional" and digital markets. For example, in the Rail Rolling Stock case[10], the Commission undertook unannounced inspections in June 2016 and sent a Statement of Objections only in June 2022. In digital markets, competition law enforcement tends to be data-intensive, complex and even more time consuming.[11] The Google Shopping case, for example, was formally opened in November 2010 and the decision was adopted nearly seven years later.[12] In November 2021, the General Court largely upheld the Commission's decision and while the outcome is welcomed, it must be noted that it has, to date, taken 11 years to confirm that Google's practices violated Article 102 TFEU.[13]

3.1.1. Rebuttable presumptions

More recourse to rebuttable presumptions could be warranted, thereby reducing evidence requirements in justified cases and leaving the Commission more time to bring more complex cases dealing with today's new challenges. This could be foreseen in the context of Article 2 of Regulation 1/2003. The decision-making process would also be improved by adequately increasing human and technical enforcement resources.

3.1.2. Commitments

Where appropriate, the Commission should try to use more commitment decisions pursuant to Article 9 of Regulation 1/2003 (business model changes) rather than fines which would allow faster enforcement with more immediate effect on the market and for consumers. This obviously needs to be balanced with the need for prohibition decisions under Article 7 of Regulation 1/2003, which can be legally tested to set important new precedents. Nonetheless, when the competition rules have been infringed, competitive

[10] Press release IP/22/3585 of 10 June 2022, access here: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3585.
[11] BEUC, 'Ex-Ante Regulation and Competition in Digital Markets – OECD Note by BEUC' DAF/COMP/WD(2021)66, p. 4.
[12] Commission decision of 27 June 2017, Case AT. 39740 - *Google Search (Shopping)*.
[13] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021], itself under appeal.

markets being restored in order to have functioning markets that will offer choice, competitive prices, and innovation will generally be more valuable to consumers than the imposition of fines.[14]

3.2. Fines

The possibility to impose fines represents an important element to reach effective antitrust remedies but on a stand-alone basis fines, for the largest companies, may no longer be an effective enough deterrent against anticompetitive behaviour. Similar, to what has recently been proposed by the Commission for remedies (*see 3.3.1. below*), the Commission should conduct reviews of fines to determine whether their level is effective as a deterrent or not. This could then lead to either an adjustment of the Commission's fining level practice, if necessary through an adjustment of the caps in Article 23(1) and (2) Regulation 1/2003 or of the factors to be taken into account under Article 23(3).

Where fines are imposed, they should be used to help establish funds for different consumer and competition focused projects linking competition law enforcement more closely to the consumer (*see 3.5. below*).

3.3. Effective remedies

Under Regulation 1/2003, the Commission has the power to impose remedies where it finds that companies have infringed Article 101 or 102 TFEU. Designing appropriate remedies is essential to ensure proper enforcement of competition law. Nevertheless, not all remedies imposed under Article 101 and 102 TFEU have been timely, sufficient or effective. The question of how to design effective and appropriate remedies is as important as, for example, defining the relevant market, establishing dominance and qualifying the suspected behaviour as an abuse, though this does not always appear to have been front of mind in competition law enforcement.[15]

3.3.1. Reviewing remedies' effectiveness

In every case, it is essential to consider what kind of remedy is required and how this can be achieved effectively in practice. New theories of harm, especially in digital markets, will require correspondingly appropriate remedies.[16] In August 2022 the Commission announced a study to evaluate the effectiveness of antitrust remedies, in particular looking at remedies in digital markets cases.[17] Such initiatives are to be welcomed as they are essential for ensuring strong and efficient enforcement. The Commission should continue in future to use existing tools under Regulation 1/2003 that offer the possibility to review the effectiveness of implemented remedies to draw conclusions and detect areas for improvement. By way of example, both formal requests for information (RFIs), as well as gathering sufficient information on a voluntary basis from parties with an interest in remedies could be used. This could be explicitly added to a new Regulation 1/2003.

3.3.2. Systematic consultation of third parties

The Commission should rely less on the parties being investigated when it comes to designing remedies. Instead, DG Competition, as well as third parties, should have greater involvement in constructing effective remedies. This should include consumer representatives in consumer-facing markets. Unlike under Article 9, a formal consultation

[14] Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' [2020] Journal of European Competition Law & Practice, Vol. 11, No.8., p. 430-436.
[15] BEUC, 'Abuse of Dominance in Digital Markets – OECD Note from BEUC' DAF/COMP/GF/WD(2020)1, p. 5.
[16] Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' [2020] Journal of European Competition Law & Practice, Vol. 11, No.8., p. 430-436.
[17] European Commission, 'Ex Post Evaluation of the Implementation and Effectiveness of Antitrust Remedies' (2022) COMP/2022/OP/0009, see here: https://competition-policy.ec.europa.eu/single-market-programme-smp/calls-tenders-contracts_en.

procedure on remedies under Article 7 of Regulation 1/2003 does not exist for prohibition decisions. This should be added to a revised Regulation 1/2003. Having such consultation confirmed under Regulation 1/2003 would benefit all market participants, including consumers.[18]

In addition, where a third party has been formally admitted to a case during the Commission's investigative phase, this formal admission should continue beyond the Commission's prohibition or commitments decision where it subsequently becomes necessary to review the remedies taken. Third parties should not lose their rights to be heard at this stage, which can be equally important for effective termination of competition law infringements. The revision of Regulation 1/2003 (and its implementing regulation) should explicitly include this right to be heard.

3.3.3. Behavioural economics

Systematically integrating insights from behavioural economics should also be considered to ensure that remedies are effective in consumer-facing markets. Testing in advance how a specific consumer-facing remedy works in practice is essential for competition authorities to know whether its objectives are likely to be successfully met. Given the fact that companies can and very often do take advantage of the way consumers behave to sell their products and steer consumer choice, consumer behaviour can have a considerable effect on the effectiveness and success of a specific remedy.[19] This could be specifically foreseen in a new Regulation 1/2003.

3.3.4. Restorative remedies

In some cases, in addition to requiring the conduct to be terminated, the Commission may need to require restorative steps to be taken[20] to re-introduce or restore effective competition in a market in light of the gravity and/or duration of an infringement. Such remedies may sometimes be the only possibility to counter the competitive harm that may be otherwise preserved. For example, when the assessment shows the ability of an infringement to "wall off" (almost incontestable) markets, the remedies used must be capable of breaking down these walls.

The revision of the Regulation 1/2003 provides an opportunity to clarify the use of restorative remedies in some cases as recognised in the case law.[21]

3.4. Restitution for consumers under commitment decisions and settlement procedures

Compensation for consumers harmed by competition law infringements is not working through private follow-on damages actions. Regulation 1/2003 should be amended to include that companies who wish to close antitrust cases by commitments or through settlements are required to include a mechanism offering some form of compensation to consumers who have suffered harm caused by the conduct concerned.

There are several precedents for this type of mechanism, but this approach should be considered systematically in commitment and settlement cases.

---

[18] Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' [2020] Journal of European Competition Law & Practice, Vol. 11, No.8., p. 430-436.
[19] BEUC, 'Integrating Consumer Behaviour Insights in Competition Enforcement – OECD Note by BEUC' DAF/COMP/WD(2022)55, p. 7, 8; Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' [2020] Journal of European Competition Law & Practice, Vol. 11, No.8., p. 430-436.
[20] Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' [2020] Journal of European Competition Law & Practice, Vol. 11, No.8., p. 430-436.
[21] Commission decision of 16 December 2009, Case COMP/39.530 - *Microsoft (Tying);* Commission decision of 18 July 2018, Case AT.40099 - *Google Android.*

3.4.1. Commitment decisions

Competition authorities can have a more active role in achieving the objective of providing compensation for the victims of anticompetitive practices by including compensation payments in legally binding commitments under Article 9 of Regulation 1/2003.[22] Having compensation payments as part of decisions to close investigations is not a novelty but has been included in a number of cases as set out below to either the direct or indirect benefit of consumers.[23]

The Philips/Sony CD Licencing Program case involving allegations that standard joint licence agreements violated Articles 81 and 82 EC Treaty included, among the commitments accepted to close the investigation, a retroactive application of a reduced royalty rate and the offer of a one-time credit of 10.000 USD on royalties to each EEA licensee.[24]

In the Aspen case[25] concerning excessive pricing for critical off-patent cancer drugs sold across Europe, the Commission accepted commitments offered by Aspen[26] involving also a retrospective element. Aspen committed to retroactively apply reduced net medicine prices to public and private entities (that ultimately pay or reimburse medicine prices) from the moment Aspen first proposed its commitments until the time that Aspen effectively implemented the price reductions.

The Aspen decision also included a fall-back mechanism[27] for when it was not possible to pay all or part of a transitory rebate to the 'appropriate beneficiary' identified in the decision. If no appropriate beneficiary could be identified, any non-paid parts of the transitory rebate were to be transferred to 'fall-back recipients'.

3.4.2. Settlement procedures

Settlement procedures in both cartel and other antitrust cases, which allow parties to obtain a 10% reduction in their fines in exchange for a simplified case procedure, could also constitute a vehicle to introduce a compensation mechanism for the consumer victims of anticompetitive conduct.

By way of example, the UK Office of Fair Trading (OFT) ended its 2006 investigation in the Fee-Paying Schools case[28] with a settlement involving the schools agreeing to make an *ex gratia* payment to fund a £3 million educational charitable trust fund for the benefit of pupils who attended the participant schools during the academic years of the conduct in question. This was in addition to a nominal penalty of £10,000 imposed on each of the

[22] Jacques H.J. Bourgeois and Stephanie Strievi 'EU Competition Remedies in Consumer Cases: Thinking out of the Shopping Bag' (2010) World Competition 33, No. 2, p. 241-255.
[23] See also the recent development in the Netherlands under consumer law on misleading advertising. Following the investigation by the Netherlands Authority for Consumers and Markets (ACM), Decathlon and H&M agreed to adjust their practices and to make certain commitments to minimize the risk of misleading practices involving sustainability claims. In addition, they will donate sums of money (400,000 EUR and 500,000 EUR) respectively to independent organizations that contribute towards sustainability in clothing to compensate for their vague sustainability claims. The ACM decided therefore not to impose any sanctions. See here: https://www.acm.nl/en/publications/going-forward-decathlon-and-handm-will-provide-better-information-about-sustainability-consumers
[24] Press release IP/03/1152 of 7 August 2003, access here: https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1152.
[25] Press release IP/21/524 of 10 February 2021 access here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_524.
[26] Commission decision of 10 February 2021, Case AT.40394 - *Aspen.*
[27] Final commitments of 28 January 2021, Case AT.40394 - *Aspen*, p. 10-11; see also under Appendix 1, p. 1-3.
[28] Decision of the Office of Fair Trading No. CA98/05/2006 'Exchange of information on future fees by certain independent fee–paying schools' (20 November 2006; Case CE/2890-03).

participant schools. The decision noted that this would be *"indirectly benefiting those whose interests the Act is designed to protect"*[29] and included instructions for undistributed funds.[30]

Compensation payments have been recognised as a mitigating circumstance when setting the amount of fines imposed on infringers, ultimately leading to a reduction in the fine. For example, in the Pre-insulated pipes cartel, the infringers made a substantial compensation payment to the complainant and in the Nintendo case, the company offered substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm as a result of Nintendo's infringement.[31]

3.4.3. Restitution mechanism under a new Regulation 1/2003

The Fee-Paying Schools case illustrates that restitution in a commitments or settlement case can avoid the complexity and wasted resources involved in follow-on private damages actions. Any amounts paid in the context of commitments or settlements should be calculated on the basis of a simple mechanism, without the need for precise quantification by the infringers, the victims or the Commission but on the basis of mitigation of the adverse consequences caused by the conduct.

The amount could be a (lump) sum based on other figures that the Commission in any event would have to calculate in the course of its investigation, for example a percentage of the fine or value of sales affected. The compensation payment should be made directly to the consumers or their representatives.

If the amount is considered fair by consumer representatives, they are highly unlikely to bring damages proceedings, (even if such right cannot be legally excluded), saving the companies concerned time and money. Companies would have every incentive to agree to such restitution in order to more quickly terminate the investigations and legal, including court, proceedings against them and in all likelihood conclude their liabilities.

The discussion of a compensation element of a commitment or settlement decision could run in parallel with other elements which need to be agreed and should not therefore lead to a lengthening of Commission proceedings. The Commission would not necessarily need to be involved in the determination of the amounts but only oversee that some form of compensation is paid to consumers as a condition for accepting commitments or a fine reduction in settlement cases. Thus, the Commission would not need to spend significant resources on assessing whether the compensation is satisfactory or not.[32]

With such restitution, consumers would in a timely manner directly see the benefits of competition law which are often too remote for them to appreciate fully, thus lending credibility and further support to this area of law. The inclusion under Regulation 1/2003 of some form of compensation to consumers for anticompetitive conduct would thus be beneficial to all concerned.

3.5. Fines – benefit to consumers

Fines for anticompetitive conduct are an important deterrence mechanism to try to convince companies to comply with competition law in the interests of society – to the benefit of companies who behave legally and to consumers. Nevertheless, while consumers

[29] Decision of the Office of Fair Trading No. CA98/05/2006 'Exchange of information on future fees by certain independent fee–paying schools' (20 November 2006; Case CE/2890-03), para. 1427.
[30] Ibid, Annex 1, Terms of the resolution agreed with the 'Participant schools', point 3) e).
[31] Commission decision of 21 October 1998, COMP IV/35.691/E.4 *Pre-insulated pipes*, OJ L 24, 30.1. 1999, p. 1-70, point 172; Commission decision of 30 October 2002, COMP/35.587 *PO Video Games*, COMP/35.706 *PO Nintendo Distribution* and COMP/36.321 *Omega — Nintendo*, OJ L 255/33, 8.10.2003, p. 33–100, points 440 and 441.
[32] Wouter P. J. Wils, 'The relationship between public antitrust enforcement and private actions for damages' [2007] Concurrences N°4-2007.

are intended to be the ultimate beneficiaries of competition law enforcement, these benefits are often not directly obvious to consumers.

If a small legally predefined portion/percentage of EU competition law fines was set aside in the EU budget to establish a fund to finance competition law enforcement projects of direct benefit to consumers, this would help to ensure that public competition law enforcement is perceived as directly beneficial by consumers. Consumer representatives at EU and Member State level could then bid for grants for specific competition law related projects from this fund, for example to secure access to justice, financial redress, or the promotion of consumer rights in other ways including advocacy or training projects.

To preclude any conflicts of interest in fine setting by the Commission, this fund should be delinked from any particular fines and be historically based. For example, the amount in the fund could be determined on the basis of a small percentage of the total net competition law fines collected in the preceding Multiannual Financial Framework period.

Portugal has introduced such a 'Fund for the Promotion of Consumer Rights'. 20% of the values of fines imposed by the NCA will be contributed to this fund which is designed to support projects that promote consumer rights and interests, by financing out-of-court mechanisms for consumer access to justice and national, regional or local projects promoting consumer rights and interests.[33]

Variations of the idea exist in other areas of law, for example, the US concept of "Fair Funds" in US financial and securities law.[34] The US Securities and Exchange Commission (SEC) distributes collected public fines to compensate victims of securities law violations. Initially the collected fines were paid to the United States Treasury and not distributed to investors harmed by securities law violations. However, the Sarbanes–Oxley Act introduced a change allowing the SEC to compensate victims of securities law violations by distributing collected fines through these Fair Funds.[35]

The two mechanisms set out in 3.4. and 3.5. to enhance the perceived value of competition law to consumers are not mutually exclusive.

3.6. Private actions for damages

3.6.1. Collective redress

Traditionally, victims of competition law violations are supposed to be compensated for the harm caused to them through private damages actions. This was meant to be facilitated by the EU Damages Directive. However, this Directive is in reality of no practical help to consumers as it does not include collective redress, unlike under other areas of EU law.[36]

[33] Law no. 17/2022, of 17 August which transposed Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive), OJ L 11, 14.1.2019, p. 3–33.

[34] Public Law 107–204, 107th Congress, 116 STAT. 745, Sec 308(a) of the 2002 Sarbanes–Oxley Act, access here: https://www.govinfo.gov/content/pkg/PLAW-107publ204/pdf/PLAW-107publ204.pdf

[35] US Code, Title 15, Subchapter III, § 7246 (a) - Fair funds for investors reads as follows: *"If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation",* access here: https://www.law.cornell.edu/uscode/text/15/7246#a

[36] Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27. Under the Representative Actions Directive (RAD), consumers will be able to bring collective actions for injunctions and damages for breach of EU laws such as unfair terms in

Private actions for damages are overall complex, slow and expensive to bring. The information asymmetry between the infringer, in control of the evidence required to prove a claim, and the plaintiff[37] contributes to the complexity. Without collective redress, the ability of consumers to bring damages actions is highly likely to remain exceptional. Collective redress must therefore be included in the revision of the Damages Directive.

3.6.2. Interaction between damages claims and leniency

In the recent years, concerns have arisen around the effectiveness of leniency programs and how these are affected by the Damages Directive. Before the Damages Directive came into force in 2016, the majority of cartel investigations were initiated through leniency applications, and as such they represented an important role in detecting cartels. With the increase in private damages actions primarily by companies for infringements of the competition law based on the Damages Directive, there has been a decrease in the number of the leniency applicants. Leniency applicants must weigh the financial benefit of full or partial immunity from fines against the cost of private actions for damages.

Certain policy makers advocate limiting the civil liability of leniency applicants by exempting them from follow-on damages actions fully or partially (similar to the exemption from treble damages liability for immunity applicants under US law) which would create greater incentives for cartelists to apply for leniency. This approach might negatively impact the victim's right to full compensation for the harm that has been caused by an infringement.[38] Any change in the policy must therefore ensure that the position of victims is also taken into account.

3.7. Upgrading evidence-gathering

A revised Regulation 1/2003 must ensure that the Commission's evidence-gathering practices and procedures are equipped and up-to-date to tackle today's challenges, in particular digitalization. This would include the greater use of behavioural insights in competition law enforcement in consumer-facing markets, as well as updated investigatory tools.

3.7.1. Consumer behavioural insights

Recent case developments demonstrate the importance of using not only traditional industrial economics but also behavioural economics in competition law enforcement.[39] Competition authorities and other regulators have started to integrate consumer behavioural insights from behavioural economics into their competition assessments. From the competition law perspective, behaviour of consumers matters because it can affect companies' ability to retain existing customers and steer new ones away from rivals.[40] Consumers do not always follow the theoretical models in the "more economic approach". By taking advantage of consumers' actual behaviours, companies can undermine competition. Behavioural economics must therefore systematically be considered as part

consumer contracts, general product safety, protection of privacy in the electronic communications sector, food law and safety, rights in relation to flights, misleading and comparative advertising. The Digital Markets Act will also be included in the scope of the RAD.

[37] European Commission, 'Green paper on damages actions for breach of the EC antitrust rules' (2005), p. 5.

[38] Lena Hornkohl, 'A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds' [2022] Kluwer Competition Law Blog, access here: http://competitionlawblog.kluwercompetitionlaw.com/2022/02/18/a-solution-to-europes-leniency-problem-combining-private-enforcement-leniency-exemptions-with-fair-funds/.

[39] Commission decision of 16 December 2009, Case COMP/39.530 - *Microsoft (Tying)*; Commission decision of 27 June 2017, Case AT. 39740 - *Google Search (Shopping)*; Commission decision of 18 July 2018, Case AT.40099 - *Google Android.*

[40] BEUC, 'Integrating Consumer Behaviour Insights in Competition Enforcement – OECD Note by BEUC' DAF/COMP/WD(2022)55, p. 2-8.

of the relevant economic context in consumer-facing markets.[41] A revision of Regulation 1/2003 and guidance notices should ensure that this type of evidence can be collected and effectively used in investigations into consumer-facing markets.

3.7.2. Requests for information

The scope of investigatory powers such as RFIs must be updated to explicitly take account of market developments. The Commission should in a revision of Regulation 1/2003 make sure that its RFI powers in Article 18 are sufficiently broad to enable it to obtain all relevant information in the digital era and for digital markets. Having access to all relevant information in an investigation is a prerequisite for effective enforcement. The Commission should be able therefore to request access to all data and algorithms of undertakings as well as *"to records of testing, for example in relation to the use of behavioural techniques and interface design, and explanations on these".*[42]

3.7.3. Evidence from consumer representatives

Consumer organisations can substantially contribute with their expertise and factual evidence to support competition authorities in their competition assessments, including behavioural insights in consumer-facing markets. BEUC's interventions in several cases before the European Commission and the European Courts where it provided evidence of consumer behaviour and purchasing patterns could be used in the definition of the relevant market and to assess the negative effects of an abuse of a dominant position for example. Our Members have also provided information and insights to both the Commission and their national competition authorities in relation, for example, to the financial services, telecommunications, energy and tech sectors. The same can apply to other civil society organisations.[43]

Consumer input is also essential in designing effective remedies in consumer-facing markets, where a proper understanding and integration of consumer behavioural biases would enhance the likelihood of designing appropriate remedies.

Mechanisms should be improved and strengthened to ensure greater outreach to consumer organisations to use actual real-life evidence on how consumer markets work rather than considering the theoretical consumer interest. The Memoranda of Understanding between consumer organisations and the Netherlands and Greek competition authorities respectively are a good model for such mechanisms.[44]

The Commission should also ensure that it has the necessary in-house experts, resources, and tools to assess behavioural insights.[45]

3.7.4. Financial evidence

Economic evidence should furthermore be broadened out to other expertise beyond industrial organisation economics to comprise financial evidence analysis, (including of

[41] Competition and Markets Authority, 'Online Choice Architecture – How Digital Design Can Harm Competition and Consumers' (2022) Discussion Paper CMA155, access here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1066524/Online_choice_architecture_discussion_paper.pdf.
[42] BEUC Recommendations for the Trilogue Negotiations on the Proposed Digital Markets Act (2022), p. 9.
[43] The interpretation of the notion of "interested third party" could be reviewed in this regard.
[44] The Greek competition authority, Hellenic Competition Commission, signed Memoranda of Understandings with Consumer Associations in 2019: https://www.epant.gr/en/enimerosi/press-releases/item/1423-press-release-mem Please find below the draft position paper we have prepared in response to the mentioned consultation. oranda-of-cooperation-between-the-hellenic-competition-commission-and-consumer-associations.html. Cooperation protocol between the Netherlands Authority for Consumers and Markets and the Dutch consumer association: https://zoek.officielebekendmakingen.nl/stcrt-2015-44660.html.
[45] BEUC, 'Integrating Consumer Behaviour Insights in Competition Enforcement – OECD Note by BEUC' DAF/COMP/WD(2022)55, p. 9.

statutory accounts, financial reporting, communications to shareholders and investors, published financial performance and targets, etc) to better understand company incentives and to test theories against actual financial data/company behaviour.

3.7.5. Co-operation with other regulators

The provisions in Regulation 1/2003 (Articles 11 and 12) on cooperation with other authorities should be replicated to enable meaningful cooperation between the Commission and other types of regulators where appropriate to enable consistent non-siloed enforcement. This should include data protection, financial services, energy and telecoms regulators and consumer protection authorities.

A revised Regulation 1/2003 should include a legal basis for the sharing of information with other relevant regulatory bodies, including the equivalent of Article 11 (2), (4) and (5), together with an appropriately adapted version of Article 12. At present an interested third party has more rights than a data protection authority to access information about a case concerning the use of personal data for example.[46]

3.7.6. The "New Competition Tool"

The Commission should revive the idea of the "new competition tool" set out in its 2020 consultation[47] and include this as an option for all markets under a revised Regulation 1/2003 to make sure that competition law enforcement is fit for the modern economy.

The new competition tool needs to be sufficiently broad and future proof and as such able to tackle (subject to safeguards), concerns that affect many market players at once, i.e. systemic problems.[48] In-depth investigations into market structures and harmful practices not only help in identifying market or structural issues but may also reveal a possible need for an ex-ante regulation. By way of example, the EU roaming regulation was based on a sector inquiry into roaming in the telecoms sector, conducted by the European Commission.[49]

Article 17 of Regulation 1/2003 could be updated to better reflect new markets and market functioning today. The "trend of trade between Member States, the rigidity of prices" may no longer be the most relevant examples of "circumstances [that] suggest that competition may be restricted or distorted within the common market". Whilst these are only examples, it may be useful to add other factors such as data, multisided/"zero price" markets,

[46] This would be in line with the position in some Member States such as the Netherlands and in the UK, for example. The Netherlands Authority for Consumers and Markets (ACM) has several protocols to organize its relationship with other Dutch enforcers, see https://www.acm.nl/en/about-acm/collaboration/national-cooperation. Organisations with whom the ACM has a cooperation protocol include, inter alia, the Consumer Complaints Boards, The Dutch central bank, The Dutch Data Protection Authority, The Dutch Healthcare Authority, The Dutch Human Environment and Transport Inspectorate, The Dutch Media Authority, The Netherlands Authority for the Financial Markets, The Netherlands Food and Consumer Product Safety Authority. In the UK, cooperation between the competition and various sectoral regulators exists on the basis of the so-called "concurrency arrangements", which are set out in the Enterprise and Regulatory Reform Act 2013: https://www.gov.uk/government/publications/annual-report-on-concurrency-2022/promoting-competition-in-services-we-rely-on-the-annual-concurrency-report-2022#fnref:1. A specific agreement exists between the Information Commissioner's Office (ICO), Office of Communications (Ofcom) and the Competition and Markets Authority (CMA) in the UK in relation to the digital markets.

[47] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en.

[48] Speech of Margrethe Vestager at the ASCOLA Annual Conference 'Competition in a Digital Age: Changing Enforcement for Changing Times' (2020): https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en; BEUC, 'Digital Services Act (Ex-Ante Rules) and New Competition Tool, Response to public consultation' (2020), "*[…]a market structure-based competition tool with a horizontal scope, which would allow the Commission to impose behavioural and, where appropriate, structural remedies to improve the functioning of markets independently of the finding of an infringement of Article 101 or 102 TFEU.*", p. 14.

[49] BEUC, 'Ex-Ante Regulation and Competition in Digital Markets – OECD Note by BEUC' DAF/COMP/WD(2021)66, p. 5.

ecosystems, etc. The tools to enable the Commission to make greater and more effective use of sector inquiries may also require review (*see 3.7.2. above*).

4. Conclusion

The current review of Regulation 1/2003 provides the Commission with an important opportunity to enhance the effective enforcement of EU competition law. The review is essential for enforcement to keep pace with today's market realities. This review should focus on procedural matters and not lead to a change in the tried and tested EU consumer welfare standard. Nevertheless, it should go beyond the points specifically raised in the consultation questionnaire and take the opportunity to make EU competition law more tangible to consumers, who are ultimately intended to be the key beneficiaries of this law, in the ways suggested in this paper.

Co-funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or EISMEA. Neither the European Union nor the granting authority can be held responsible for them.