

Regulatory vs antitrust remedies

A policy perspective

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Regulatory vs antitrust remedies

- Under Articles 101 and 102 TFEU, one can distinguish between two main ways in which an infringement may be brought to an end
 - **Antitrust remedies:** traditional intervention *reactive* in nature (they entail (i) a *negative obligation*, administered (ii) on a *one-off basis*)
 - The point of antitrust remedies is to preserve the competitive process
 - They make sense and are effective in the market structures of the ‘industrial era’
 - **Regulatory remedies** are *proactive* instead (they entail (i) a *positive obligation* that (ii) may require *monitoring*)
 - Regulatory remedies re-shape the competitive process
 - They apply where reactive intervention would prove ineffective

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- A decision adopting a *reactive approach* typically
 - ...declares the behaviour to be an infringement;
 - orders the firms to refrain from engaging in similar conduct in the future;
 - [and may impose a fine]
- Practices in which reactive enforcement is manifested include:
 - Cartels
 - Exclusive dealing
 - Predatory pricing

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- A decision adopting a ***proactive approach*** may take many different forms, depending on the circumstances of the case. It may...
 - ...order a firm to give access to a facility, or to license an intellectual property right;
 - set the prices at which a firm is entitled to sell a product;
 - require a firm to sell some of its assets;
 - require a firm to alter the design of its products

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Remedy	Examples
Obligation to supply/resume supplies on regulated terms and conditions	<i>CDS, Commercial Solvents, Microsoft I (interoperability obligations)</i>
Regulation of the conditions under which an input must be sold	<i>Container Shipping, Rambus, Standard & Poor's</i>
Obligations to change the design of a product	<i>Google Search, Microsoft I (media player), Microsoft II</i>
Divestiture obligations	<i>BA/AA/IB, CEZ, German Electricity Balancing Market (E.On),</i>

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gas grill

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See gas grill

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Product Name	Price	Retailer	Rating	Source
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Boretti Barilo	379,00 €	AllesvoorBBQ.nl		By Google
Horeca Contactgrill Sol...	211,75 €	XXLhoreca.com		By Google
Barbecue Kookvuur Billy ...	64,95 €	A.S.Adventure		Free shipping By Buy Now
Tristar GR-2650 Contactgrill	19,95 €	bol.com	★★★★★ (77)	By beslist.nl

Map showing locations in the Netherlands: Birmingham, Cambridge, Oxford, Bristol, Cardiff, Brighton, Southampton, The Hague, Amsterdam, Brussels, Weber-Stephen Products, Barbecue Land (Coppens), Roeben Gas GmbH & Co. KG, Cologne.

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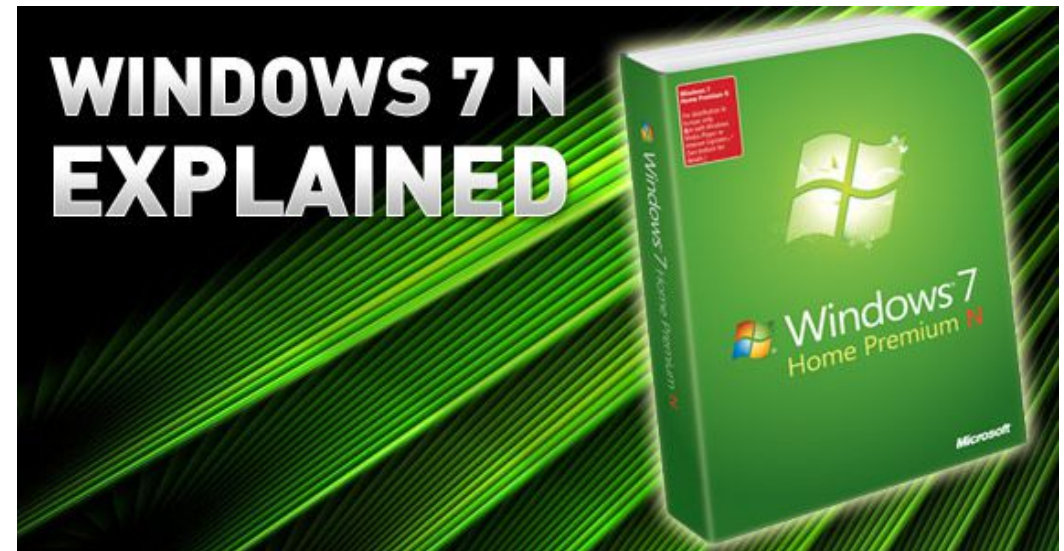
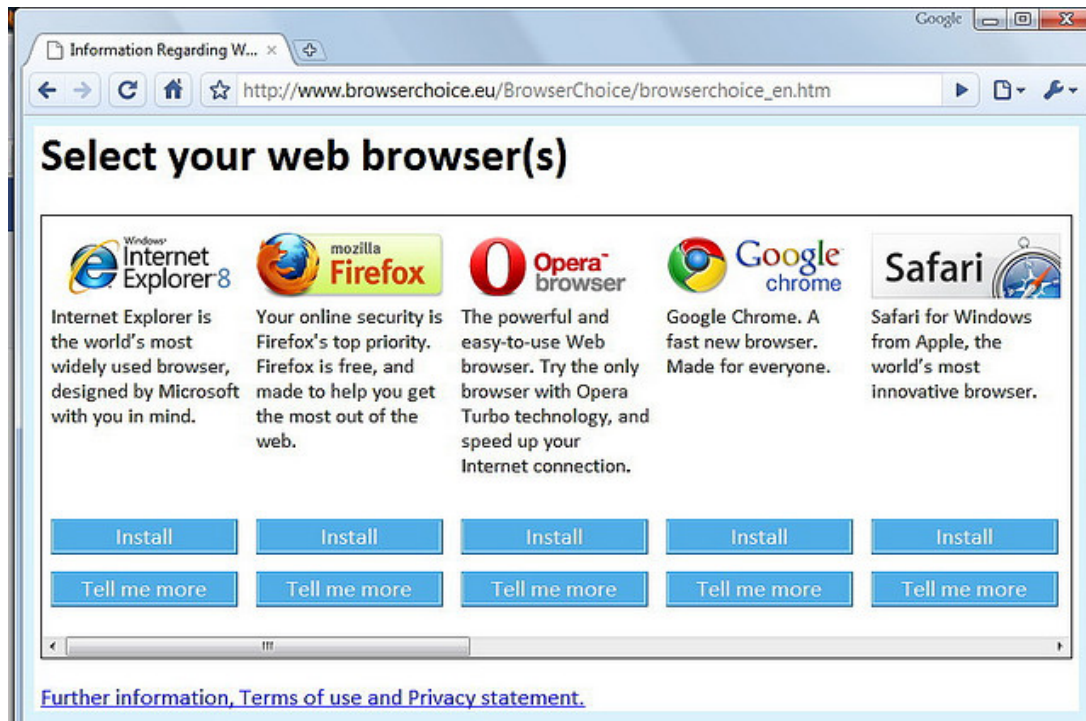
- Regulatory remedies give rise to issues and concerns that do not arise in the case of antitrust remedies. These may relate to:
 - **Design:** when enforcement is proactive, there is not a unique and/or obvious response to the concerns identified
 - The design of proactive remedies is sometimes left for the firm to figure out ('principles-based remedies')
 - In some cases, proactive enforcement will fail to yield
 - **Implementation:** proactive enforcement is inherently more complex than a negative obligation administered on a one-off basis
 - **Consequences:** striking the right balance between pro- and anticompetitive effects may be more delicate when intervention is proactive

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Tying

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Regulatory vs antitrust remedies

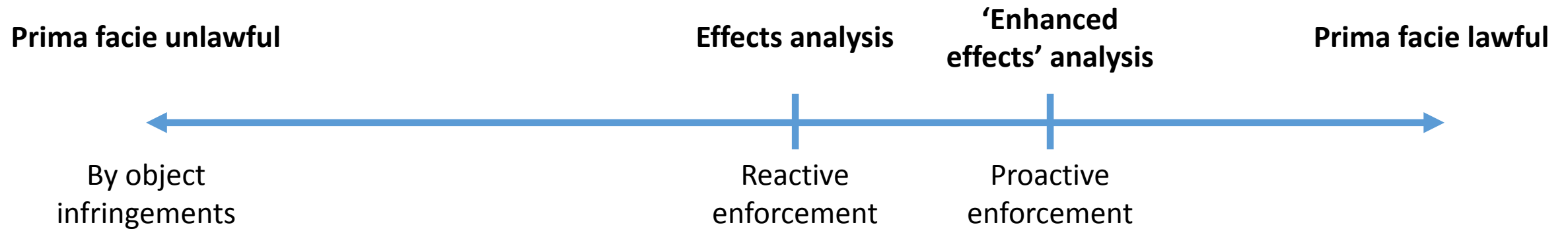


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- The nature of the remedy (regulatory vs antitrust) provides crucial insights about the nature of the case and the issues involved
 - Cases involving regulatory remedies are fundamentally different from those where reactive enforcement is effective ('tying' means nothing)
 - The remedy cannot be an afterthought: the difference should be reflected in the criteria for their prioritisation, if not the law
 - These criteria should take into account:
 - The complexities involved in the design and implementation of the remedy
 - The risks inherent in the re-shaping markets

→ **Competition law has been here before (excessive pricing, refusals)**

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