

Panel: Underling theories of harm behind the new legislative proposal

## **Market Investigations: A new competition tool for Europe?**

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(together with Massimo Motta)**

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- Massimo Motta and I express our views on the New Competition Tool (NCT) in our report commissioned by the EC:

[Intervention triggers and underlying theories of harm:  
Expert advice for the Impact Assessment of a New  
Competition Tool](#)

# In need of Market Investigations (MIs)?

- Industries and markets in which market forces alone are unlikely to result in a “competitive” outcome and thus a bad outcome for society/consumers
    - Sector regulation
  - Others in which a priori market forces might deliver
    - Competition law, when occasionally firms engage in anti-competitive conduct (agreements, abuse, mergers)
    - But sometimes markets do not function as they should (or are at risk in the foreseeable future), and competition law cannot intervene (or intervention would be too slow or of limited effectiveness)
      - ➔ MIs with adequate remedies
- (Sector inquiries by the EC are just 'market studies')

# The potential role of NCT/MI in the EU

- NCT as a market structure-based competition tool with a horizontal scope
- NCT may be the only available instrument to solve the problem or the preferred one, and thus dominates traditional competition law tools such as articles 101 or 102, or sectoral regulation if applicable
  - competition law provisions contained in articles 101 and 102 TFEU and the Merger Regulation
    - not applicable OR
    - difficult to use in a timely and effective way
  - sector regulation
    - not available (at least in the medium term) OR
    - not preferred because of the nature of the issue

**NCT/MI – desiderata**

# MIs exist elsewhere

- A few jurisdictions have market investigations
- UK AAs have carried out Market Investigations in several sectors, *i.a.*:
  - Airports,
  - Audit
  - Energy
  - Groceries
  - Local Buses
  - LPG
  - Motor Insurance
  - Private Healthcare
  - Retail Banking.....

# Theories of harm for MIs: market features

- Bad outcome not necessarily caused by the firms' behavior (although they may be reinforced by it)
  - scale or scope economies
  - (direct or indirect) network effects
  - switching costs and lock-in effects
  - asymmetric information and limited information
  - behavioral biases by consumers
- (Note: these features may exist in a variety of markets and industries; in several digital markets, they often all co-exist)

# Theories of harm for MIs: conduct

- **Conduct** of the firms themselves, which may be difficult to address under current law or case-law such as:
  - dominant firms' business practices that hurt competition (→ next slide)
  - but also more generally conduct which prevents markets from delivering consumer benefit, e.g.:
    - common ownership and cross-ownership
    - tacit collusion incl. algorithmic collusion
    - other horizontal or vertical agreements between firms
    - contractual clauses imposed on consumers

# MIs and dominant firm conduct

- Non-standard practices, e.g.:
  - Hybrid platform using data of competing sellers to own advantage? Or copy their features?
    - E.g., self-preferencing and sherlocking
  - Practices to limit bypass
- Practices that in principle art. 102 TFUE may deal with, but:
  - It may not allow for prompt intervention
  - It may deal with one particular practice
  - It would allow to deal with one particular company/sector only

# Intervention triggers of MIs

Trigger = signal that MI is worthwhile

- intimately connected to the theory of harm
- simple indicators and data (e.g. 'collusive markers')
- may be triggered by complaints, or a 101/102 case, e.g.:
  - cartel investigation that does not find documentary evidence but may hint at tacit collusion
  - abuse of dominance case that may suggest a broader competition problem

Conditions for opening a MI

- the potential consumer harm is sufficiently large (because of long-run effects or immediate serious harm) AND
- feasible and appropriate *remedies* foreseeable

# Remedies

<b>Regulatory remedies</b>	<b>Changes to regulatory framework</b>	Airports, Groceries, Local Buses, Audit, Energy
	<b>Improved info for regulators</b>	Airports
	<b>Price regulation</b>	Classified Directories, Energy (pre-payment customers)
<b>Demand-side remedies</b>	<b>Disclosure requirements</b>	Liquified Petroleum Gas (LPG), Home credit, Store Cards, Private Healthcare, Motor Insurance, Banking
	<b>Measures to facilitate/enhance search</b>	Home credit, Payment Protection Insurance (PPI), Audit, Payday, Extended warranties, Banking
	<b>Measures to improve consumer engagement or switching</b>	LPG, Extended Warranties. Home Credit, Banking, Energy
	<b>Fair terms for consumers</b>	Home Credit, Extended Warranties, Store Cards, Banking
<b>Supply-side remedies</b>	<b>Point-of-sale prohibition</b>	PPI
	<b>Data portability</b>	Banking (Open Banking)
	<b>Access to key inputs</b>	Local buses
	<b>Transparency reduction</b>	Aggregates
	<b>Unbundling</b>	PPI, Store Cards, LPG
<b>Structural remedies</b>	<b>Limits on restrictions in agreements</b>	Groceries, Audit, Motor Insurance
	<b>Limits on referral incentives</b>	Private Healthcare
	<b>Divestment</b>	Airports, Aggregates
	<b>Market share/expansion limits</b>	Classified Directories, Groceries
	<b>Market redesign</b>	Energy (settlement market)

Examples of remedies imposed in UK MIs

Source: Fletcher (2020, Journal of European Competition Law & Practice)

# **NCT/MI – current developments**

# EU – current developments

- Dec. 2 (?): **Digital Markets Act** proposal, two instruments
  - **Gatekeeper Regulation** (inspired by EC competition cases), with two lists for gatekeepers:
    - *dont's* (gatekeepers may not do, e.g., self-preferencing, pre-installation of apps...);
    - *do's* (e.g., grant access under FRAND terms, allow customers to opt-in explicitly to cross data, allow business clients to get customers out of the platform but with their consumers be able to use their apps on the platform).
  - **Market Investigation Regime** (MIR, ex-NCT): digital market is dynamic, an exhaustive list of practices not enough (big platforms may use other practices to same effects) – MIR as insurance tool to complement the regulation
  - NCT/MIR restricted to digital sector (however defined), rather than a general competition policy.

# EU – current developments

Approach 1 (as initially considered): Identify competition problem that cannot be properly dealt with the current tools

Approach 2 (as currently considered): Identify a competition issue in digital that cannot be properly dealt with the new gatekeeper regulation

Approach 2 can only deal with a very limited set of competition problems

- not sure yet which
- arguably creates more legal uncertainty (who is in, who is out?)

# EU – current developments

chance missed?

OR

first step in the right direction?