



The New Competition Tool – Institutional design and procedural rules

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The NCT – where are we?



- Conference title: **Digital Markets Act (DMA)**
 - ⇒ Focus of DMA: some sort of *ex ante* regulation of big digital platforms

- Initiative for introducing a regime of *ex ante* regulation for (some) digital platforms and the initiative for introducing a NCT are two **separate (though complementary) initiatives.**

- See **Inception Impact Assessment** for a NCT: **4 options**
 - **Option 1:** Dominance-based NCT with a horizontal scope – address unilateral conduct by dominant companies without a prior finding of an infringement
 - **Option 2:** Dominance-based NCT with a limited scope – e.g. limited to digital or digitally-enabled markets
 - **Option 3:** Market-structure-based NCT with a horizontal scope – address structural competition problems
 - **Option 4:** Market-structure-based NCT with a limited scope

- ⇒ If a NCT will be part of the DMA, the NCT will follow either option 2 or 4: NCT with a **limited scope** – limited to digital realm

Why would we need a „New Competition Tool“?



- **Goals of the NCT:**
 - Allow Commission to **remedy competition problems** that do **not follow primarily from conduct**, but from specific **„features of the market“**
 - Address competition problems in a particularly **timely and effective** manner and enable the Commission to **address the root cause of the identified competition problem**
 - ❖ **Timely intervention: speed** as defining feature
 - Strict deadlines
 - Efficient, but flexible procedure
 - Possibly also: interim measures
 - ❖ **Effective intervention presupposes:**
 - Efficient information gathering process
 - Efficient access to the file procedures
 - ❖ **Address the root cause of the competition problem:**
 - Effective remedies

Why would we need a „New Competition Tool“?



- Goals of the NCT: (continued)

⇒ At the same time: The NCT must **not give up on**

- ❖ (1) **analytical rigour**;
 - ❖ (2) **procedural rights** of the parties to the proceeding under Art. 41 and Art 47 of the Charter of Fundamental Rights
- Create instrument of a **purely administrative nature**: no infringement to be established, not quasi-criminal
 - ❖ Ideally: **less adversarial, more participative** process / more cooperation
 - ❖ At the same time: it **affects the procedural guarantees** that apply:
 - **Art. 41 CFR** (right to be heard, access to the file, reasoned decision) and Art 47 CFR (judicial review) continue to apply
 - **Art 48** (presumption of innocence) and **Art 49/50** (ne bis in idem) will not apply

How to develop a NCT that meets these goals?

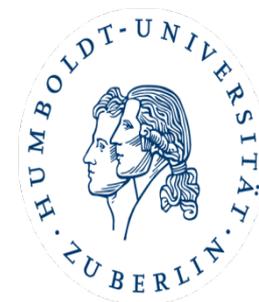


- **How to develop a NCT that meets these goals?**
 - **Procedural models available at the EU level:**
 - ❖ Reg. 1/2003
 - ❖ Procedural rules in place for Merger control
 - **CMA market investigation procedure (UK) as a role model**
⇒ But the legal framework and institutional setting differs

Presentation will focus on:

- Some **key conceptual questions** for the NCT: **(I.)**
 - ❖ The legal nature of the NCT: comp law or regulation?
 - ❖ Interaction with Art 101/102 TFEU enforcement
- **Set-up of the procedure (II.)**
- **Remedies (III.)** and
- **Interim measures (IV)**

I. Key conceptual questions for the NCT



1. Legal nature of the NCT: competition law or regulation?

- So far, we have **distinguished** between **comp law and regulation**.
- The **NCT** would add an instrument of „**small scale**“ **ex ante regulation** to the toolbox of comp law:
 - ❖ **Traditional comp law goals** – protecting competition
 - ❖ But reacting to a **broader set of market failures** that can distort the competitive process (e.g. information asymmetries) – market failures that are traditionally addressed by other branches of the law (unfair comp law, consumer protection etc.)
 - ❖ Also: The NCT can address **risks to competition**, i.e. intervene ex ante, upon a **precautionary principle**
 - ❖ Remedies imposed will not be meant to put an infringement to an end, but to **fix the underlying market failure**



I. Key conceptual questions for the NCT

2. Interaction of the NCT with Articles 101/102 TFEU

a) How does NCT relate to Art 101/102 TFEU (at the EU level)?

- **Starting point: Art 101/102 TFEU** impose **intervention thresholds** for a reason. ...
 - **Possible argument: NCT should apply only according to a subsidiarity principle**
- ⇒ **But: Will not work** in practice.
- ⇒ Nonetheless: **Art 101/102 enforcement should remain the rule.** NCT intervention should be limited to special cases
- ⇒ Proposition: **use a broad criterion for opening NCT proceedings („adverse effect on competition“)**, but complement it with **examples**
- ⇒ Also: EU Commission should **explain why it makes use of NCT,** and not Art 101/102
- ⇒ Expect NCT to be limited to some **extraordinary cases** (highly resource-intensive!).

I.2. Interaction of the EU NCT with national enforcement action



b) NCT at EU level can overlap with national Art. 101/102 TFEU enforcement

- **Coordination within the ECN must extend to the NCT:**
 - Obviously: **Avoid conflicting remedies**
 - ⇒ Suspension of pending Art. 101/102 proceedings at national level while NCT proceedings are ongoing?
 - **Companies will not be willing to cooperate in the NCT proceeding when the information gathered can be used against them in an infringement proceeding** (a related problem: private damage claims)
 - ⇒ possibility for NCAs to impose fines after the closure of the NCT proceeding?
- ⇒ At the same time: Art. 101/102 TFEU will remain fully applicable (primary law)

II. Brief outline of the NCT procedure

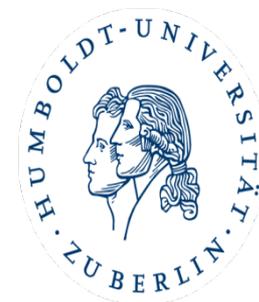


Structure of the proceeding:

- Initial informal **scoping phase**
- **Opening decision**

- Depending on the remedy envisioned:
 - ❖ **Var. 1: Remedies envisioned shall be addressed to a selected group of undertakings:**
 - **Evidence-gathering phase 1** (max 12 months; possibility of one-off 6-months extension) => ends with either closure of proceedings or a rough informal summary of the findings / theories of harm explored / bright-line principles for suitable remedies
 - **Phase 2** (max 12 months; possibility of one-off 6-months extension): state of play-meetings, commitment negotiations, further evidence gathering, market consultation, possibly market testing of remedies
 - Sending out of **provisional draft decision** to potential addressees of remedies
 - **Access to the file**
 - **Publication of decision**

II. Brief outline of the NCT procedure



Structure of the proceeding: (continued)

❖ **Var. 2: Market-wide remedies are considered**

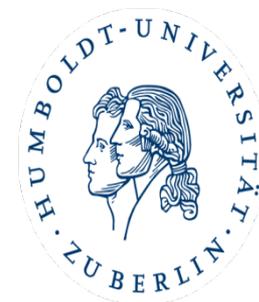
- Initial evidence gathering phase 1
- Publication of a provisional findings report that presents the evidence gathered, theories of harm explored, potential remedial options
- Informal consultations on the findings and remedial options
- Publication of decision

- Implementation of remedies

Reason for 2 procedural options:

- ❖ Where Commission considers imposing remedies upon a limited number of selected market participants: Access to the file and hearing requirements under Art 41 CFR need to be observed
- ❖ Market-wide remedies: Art 41 CFR may not be applicable.

II. Brief outline of the NCT procedure



- NCT proceedings should take **no more than 2 years** under a „normal“ schedule, with a **possibility of prolongation** by no more than **1 year** in total
 - ⇒ **Very ambitious timetable** for potentially complex proceedings
- **The procedure must be aligned to the need for speed:**
 - ❖ Strict deadlines for the Commission
 - ❖ Possibility to import information from NCAs / from other proceedings
 - ❖ Duty of companies to cooperate!
 - ❖ Efficient access to the file (mandatory confidentiality rings)
 - ❖ Interim measures

III. Remedies



Effective remedies are essential

- Remedies shall ideally **address the root cause** of the problem (not just: put infringement to an end). They:
 - ❖ must be **suitable** to address the comp problem identified and **proportionate** to it
 - ❖ will be **forward looking** and strive to **make market function more competitively**
 - ❖ Focus: reducing barriers to entry and expansion, ensuring contestability, reducing incentives to coordinate etc.
- In order to do effectively address root cause of comp problem: Commission needs **flexibility** – remedial options should include **behavioural and structural** ones, + access remedies
- Possibility to **adjust remedies in case of a material change in the facts** on which the decision was based; **or where they prove inadequate** with a view to the goals pursued (currently discussed in the UK)



IV. Interim Measures

- **Will be needed** in cases where very speedy intervention is necessary – e.g. to prevent market from **tipping**
- In such cases, interim measures must be available **already early on** into a proceeding.
- If **serious harm to competition is to be prevented**, the requirement that interim measures must only be of a **„conservatory“ nature cannot be upheld** in all cases
- Requirement of substantiating harm: The more far-reaching the interim measure / the less it can be unwound, the more robust must the ToH and evidence be
- Experience from IP law (and some NCAs): **Interim measures may strengthen the willingness of companies to cooperate**