

Position Paper on the New Competition Tool

A paper prepared by the European Competition Lawyers Forum¹

1. Introduction

- 1.1 On 2 June 2020, the European Commission (the “**Commission**”) launched a public consultation seeking views on a “*new complementary tool to strengthen competition enforcement*” (the “**New Competition Tool**” or “**NCT**”). According to the Commission, the NCT is one of the measures aimed at making sure that competition policy and rules are fit for the modern economy. It will seek to address “*gaps in the current EU rules identified on the basis of the Commission’s experience with enforcing the EU competition rules in digital and other markets as well as the worldwide reflection process about the need for changes to the current competition rules to allow for enforcement action preserving the competitiveness of markets.*”²
- 1.2 The European Competition Lawyers Forum (“**ECLF**”) welcomes the opportunity to take part in the consultation and comment on the proposed introduction of the NCT. This Position Paper summarizes the ECLF working group’s considerations relating to the NCT. In section 2, we set out in the form of an executive summary our general comments and recommendations on the NCT proposal. In the following sections we provide our specific comments. In particular, in section 3, we take a position on the possible introduction of the NCT, bearing in mind its nature as a far-reaching tool of competition enforcement and we also touch upon the question of its scope of application, i.e. whether it should be of general application or whether it should be confined to the digital markets. In section 4, we question how the NCT relates to the other proposed measures in the Digital Services Act package. In section 5, we touch upon the questions of the appropriate legal basis and EU/national competence. Finally, in section 6, we examine the operation of the market investigation tool in the UK and we draw on the UK system in putting emphasis on the necessary substantive and procedural safeguards that the NCT must integrate, if it were to be adopted in the EU.

2. General observations and position of the ECLF

- 2.1 The ECLF believes that the introduction of the NCT would represent a rather dramatic shift in the nature of EU competition enforcement. This is a far-reaching enforcement tool that under certain circumstances could lead to a weakening of existing legal and economic standards in Articles 101 and 102 TFEU, thus decreasing legal certainty. While we can certainly see that it would increase significantly the powers of the Commission, we are not persuaded that it fills a sufficiently-identified gap. The existing competition rules (including merger control and the provisions on sector inquiries) are

¹ The European Competition Lawyers Forum (“**ECLF**”) is a group of the leading practitioners in competition law from firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or their law firms. The views set out in this working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 1.

² See “Summary” in the Commission dedicated webpage [here](#).

fit for purpose and can deal with the challenges of the modern economy, as indeed the recent increase in enforcement activity shows. In the alternative, if the NCT were to be introduced, we would strongly advocate that it should be available to the Commission only in circumstances where the Commission identifies concrete competition concerns that relate specifically to market structure and not to conduct.

- 2.2 The ECLF also believes that in the case of the NCT's adoption, it should be of general application and not be confined to the digital sector or indeed to any specific market or sector.
- 2.3 The ECLF believes that the discussion around the introduction of the NCT must be seen in conjunction with the proposed Digital Services Act package. If that package were to be adopted, we see no justification for cumulatively introducing the NCT for the digital sector. In such a case, the introduction of the NCT would be even more disproportionate.
- 2.4 The ECLF has material concerns and doubts as to the appropriate legal basis for the introduction of the NCT. In particular the ECLF believes that Articles 103 and 11 TFEU cannot be a legal basis for the introduction of the NCT. Article 352 TFEU might be an appropriate legal basis, but only if the NCT is not impinging on the legal standards and conditions of the existing Treaty provisions (in particular of Article 102 TFEU), i.e. only if the NCT was destined to deal with competition concerns akin to market structure and not conduct. The ECLF also believes that the NCT should fall under the exclusive competence of the Commission and that NCAs should not have any decisional powers aside from being consulted.
- 2.5 Finally, the ECLF notes that the UK system of market investigations, which has been mentioned as a model for the NCT, contains an important number of checks and balances, and substantive and procedural safeguards. In short, the UK possesses a powerful enforcement tool but is deliberately subject to carefully judged limits. We would be concerned if the NCT were to be introduced without equivalent safeguards.

3. The nature and scope of the NCT

(a) Nature of the NCT

- 3.1 The NCT would fundamentally change the nature of competition enforcement in the European Union, if it were to be adopted. It would differ from the existing antitrust rules and would signal an important shift in their overall philosophy: in addition to a system of *ex post* enforcement, which is based on the finding of infringements, we would have a system of *ex ante* enforcement, which would not be triggered by any infringement of the law but rather by the mere existence of "competition concerns" that may (under the existing proposal) be related to **conduct** or **market structure** problems. At the same time, it would differ from the merger control rules. The latter may also amount to *ex ante* enforcement, but it remains the case that merger control is triggered by the specific conduct of undertakings – the change of control over an undertaking as a result of a commercial transaction. On the other hand, the NCT would be triggered, irrespective of a suspected violation or, indeed, of any specific conduct: the mere existence of a market structure which raises "competition concerns" would be sufficient. In that sense, the NCT in its nature is a highly "regulatory" tool departing from the historic

philosophy of EU competition law, and competition law as applied in other jurisdictions globally.

- 3.2 Therefore, we invite the Commission to be cautious before deciding to pursue the bringing into the EU competition toolkit of a tool that lies outside the historic philosophy of global competition law. We do not believe that the mainstream competition rules are incapable of dealing with perceived competition problems in digital or in any other markets. The active enforcement of the Commission and other competition authorities in the EU Member States proves that the existing antitrust rules are fit for purpose.³
- 3.3 The Commission has recently made progress in terms of time and resource-efficiency by resuscitating interim measures in appropriate cases.⁴ National competition authorities (“NCAs”) also use interim measures quite often.⁵ In addition, competition authorities can and do use commitment decisions, which are generally more time and resource-efficient than infringement ones.⁶ The Commission also avails itself of the power to conduct sector inquiries. This specific tool has been put to use by the Commission on many occasions. More importantly, the Commission has been able to build

³ See Commission decisions of 27 June 2017 in Case AT.39740 - *Google Search (Shopping)*, 18 July 2018 in Case AT.40099 - *Google Android*, and 20 March 2019 in Case AT.40411 - *Google Search (AdSense)*. The Commission is also currently pursuing a number of antitrust investigations in this area. For NCA decisions, see, in particular: (a) *Facebook user data*, in Bundeskartellamt press release, *Bundeskartellamt prohibits Facebook from combining user data from different sources*, 7 February 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html; (b) *Google Ads*, in French Competition Authority (“AdIC”) press release, *The Autorité de la concurrence hands down a €150M fine for abuse of a dominant position*, 20 December 2019, available at: <https://www.autoritedelaconurrence.fr/en/press-release/autorite-de-la-conurrence-hands-down-eu150m-fine-abuse-dominant-position>; and (c) *Apple wholesalers*, in AdIC press release, *Fines handed down to Apple, Tech Data and Ingram Micro*, 16 March 2020, available at: <https://www.autoritedelaconurrence.fr/en/press-release/fines-handed-down-apple-tech-data-and-ingram-micro>.

⁴ See European Commission press release, *Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets* (Case AT.40608 – *Broadcom*), 16 October 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109.

⁵ For NCA cases, see:

(a) *Google/Amadeus*, in AdIC press release, *The Autorité de la concurrence has ordered interim measures against Google*, 31 January 2019, available at: <https://www.autoritedelaconurrence.fr/en/communiqués-de-presse/31-january-2019-online-advertising-directory-enquiry-services-0>;

(b) *Greek press distribution*, in Hellenic Competition Commission press release, *Press Release - Decision of the Competition Commission ordering interim measures*, 4 June 2019, available at: <https://www.epant.gr/en/enimerosi/press-releases/item/916-press-release-decision-of-the-competition-commission-ordering-interim-measures.html>;

(c) *Riga waste management*, in Latvian Competition Council press release, *The Competition Council adopts a decision imposing interim measures regarding waste management in Riga*, 11 September 2019, available at: <https://www.kp.gov.lv/en/posts/the-competition-council-adopts-a-decision-imposing-interim-measures-regarding-waste-management-in-riga>;

(d) *Orange / Proximus / JV*, in Belgian Competition Authority (“BCA”) press release, *Interim measure imposed on Orange and Proximus in respect of the joint venture for the sharing of the mobile radio access networks*, 10 January 2020, available at: <https://www.belgiancompetition.be/en/about-us/actualities/press-release-ndeg2-2020>;

(e) *Bumper Pools*, in BCA press release, *Interim measure imposed on the Belgian Bumper Pool Association concerning the bumper pool balls that may be played with in competitions and matches*, 24 January 2020, available at: <https://www.belgiancompetition.be/en/about-us/actualities/press-release-ndeg5-2020>; and

(f) *Google Press publishers*, in AdIC press release, *Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP (Agence France Presse)*, 9 April 2020, available at: <https://www.autoritedelaconurrence.fr/en/press-release/related-rights-autorite-has-granted-requests-urgent-interim-measures-presented-press>.

⁶ See indicatively, closed investigations by the German and Austrian NCAs in *Google/Eyeo Adblock*, in Bundeskartellamt press release, *Proceeding against whitelisting contract between Google and Eyeo terminated after amendments to the contract*, 21 January 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/21_01_2019_Eyeo_Google.pdf?blob=publicationFile&v=2.

on such sector inquiries and has initiated antitrust investigations using Articles 101 and 102 TFEU.

- 3.4 Besides, it is difficult to conclude that the NCT would necessarily be more time and resource-efficient. Indeed, the UK experience shows that, if anything, major market investigation proceedings are highly resource intensive, and in many cases can take comparable periods to complete compared with antitrust investigations.
- 3.5 In addition, the introduction of the NCT, under certain circumstances, could have serious negative repercussions on existing legal and economic standards and tests under Articles 101 and 102 TFEU. We are concerned that the NCT may be seen as a way for the public authority to simply evade existing antitrust rules and the relevant case on the basis of a rather nebulous argument that a certain perceived “problem” cannot be addressed by these rules in the “*most effective manner*”.⁷ This is a particularly acute risk for Article 102 TFEU, since the Commission is considering among the various policy options the introduction of a “*dominance-based competition tool*”, whether with a horizontal or a limited (sectoral) scope, which would “*address competition concerns arising from unilateral conduct by dominant companies*”.⁸
- 3.6 Yet, if such conduct does not amount to an abuse of a dominant position under existing legal and economic tests, the Commission’s intervention by means of the NCT could *de facto* circumvent those standards and tests, thus weakening the integrity of Article 102 TFEU. To use a hypothetical case, if the Commission finds that it cannot bring an Article 102 TFEU case of refusal to supply/license, because the condition of “indispensability” cannot be fulfilled, or a margin squeeze case, because the price-cost test remains positive, it must not be open to the Commission to use the NCT precisely against the same undertaking and the same conduct, thus effectively circumventing existing legal and economic standards.
- 3.7 This would harm predictability and also lead to legal uncertainty. The fact that the Commission “*would not make any finding of an infringement of the EU competition rules, nor impose fines*” is immaterial and beside the above fundamental point. Leaving aside the imposition of fines, the characteristic of the application of the competition rules is precisely that they can lead to the imposition of changes to the business conduct of undertakings. That objective should not be attained “through the back door”, i.e. through the NCT, and outside the framework of the established legal and economic standards and tests of the antitrust rules.
- 3.8 For this reason, we believe, that if the EU were to adopt the NCT, it should be triggered by concrete competition concerns that relate **only to market structure and not to conduct**; otherwise this could be detrimental to the existing legal and economic standards and tests that apply to Article 102 TFEU and as a result legal certainty would suffer.
- 3.9 There is also a broader concern about the NCT, even if it were to be limited to cases of competition concerns due to market structure. This is a tool which can lead to dramatic consequences, including structural remedies, in the absence of any unlawful conduct. Such measures retroactively affect the core of the rights of owners, investors, and commercial partners of the undertakings concerned. We fear that this would harm the investment climate in the EU because of the ensuing legal uncertainty. It may also lead to protracted litigation, in the form of arbitration cases against the Member States based on the investment protection provisions of Bilateral Investment Treaties with third

⁷ See Inception Impact Assessment, p. 2.

⁸ See Inception Impact Assessment, Policy Options 1 and 2.

countries, especially when structural measures do not reflect appropriate levels of compensation.

- 3.10 In conclusion, we believe that a strong case has not been made for the introduction of the NCT and that the negative elements and risks outweigh any benefits. The ECLF believes that an efficient application of Articles 101 and 102 TFEU and the other existing tools in the Commission’s toolbox provides the best response to the challenges identified by the Commission. If anything might be improved, it could be the more increased and speedier recourse to interim relief measures and sector inquiries.

(b) Scope of application

- 3.11 In its inception impact assessment, the Commission explains that it is reflecting on whether the NCT’s use should be confined to specific sectors that are more prone to entrenched dominance and high entry barriers, in particular, digital or digitally-enhanced markets, or whether it should be of general application and have a “horizontal scope”.
- 3.12 We are fundamentally opposed to any “sectoral” competition law or tool for the following reasons.
- 3.13 Unlike “regulation”, which is sectoral in nature, i.e. it applies only to specific sectors of the economy (usually, sectors with former State monopolies), Articles 101-106 TFEU establish that the enforcement of competition law is of general application; its principles and case law apply horizontally across all sectors and industries.⁹ The Commission’s Directorate General for Competition (“**DG COMP**”) has also been established as a competition authority and not as a sectoral regulator. It possesses the same wide arsenal of enforcement, investigatory, and decision-making powers without sectoral distinctions. This general scope ensures neutrality, quality and independence.
- 3.14 Introducing the NCT and applying its interventionist measures (including potentially the imposition of structural measures) only to the digital sector or to any other specific market would also raise concerns of constitutional nature, in particular concerns centered around the principle of equality.¹⁰ Such concerns would be less pronounced if the tool had a horizontal scope. Besides, the characteristics that are sometimes raised as potential concerns with respect to the digital sector are not unique to that sector, but can also be found in other sectors.

⁹ See e.g. case C-45/85, *Verband der Sachversicherer v Commission*, ECLI:EU:C:1987:34, paras. 12-15: “It should be pointed out that [...] where the Treaty intended to remove certain activities from the ambit of the competition rules it made an express derogation to that effect. [...] [I]t must be concluded that the [Union] competition system, as set out in particular in Articles [101] and [102] of the [...] Treaty and in the provisions of Regulation No 17, applies without restriction to the insurance industry” (emphasis added). The Court clearly refers to the “competition system” (and not just to Articles 101 and 102 TFEU) as one that applies to all sectors. We therefore fail to see how that “system” can contain a tool that would be destined only for a specific sector and exclude all others.

¹⁰ The Member States’ legal systems are particularly attuned to this concern, i.e. to ensure that prescriptive rules are in conformity with the principles of proportionality and equality, which are of a constitutional nature. For similar EU law principles, see e.g. Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others v Premier ministre and Others*, ECLI:EU:C:2008:728, paras 57-74.

4. Relationship between the NCT and the Digital Services Act

- 4.1 The ECLF believes that the discussion around the introduction of the NCT must also be seen in conjunction with the proposed Digital Services Act package (the “**DSA package**”),¹¹ which the Commission published for consultation simultaneously. The ECLF is separately submitting comments on the DSA package and we refer the Commission to them. For purposes of the present Position Paper, which provides comments solely on the NCT, we explain why we consider that the NCT cannot be considered independently of the DSA package, and in particular of the proposed rules to address perceived imbalances in digital markets, where, according to the Commission, a few large online platforms act as “gatekeepers” (the “**Gatekeeper Rules**”).
- 4.2 If the EU were to introduce such Gatekeeper Rules, we believe that any justification behind the introduction of such an interventionist tool as the NCT would be very hard to see. It would certainly be so for any proposal to introduce a “sectoral” NCT, only for “digital markets”. It would be disproportionate and constitutionally controversial to subject a single sector to such a formidable combination of measures, especially since one overlaps with the other.
- 4.3 While it is true that the Commission’s proposals for *ex ante* regulation do not go as far as imposing structural interventions,¹² this should not be taken as an argument in support of the cumulative introduction of the NCT, in order to fill a supposed gap in the Gatekeeper Rules. Besides, if the EU legislator opts not to introduce structural interventions as part of the Gatekeeper Rules, we do not see why such measures should be available “through the back door”, via a tool of competition enforcement that is confined to exactly the same sector that the Gatekeeper Rules are supposed to regulate. Indeed, if, there were a serious infringement of the competition rules, Article 7 of Regulation 1/2003 (which is of general and no sectoral application) does give the Commission the power, in appropriate cases and under an enhanced proportionality test, to adopt structural remedies. We see no reason to unsettle the present state of affairs, which expresses a wise and balanced legislative choice.

5. Issues of legal basis and competence

- 5.1 The Commission proposes that Article 103 TFEU be used, in conjunction with Article 114 TFEU, as legal basis for the introduction of the NCT. The ECLF has doubts as to whether these Treaty provisions could be used for such a far-reaching tool.
- 5.2 First, under Article 103 TFEU, the Council, on a proposal from the Commission and after consulting the European Parliament, has the power to adopt the appropriate regulations or directives **to give effect to the principles set out in Articles 101 and 102 TFEU**. The Treaty is quite clear: it refers to “principles” which are themselves “set out” in Articles 101 and 102 TFEU. In other words, the text of the Treaty refers to the specific rules of Articles 101 and 102 TFEU and to the violations of these rules, not to an abstract principle that possibly lies behind those prescriptions. Rather, it refers to the prescriptions themselves.

¹¹ Commission press release dated 2 June 2020, available [here](#).

¹² Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?*, Centre for Competition Policy, 6 August 2020, p. 16.

- 5.3 Yet, if the NCT will be triggered not by any infringement but rather by the existence of concerns about certain market structure or – indeed – about certain conduct, which does not justify “*a finding of an infringement of the EU competition rules*”, as the Commission puts it, it is not clear to us how Article 103 TFEU could be used as a legal basis for a tool of competition enforcement that is over and above Articles 101 and 102 TFEU.
- 5.4 Further, Article 114 TFEU is also not an appropriate legal basis, since this is a typical basis for the approximation and harmonization of national laws of relevance to the internal market, and not a legal basis for the introduction of a new norm at EU level. The case law of the Court of Justice on this point is clear.¹³
- 5.5 The only possible legal basis would be Article 352 TFEU, which serves as *ultimum refugium* for an EU legal basis and is subject to the Council acting unanimously. It is also important to note that the Court of Justice has stressed that this provision “*being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the [Union]. Article [352 TFEU] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose*”.¹⁴
- 5.6 This is an important limitation on Union competencies. Contrary to national legislations, which result in amendments in national competition laws, in order to introduce additional powers to deal with digital markets and “gatekeepers”,¹⁵ the Union cannot act in the same way by relying on Article 352 TFEU. It has to be clear that any introduction of secondary legislation via Article 352 TFEU cannot effectively result in an amendment of the Treaty competition norms, in particular of Article 102 TFEU.
- 5.7 As far as questions of competence are concerned, the ECLF notes that the Commission’s proposal seems to imply that the NCT should be concentrated in the hands of the Commission and not be decentralized. There is a generic reference to “*close cooperation with the national competition authorities*”¹⁶ but that does not seem to imply any concrete powers to be shared with the national authorities. So we do not have indications from the Commission that the NCT is envisaged as a decentralized tool, so we assume that only the Commission would have the competence to commence an NCT investigation, possibly after some consultation with the NCAs. Therefore, no system of sharing of competencies between the EU and the Member States would be put in place, like in merger control.

¹³ See e.g. Case C-436/03, *Parliament v Council*, ECLI:EU:C:2006:277, paras. 44-6: “*In those circumstances, the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms. [...] It follows from the above that [Article 114 TFEU] could not constitute an appropriate legal basis for the adoption of the contested regulation, which was correctly adopted on the basis of [Article 352 TFEU].*”

¹⁴ Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:1996:140, para. 30.

¹⁵ The Commission’s proposal seems to be inspired by such developments: “*More recently, several EU Member States have called for changes and complements to the existing competition rules and some of them have prepared legislative proposals for amendments to their national competition laws*” (see Inception Impact Assessment, under A).

¹⁶ See Inception Impact Assessment, under Policy Option 1.

- 5.8 In case the NCT were to be adopted, the ECLF would, indeed, prefer a centralized to a decentralized model and would agree with the Commission having exclusive competence to put the NCT in effect, if that is the implied position of the Commission. Especially if the NCT is reserved only for serious competition concerns that relate to markets, which are global in nature, only action by the Commission can effectively address such concerns. Besides, it is imperative to avoid a Europe of “bits and pieces” while employing such a powerful tool.

6. The UK market investigation tool as model and the need of appropriate safeguards

- 6.1 There is no doubt that the Commission’s NCT proposals have been inspired by the UK market investigation regime. Other countries such as Greece, Israel and South Africa have also introduced this model, but aside from two occasions in Greece with meagre results and six cases in South Africa, four of which were concluded with commitments or undertakings, the UK experience stands out. It is therefore fundamental to study the UK model and draw inspiration from the very elaborate safeguards of that system in terms both of substance and procedure.
- 6.2 As a starting point, the Commission should consider carefully the record of the UK market investigation tool. It is, at least, debatable whether it has proved an effective tool – at least relative to the agency resources that have been consumed by the process. For example, it is widely believed that a number of major market investigations did not secure significant market change, following a lengthy and intensive review process. These include, for example, the cases of motor insurance, movies on Pay-TV (which concluded with no remedies), audit (where a further market study was deemed necessary), energy, retail banking, and the most recent market investigation in relation to the funeral sector (partly in this case for COVID-related reasons).
- 6.3 It is also notable that the CMA declined to make market investigation references (and, indeed, preliminarily ruled out making such references at an early stage) in two recent, major market studies. First, the audit market study followed an earlier market investigation, which was perceived as having failed to secure sufficient market change. Despite the fact that a follow-on review necessarily had to “clear the air” once and for all, the CMA declined to undertake the full review available to it by making a market investigation reference. Second, the recent online advertising market study displayed many of the hallmarks of a case where a market investigation would previously have been thought appropriate: a highly complex market which had not been studied in depth before, with significant consumer implications, and a need for deep investigation. Nonetheless, the CMA concluded after just six months of review that it did not propose to make a market investigation reference. We believe that the Commission should reflect on this record before deciding whether to pursue the implementation of a comparable tool in an EU context.

(a) Procedure leading to a market investigation

- 6.4 Before launching a market investigation, the CMA - or the authority making the market investigation reference - may¹⁷ carry out a market study, to examine why particular markets may not be working well. During a market study, the CMA has the power to

¹⁷ The CMA can launch a market investigation without a market study, as it did, for example, in the case of the 2011-2012 audit market investigation.

require the attendance of parties to give evidence, require any person to produce specified documents or categories of documents that are in that person's custody or under her control, require any person carrying on business to supply specified forecasts, estimates, returns or other information in a specified form and manner.¹⁸ The CMA cannot, however, conduct dawn raids in the context of a market study.

- 6.5 Pursuant to Section 131(1) of the Enterprise Act, the CMA Board has the power - but is under no obligation - to make a market investigation reference if it has reasonable grounds for suspecting that any feature, or combination of features, of a market prevents, restricts or distorts competition in all or part of the UK.¹⁹

(b) The Adverse Effect on Competition

- 6.6 Market investigations will not normally aim to identify and prosecute anticompetitive horizontal concertation, abuse of dominance, or vertical restrictions. As explained in the Guidelines on market investigations (“**CMA Guidelines**”),²⁰ the process is investigative and inquisitorial, not accusatorial; the investigation does not imply that market participants are suspected of wrongdoing. Market investigations aim to tackle an adverse effect on competition (“**AEC**”).²¹
- 6.7 The AEC analysis is not bound by the requirements and methodology of antitrust analysis, such as the need to establish firm culpability and/or intent, or the need to provide a firm and unerring market definition. However, the CMA needs to show that the AEC is the result of firm conduct, or the corollary of structural weaknesses that arise either in the supply side (e.g. tight oligopolistic structures) or the demand side (e.g. lack of transparency towards consumers) of a particular market.²² Next, the CMA must set out a theory of harm, i.e. “*a hypothesis of how harmful competitive effects might arise in a market and adversely affect customers.*”²³ Countervailing factors, including efficiencies, are taken into account.²⁴
- 6.8 Although the AEC is determined on the basis of a “balance of probabilities” analysis,²⁵ the CMA is required to identify a competitive benchmark, in the form of a “well-functioning market”, against which to determine how the market performs in terms of competition.²⁶

¹⁸ The CMA can impose administrative penalties for failure to comply with any requirement or notice, or for intentionally obstructing or delaying a person in the exercise of its powers.

¹⁹ The sectoral regulators with concurrent powers can also make references on this basis.

²⁰ See para. 21: “*The identification of anticompetitive features in a market investigation or the imposition of remedies does not mean that market participants have infringed the law. The process is investigative and inquisitorial, not accusatorial. To be required to give evidence in a market investigation or be subject to remedial action following an investigation does not imply that market participants are suspected of wrongdoing.*”

²¹ CMA Guidelines, para. 19.

²² CMA Guidelines, paras 155-161.

²³ CMA Guidelines, para. 163. The initial theories are set out in the issues statement published at an early stage in an investigation. Moreover, the Guidelines (para. 170) specify that competitive harm can arise from five main, mutually exclusive, sources, namely (a) unilateral market power, including market concentration; (b) barriers to entry and expansion; (c) coordinated conduct; (d) vertical relationships; and (e) weak customer response.

²⁴ CMA Guidelines, paras 173-176.

²⁵ CMA Guidelines, para. 319.

²⁶ CMA Guidelines, para. 320.

(c) Remedial action

6.9 The AEC found by the CMA may be addressed through remedial action. The CMA’s power to adopt remedies is the most critical feature of this process. Traditional competition law enforcement leads to backward-looking, firm-specific, and, mostly punitive, remedies, while market investigation remedies are supposed to capture the entire structure of and behaviour in a market, in a forward-looking manner. However, remedies must always be addressed to specific undertakings; it is only the government and the legislature that may introduce horizontal regulation. Indeed, the range of remedies open to the CMA is limited by statute (Schedule 8 of the Enterprise Act).

In nearly all market investigations to date, some form of remedy has been imposed. In most cases, behavioural remedies have been imposed (e.g., transparency obligations, codes of conduct), but some have resulted in the break-up of companies (e.g., Heathrow and Gatwick airports to be under separate ownership). Table 1 below provides an indicative typology of the different remedies utilized by the CMA in its market investigations.

Table 1: A Selection of Market Investigation Remedies, 2003-2016

Regulatory remedies	Changes to regulatory framework	Airports, Groceries, Local Buses, Audit, Energy
	Improved info for regulators	Airports
	Price regulation	Classified Directories, Energy (pre-payment customers)
Demand-side remedies	Disclosure requirements	Liquified Petroleum Gas (LPG), Home credit, Store cards, Private Healthcare, Motor Insurance, Banking
	Measures to facilitate / enhance search	Home credit, Payment Protection Insurance (PPI), Audit, Payday, Extended warranties, Banking
	Measures to improve consumer engagement or switching	LPG, Extended Warranties, Home Credit, Banking, Energy
	Fair terms for consumers	Home Credit, Extended Warranties, Store Cards, Banking
	Point-of-sale prohibition	PPI
	Data portability	Banking (Open Banking)
Supply-side remedies	Access to key inputs	Local buses
	Transparency reduction	Aggregates

	Unbundling	PPI, Store Cards, LPG
	Limits on restrictions in agreements	Groceries, Audit, Motor Insurance
	Limits on referral incentives	Private Healthcare
Structural remedies	Divestment	Airports, Aggregates
	Market share / expansion limits	Classified Directories, Groceries
	Market redesign	Energy (settlement market)

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- 6.10 Remedies can be agreed with the undertakings concerned, or adopted through CMA orders. In either case, they must undergo an analysis of effectiveness. Specifically, the CMA must review different remedy options and will tend to favour remedies that have a higher likelihood of achieving their intended effect, account taken of their practicality, time effect, compatibility with standing legislation, and interface with other proposed remedies.²⁸
- 6.11 More importantly, the CMA must perform a strict reasonableness and proportionality analysis. According to the CMA's Guidelines,²⁹ a proportionate remedy is one that:
- is effective in achieving its legitimate aim;
 - is no more onerous than needed to achieve its aim;
 - is the least onerous if there is a choice between several effective measures; and
 - does not produce disadvantages which are disproportionate to the aim.
- 6.12 Finally, the CMA must carry out an impact assessment of the remedial action.³⁰ The Guidelines emphasize the importance of considering both the benefits that are more easily quantifiable (such as lower prices), and those benefits that are harder to quantify (e.g. dynamic benefits of increased rivalry on productivity and innovation).³¹

(d) Lessons for the EU

- 6.13 It is obvious from the above that the UK system contains an important number of checks and balances and substantive and procedural safeguards.
- 6.14 First, as to substance, the UK system is not based on any finding of infringement but is nevertheless conditioned on the need to demonstrate an AEC through benchmarking,³²

²⁷ Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?*, 6 August 2020, Centre for Competition Policy.

²⁸ CMA Guidelines, paras. 334-341.

²⁹ CMA Guidelines, para. 344.

³⁰ CMA Guidelines, paras. 348-354.

³¹ CMA Guidelines, para. 351.

³² CMA Guidelines, paras. 19, 28-30, 319-320.

to identify market structure or conduct features that harm competition,³³ to point to a source of competitive harm as part of setting out a theory of harm,³⁴ and to act only under the limitations of effectiveness, reasonableness, proportionality and impact assessment of remedial action.³⁵ These are all quite high standards and for good reasons.

- 6.15 Second, as to procedure, the UK regime is premised (generally) on two separate procedural stages and on the existence of elaborate safeguards and due process. Detailed guidelines apply to the conduct of market investigations in the UK, including precise timescales that envisage site visits, the publication of working papers and annotated issues statements, a series of hearings with concerned parties, and consultation on any recommended remedies. Such level of engagement and transparency does not currently apply to the Commission's enforcement powers. Then, there is strong judicial review by the Competition Appeal Tribunal ("CAT"), which reviews the merits of the CMA's decisions. Although the EU Courts will certainly review the Commission's actions, the standard of that review is not as high as in the UK. Yet the existence of appropriate safeguards and due process is indispensable, bearing in mind that companies that have committed no infringement and may be operating perfectly legally, stand to have remedies imposed on them that can go so far as to require forced divestitures.
- 6.16 Some of these safeguards cannot simply be available in the EU. One wonders, therefore, what checks and balances can be put in place at EU level, in view of the well-known limitations of the Commission structure and the role of DG COMP. Due process is utterly important, notwithstanding that the NCT will not be leading to fines and therefore one could argue that NCT enforcement may not amount to a quasi-criminal matter. However, the NCT may lead to stringent measures that affect the core of the right to property, even though there has been no violation of any public order laws. Ensuring that procedural rights are respected is a *sine qua non*.
- 6.17 As far as the substantive standard warranting intervention is concerned, this would have to be concretely described and connected to a specific theory of competitive harm. Although the trigger of a market investigation will not be a suspected violation but rather the existence of "competition concerns", the word "competition" should carry weight. In other words, the bulk of fundamental principles behind competition enforcement must inform that particular standard.
- 6.18 With regard to remedies, we believe that the imposition of structural remedies should be subject to a higher standard of proportionality, effectiveness and necessity, following the approach of Article 7 Reg. 1/2003. In addition, as in the UK system ("undertakings in lieu"), the market investigation should allow the possibility of the undertakings concerned offering commitments. We do not think that the Commission should have the power to order interim measures in a situation where no violation has taken place, the conduct at issue is perfectly lawful, and the NCT intervention is merely guided by certain regulatory preferences.
- 6.19 Finally, we believe that judicial review should not be limited by any supposed discretion that the Commission enjoys. If anything, the standard of judicial review should be as high as in Articles 101 and 102 TFEU, if not higher. Of particular concern to the ECLF is also the rather high standard for granting of interim relief by the EU Courts

³³ CMA Guidelines, paras. 155-162.

³⁴ CMA Guidelines, paras. 163-170.

³⁵ CMA Guidelines, paras. 334-353.

against decisions of the Commission. If there has been no violation and still the Commission is ordering far-reaching remedies that fundamentally limit companies' right of property and contractual and economic freedom, such measures ought to be suspended until the EU judicature has had the chance to review them.

- 6.20 All of the above shows the inherent difficulties of introducing a far-reaching tool into EU competition enforcement while some of the important UK safeguards will simply not be available or it will be very difficult to put in place. For this reason, the ECLF's primary recommendation and comment remains: the introduction of the NCT appears as an unnecessary irritant in an otherwise effective EU competition enforcement system.

ANNEX 1

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