The New Competition Tool: Its institutional set-up and procedural design

Expert report

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Expert Report

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I. Introduction

The Commission is considering legislation which would introduce a "New Competition Tool" (NCT). Its general goal would be to undergird the protection of undistorted competition in the internal market with a new pillar. The NCT shall allow the Commission to tackle competition problems that are not covered or cannot be addressed effectively under the current EU competition rules. The NCT shall differ from and complement the existing competition rules in various respects: (1) It shall not focus on a wrongdoing of individual undertakings, but on identifying specific features of the market that impede or hamper competition. It will therefore not be of a "quasi-criminal" nature, and its application will not involve fines; (2) in certain settings where special market characteristics and the conduct of the companies operating in the markets concerned create a threat for competition, it shall allow for a precautionary intervention that would not be feasible under existing competition rules; (3) it shall allow for a particularly timely intervention; and (4) it shall enable the Commission to address the root cause of the identified competition problem.

This study is meant to explore the institutional set-up of the NCT (IV.), its procedural design (V.), the scope of remedial powers and the criteria for choosing remedies (VI.); the need for a commitment procedure (VII.); the need for interim measures (VIII.); sanctions in case of non-compliance with remedial obligations or commitments (IX.); and judicial review (X.). The correct legal basis for the NCT is not part of this study.

The analysis has to start with a brief look at the legal nature of NCT proceedings, however (II.).

The type of competition problems to be addressed by the NCT are analysed in another study.[1] But substance and procedure necessarily interact. Among other things, it is very likely that there will be an overlap between a future NCT and the traditional competition rules. Consequently, certain competition problems could, in the future, be addressed under the existing competition rules (Articles 101 and 102 TFEU) and proceedings (infringement proceedings, Article 7 Reg. 1/2003; commitment proceedings, Article 9 Reg. 1/2003; sector inquiries, Article 17 Reg. 1/2003) or with the NCT. The interaction between the NCT and traditional competition law enforcement will be discussed in Section III.

The scope of application of the NCT is still under debate. In its Inception Impact Assessment[2], the Commission has outlined four different policy options: The NCT could be designed as a dominance-based competition tool with a horizontal scope (Option 1), as a dominance-based competition tool limited to specific sectors (Option 2); as a market structure-based competition tool with a horizontal scope (Option 3); or as a market structure-based competition tool limited to specific sectors (Option 4). This study will not take a stance on which option is preferable. In principle, the procedural issues discussed in this study would need to be addressed in all four settings. The interaction with traditional competition law enforcement would differ, however, depending on which option is chosen. When discussing the interaction, this study will therefore refer to the different policy options.

While the NCT would be a novel instrument within the EU competition policy framework, some jurisdictions have already implemented regimes that are similar in

[1] *See Motta/Peitz, Intervention trigger and underlying theories of harm, Report for the EU Commission, 2020.*
[2] *Ref. Ares(2020)2877634.*

their goal and structure.[3] Among them, the CMA market investigation stands out as a full-fledged, sophisticated regime that has already been widely used. While the institutional set-up of competition law enforcement and policy in the UK differs from that in the EU, the experience gained from CMA market investigations can nonetheless help to identify critical issues and choices to be made and will therefore serve as a reference point throughout this study.

II. The legal nature of the NCT and the style of the administrative proceeding

The NCT will differ from established competition law proceedings in two important ways: by striving for a correction of market defects to protect and improve competition irrespective of objectionable conduct, it stands somewhere between competition law and economic regulation[4] (1.); furthermore, and similar to economic *ex ante* regulation, NCT proceedings will not be of a quasi-criminal, but of a purely administrative nature (2.). These two features will affect the procedural design throughout.

Thirdly, the NCT is meant to allow for a particularly quick intervention. It will therefore need to work under a strict timetable (3.)

1. NCT between competition law and ex ante regulation

Generally, a distinction is made between competition law and economic regulation. Where competition law is meant to protect a well-functioning competitive process by prohibiting the abuse of dominance and anti-competitive agreements or concerted practices, regulation typically pursues a broader set of goals and strives to correct a broader set of market failures. Apart from merger control, competition law enforcement takes place *ex post*, whereas economic regulation intervenes *ex ante.* And typically, regulatory law takes a more pro-active stance in promoting competition, rather than merely protecting existing competition – the traditional domain of competition law.

The NCT is placed somewhere between these poles. While pursuing competition law goals, it will not focus on conduct but on features of the market that adversely affect competition. The analysis will be of a prospective and holistic nature: It shall identify risks for competition or the causes of a continuing lack of competition. Likewise, remedies will not strive to effectively put an end to an infringement but to address the underlying competition problem as such, with a goal to ensure effective competition in the future. Apart from well-known gaps of competition law – like tacit collusion or other forms of strategic interdependence between firms – demand-side conduct can be

[3] *See Whish, New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK's market investigation tool, Study for the EU Commission, 2020.*

[4] *See Larouche/de Streel, Interplay between the New Competition Tool and Sector-Specific Regulation, Study for the EU Commission, 2020; and Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 9, available on ssrn.com (speaking of „small-scale ex ante regulation (…) in markets which require intervention in order to work more effectively, but which are not covered by a sector regulator").*

considered, and remedies may be imposed that would traditionally rather be viewed as a form of consumer protection.[5]

At the same time, the NCT is not regulatory in its ambition and institutional set-up. Remedies will need to be implemented and monitored without the backing of a sectoral regulator.[6] Ideally, they will react to the special features of a market that may hamper competition by complementing or adjusting its framework of rules and "institutions" such as to preserve or restore competition without constant regulatory oversight. This shift in perspective can turn the NCT into an important complement to the current system of protecting undistorted competition in the internal market – not least in light of the "digital shift", with its novel structural challenges to competition.

2. Administrative nature of the NCT, a more participative process and procedural guarantees

A core feature of the NCT is that it will neither involve the finding and sanctioning of wrongdoing nor the imposition of fines (apart from sanctions imposed for the non-compliance with procedural obligations imposed in the course of the investigation). Rather, it is geared towards an analysis of whether specific features of a market tend to lead to a malfunctioning of the competitive process. Since NCT proceedings will not be used to investigate and sanction rule infringements, they will not qualify as quasi-criminal proceedings within the meaning of Article 48 of the Charter of Fundamental Rights (CFR) and Article 6 of the European Convention on Human Rights (ECHR).[7]

Given the potentially vast and intrusive powers that the NCT would confer upon the Commission, strong procedural rights and checks will need to be in place nonetheless. In particular, the procedural rights of fairness as set out in Article 41 CFR will apply.[8] Wherever market actors are directly and individually affected by a NCT investigation, they will have a right to be heard (Article 41(2)(a) CFR), a right of access to the file (Article 41(2)b CFR), a right to careful and impartial examination,[9] a right to a reasoned decision (Article 41(2)(c) CFR and Article 296 TFEU)[10] and a right to judicial review (Article 47 CFR and Article 6 ECHR). Furthermore, the right to protection of business secrets and other confidential information (Articles 7 and 8 CFR) and the protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities[11] will apply.

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[5] Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 4, available on ssrn.com.

[6] Where NCT remedies are imposed in a regulated sector, the sectoral regulator may, however, be tasked with the monitoring of their implementation – for further analysis see Larouche/de Streel, Interplay between the New Competition Tool and Sector-Specific Regulation, Study for the EU Commission, 2020.

[7] See European Court on Human Rights, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb), updated on 30.4.2020, p. 9-10: NCT proceedings will not have a punitive or deterrent purpose, will not rely on the finding of guilt, and no penalties will be imposed (apart from fines for the non-compliance with procedural obligations).

[8] According to Article 6(1) TEU, the CFR „shall have the same legal value as the Treaties".

[9] Case C-269/90, Technische Universität München, EU:C:1991:438, at para. 14. From the Articles 101 and 102 TFEU case law see: Case T-371/17, Qualcomm and Qualcomm Europe v Commission, EU:T:2019:232, at para. 101.

[10] Case C-269/90, Technische Universität München, EU:C:1991:438, at para. 14; Case T-394/15, KPN v Commission, EU:T:2017:756, at para 49. From the case law on Articles 101 and 102 TFEU see: Case C-39/18 P, Icap and Others v Commission, EU:C:2019:584; Case T-433/16, Pometon v Commission, EU:T:2019:201, at paras. 348-394; Case T-371/17, Qualcomm and Qualcomm Europe v Commission, EU:T:2019:232, at paras. 35-55.

[11] See Article 7 CFR. For case law: Case C-92/09, Schecke, EU:C:2010:662, at para. 72; Case C-465/00, Österreichischer Rundfunk, EU:C:2003:294, at para 86. From the case law on Articles 101 and 102 TFEU see: Case 46/87 and 227/88, Hoechst v Commission, EU:C:1989:337, at para. 19; Case C-583/13 P,

Any limitations of these guarantees, as well as of the freedom to conduct a business (Article 16 CFR) and the right to property (Article 17 CFR), must be justified under Article 52(1) CFR: they must be provided for by law, respect the essence of those rights and freedoms, they must be necessary and genuinely meet objectives of general interest recognised by the EU, and they must comply with the principle of proportionality.

However, the presumption of innocence (Article 48(1) CFR and Article 6(2) ECHR) will not be applicable. Nor will the principles of legality and proportionality of criminal offences and penalties and of *"ne bis in idem"* (Articles 49 and 50 CFR) play a role. Likewise, the rights of defence in a criminal law sense (Article 48(2) CFR) will not be pertinent.

Ideally, the non-criminal nature of the NCT proceeding will allow for a less adversarial and more participative style of interaction between the Commission and the undertakings concerned.[12] The procedural design should strive to promote such a participative and cooperative setting.

3. Speed of intervention as a defining feature of the NCT

One of the goals of the NCT is to ensure an effective and timely intervention where this is necessary to protect undistorted competition in the internal market. This will require a strict timetable and a highly efficient design of the procedure.

III. The interaction between the NCT and infringement proceedings (Article 7 Reg. 1/2003), sector inquiries (Article 17 Reg. 1/2003) and national enforcement proceedings

The NCT as envisaged by the Commission is not only "new" by name. It would allow the Commission to intervene into markets based on a significantly broadened set of competition concerns. The types of competition concerns that may justify the imposition of NCT remedies are the subject of another study.[13] However, the procedural design must be tailored to the substantive concerns to be addressed. One of the important questions to be tackled is how the NCT would interact with the traditional competition rules and their enforcement at European and national level.

This question arises, firstly, when the Commission decides on whether to initiate NCT procedings: If the Commission suspects the existence of special features of the market that may justify the imposition of remedies under the NCT, but cannot exclude infringements of Articles 101 and/or 102 TFEU, which legal rules and/or principles of competition policy shall determine its choice of procedure? Secondly, the question

Deutsche Bahn v Commission, EU:C:2015:404, at paras. 19-36; Case T-135/09, Nexans France and Nexans v Commission, EU:T:2012:596, at para. 40; Case T-325/16, Ceske Dráhy v Commission, EU:T:2018:368, at para. 34.

[12] *See for this the experience from the UK: Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 12-13, available on ssrn.com.*

[13] *See Motta/Peitz, Intervention trigger and underlying theories of harm, Report for the EU Commission, 2020.*

arises whether the Commission may later switch to an infringement proceeding when evidence suggests that Articles 101 and/or 102 TFEU have been infringed. This may be determinative for the willingness of undertakings to engage in NCT proceedings in a more cooperative spirit.

1. Interaction with Articles 101/102 TFEU at EU level

The main goal of the NCT is to address competition problems that are not – or not effectively – addressed by Articles 101 and 102 TFEU. Some of these gaps are highlighted in the Commission's Inception Impact Assessment: the risk of anticompetitive monopolisation; tacit collusion that cannot be addressed under Article 101 or 102 TFEU; demand-side market failures, e.g. market failures due to consumer inertia; or a lack of competition due to an unequal distribution of data access. Most of them have long been known and discussed with regard to different settings and industries. Some of them, like unequal access to data, have raised particular concern more recently[14] due to technological and market developments.

Even though the focus of the NCT is on specific features of markets that tend to produce anti-competitive outcomes, and not on the types of market conduct that Articles 101 and 102 TFEU address, the scope of the two legal regimes can overlap: potential infringements of the existing competition rules can contribute to the (risk of a) market failure that the NCT strives to cover. If the NTC were designed as a dominance-based tool (options 1 and 2), an overlap with Article 102 TFEU will be likely. If it were to apply irrespective of dominance (options 3 and 4), overlaps with both Articles 101 and 102 TFEU may occur. Some commentators have suggested that such overlaps must be avoided. The NCT should only address clear "gap cases". Whenever Articles 101 or 102 TFEU could potentially apply, infringement proceedings should enjoy priority. However, primary law does not require the NCT's subsidiarity. If the NCT were to be made strictly subsidiary to the application of Articles 101 and 102 TFEU, it would become useless for all practical purposes (a).

The alternative is to allow the Commission some degree of discretion in the choice of the instrument – albeit with some limits and combined with a requirement to explain their choice (b). Once the Commission has opted for the NCT, shifting to an infringement proceeding would normally be barred (c).

a) Subsidiarity of the NCT?

(1) Legal principles under primary law

Primary law does not require the NCT's subsidiarity vis-à-vis existing competition rules.

Articles 101 and 102 TFEU set out important intervention thresholds. While the protection of a system of undistorted competition[15] necessitates that certain anti-competitive conduct is outlawed, it is, at the same time, based on the principles of independent planning and decentralised coordination, rooted in the freedom to conduct a business (Article 16 CFR) and the right to property (Article 17 CFR). The incentives to invest and innovate which are crucial for the functioning of competition

[14] *See Schweitzer/Welker, A legal framework for access to data – a competition policy perspective, in: Drexl (ed.), Data Access, Consumer Interest and Public Interest, 2020 (to be published soon, pre-print on ssrn.com).*
[15] *For this goal see Article 3(3) TEU with Protocol No. 27 and Article 119(1) TFEU.*

ultimately follow from these individual rights to compete. Interventions into these rights must be justified under Article 52(1) CFR. The NCT – which is meant to become an additional pillar of the protection of competition – must respect these principles and the economic logic on which a system of undistorted competition is based. It must not become a regime of boundless discretionary intervention into markets.

However, nothing suggests that the boundaries of intervention meant to protect a system of undistorted competition are conclusively defined by Articles 101 and 102 TFEU. Rather, the EU legislator has complemented these rules before. The European Merger Control Regulation (ECMR) tackles competition problems that partially also fall under Articles 101 and 102 TFEU;[16] but a regime of *ex ante* control for mergers proved to be necessary for an effective protection of competition. Obviously, this regime is not subsidiary to the application of Articles 101 and 102 TFEU. Rather, the Commission has declared that it will normally not intend to apply Articles 101 and 102 TFEU to concentrations falling under the ECMR. Article 21(1) ECMR declares Reg. 1/2003 non-applicable where the European Merger Control Regulation applies.

Moreover, a number of sectoral regulations have been passed that complement Articles 101 and 102 TFEU and partially overlap with them.[17] In these cases, Articles 101 and 102 TFEU continue to apply alongside the regulatory regime.[18] But the application of the regulatory regime is not subsidiary to the competition rules, although competition law will prevail in case of conflict.

The general picture that emerges from these examples, backed up by the CFR, is that the EU legislator enjoys a broad margin of appreciation when specifying which rules and interventions into markets and individual economic rights are needed to ensure the well-functioning of competition. Furthermore, the EU legislator is free to grant broad discretion to the Commission to choose the best and most effective path to proceed in different settings. Reg. 1/2003, for example, essentially leaves it to the EU Commission to decide when to proceed by way of an Article 7 infringement decision and when to opt for an Article 9 commitment decision.

(2) Opting for a subsidiarity principle?

Discretion in choosing the appropriate instrument case by case will also be necessary when the NCT is introduced. If the use of the NCT were limited to cases where the applicability of Articles 101 and 102 TFEU can be excluded from the start, it would become impracticable: before activating the NCT, the Commission would need to engage in a full-blown infringement analysis. The advantage of a specifically timely intervention would be lost.[19]

Also, a subsidiarity principle would neglect the fact that in some cases competition law infringements may exist but would not enable the Commission to impose remedies that effectively address the underlying cause of the competition problem which may be rooted in specific features of the market.

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[16] See Case C-6/72, Europemballage and Continental Can v Commission, EU:C:1973:22, at para. 25; Joined Cases C-142/84 and C-156/84, BAT & Reynolds v Commission, EU:C:1987:490, at paras. 37-38. Mestmäcker/Schweitzer, Europäisches Wettbewerbsrecht, 3rd ed. 2014, § 24 paras. 6 et seq. (p. 618 et seq.).

[17] See in particular: Directive (EU) 2018/1972 of 11.12.2018 establishing the European Electronic Communications Code, OJ 2018 No. L 321/36; Directive (EU) 2012/27 of 25.10.2012 on energy efficiency, OJ 2012 No. L 315/1, as amended by Directive (EU) 2019/944 of 5.6.2019.

[18] Case C-280/08 P, Deutsche Telekom v Commission, EU:C:2010:603, at para. 84.

[19] See, however, OFT, Market Investigation References, at paras. 2.12-2.13, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf.

To conclude: if the NCT is to be turned into an effective instrument complementing the existing competition rules, a subsidiarity principle in relation to the existing competition rules is inexpedient.

b) Integrating the NCT into the competition law system

Nonetheless, the NCT must be integrated into a competition law system whose central pillars are, and arguably should remain, Articles 101 and 102 TFEU. It shall complement but not replace traditional competition law enforcement. As the NCT does not involve the imposition of fines, it will be weaker on the deterrence side. It also provides for less legal certainty.

(1) Drafting the intervention criterion

The NCT's effect on the existing competition law regime will, to a large extent, depend on the legal test that specifies the type of competition problems that will allow the launch of NCT proceedings and eventually the imposition of remedies. In their report, *Massimo Motta* and *Martin Peitz* have provided an overview of structural competition problems that are currently outside the reach of EU competition rules or cannot be addressed effectively on their basis. Some of them are based on features of the market that have always been an important part of competition analysis, albeit with an additional conduct requirement in infringement proceedings. Some of them have rather been considered the domain of consumer protection policies so far, their effect on competition notwithstanding. This is true in particular for information asymmetries in consumer markets or behavioural biases of consumers. One of the decisions to be taken by the EU legislator is the scope of the NCT in this regard. In doing so, it will need to consider that – as demonstrated by the evolution of digital markets – competition concerns can arise from an intricate mixture of market features, including economic characteristics, technological factors, firm conduct and consumer behaviour that interact with one another in potentially complex ways.[20]

The drafting of the intervention criterion will therefore become a challenging task. Three options can be distinguished: The types of competition problems that the NCT is meant to address could be specified conclusively in a NCT Regulation (model 1). Alternatively, a very broad and open-ended criterion could be chosen – for example an "adverse effect on competition" criterion (like in the CMA market investigation regime) or a "significant impediment to effective competition" criterion (similar to the ECMR) (model 2). In an intermediate model, a broad intervention criterion would be accompanied by a non-conclusive list of concrete and meaningful examples that illustrate the type of problems that the NCT is meant to address (model 3). Out of these models, model 3 would appear to be the preferable choice.

Model 1 would maximise legal certainty. It would clearly delineate the scope of application of the NCT and thereby narrow down the potential for overlaps with the enforcement of Articles 101 and 102 TFEU. It would, however, not only risk to miss certain types of problems that are not yet prevalent or well understood.[21] It could also invite litigation on the precise scope of the NCT.

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[20] *See also: Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 6, available on ssrn.com.*

[21] *See also Motta/Peitz, Intervention trigger and underlying theories of harm, Report for the EU Commission, 2020: "it would go against the spirit of introducing the NCT to aim at providing a complete list of detailed theories of harm since in emerging industries novel market-specific theories of harm may emerge as part of an investigation".*

The open-ended and highly discretionary intervention mandate under model 2 would provide for a maximum of flexibility on the other hand. But it would come at the cost of legal certainty and potentially broad overlaps between the NCT and the enforcement of Articles 101 and 102 TFEU, as well as with consumer protection policy (where demand side problems are addressed). The threshold for market intervention would be lowered and the risk of erring on the side of intervention ("false positives") would significantly increase. The Commission's discretion in applying the NCT would arguably need to be counter-balanced by a particularly stringent judicial review of the necessity and proportionality of eventual remedies imposed.

Model 3 is the model followed by Articles 101 and 102 TFEU, and it would seem that it would best ensure a coherent interaction between them and the NCT. It would retain a substantial degree of flexibility to react to new competition problems, but the list of examples would simultaneously delineate the NCT's scope of application. Also, it would serve to determine a relevant intervention threshold, it would give an indication of what the Commission would need to proof in order to impose remedies, and it would thereby set the standard for judicial review.

(2) Choosing between the NCT and infringement proceedings

Whichever model is chosen: there will be an area of potential overlap between the NCT and Articles 101 or 102 TFEU. Consequently, the Commission will sometimes have to make a choice.

Arguably, the legislator will and should sketch, in the recitals to the NCT Regulation, the principles that should guide the Commission in the exercise of its enforcement discretion.[22] Given the downsides of the NCT in terms of both deterrence and legal certainty, the NCT should be reserved to settings where the evidence available at the time of the opening of the proceedings suggests that the competition problem, instead of resulting primarily from market conduct, is rooted in the features of the market, such that – even where an element of conduct is present – Article 7 Reg. 1/2003 remedies will not suffice to effectively restore or protect undistorted competition. If the NCT were confined to specific sectors (options 2 and 4), guidance for when to use the NCT would follow from the reasons given for this legislative choice: A sectoral confinement would only make sense if the competition concerns to be addressed by the NCT are particularly acute in the sector(s) where the NCT shall apply.[23]

In any case, the Commission, when initiating a NCT proceeding, should be required to give reasons for its choice. The reasons should include an exposition of the type of competition problem(s) that the Commission suspects and of why it finds it more appropriate to tackle the suspected problem on the basis of the NCT instead of an infringement proceeding. Possible explanations include an assessment that the competition problem to be tackled is one that is not addressed by Articles 101 and 102 TFEU; or an assessment that an action under traditional competition law is likely to be ineffective or significantly less effective in dealing with the competition problem identified, e.g. because the competition problem results from industry-wide market

[22] *Similarly: Commission Recommendation of 9.10.2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (Market Recommendation) 2014/710, OJ 2014 L 295/79, rec. 16 – with regard to the appropriateness of ex ante regulation in electronic communications markets.*

[23] *For a critique of an approach that would confine the scope of application of the NCT to „digital markets" – which I share – see Motta/Peitz, Intervention trigger and underlying theories of harm, Report for the EU Commission, 2020: "the distinction between digital and non-digital markets is not very useful (and to a certain degree arbitrary); market features such as the degree of consumers' switching costs and the scalability of economic activities may well be related to a market being "digital", however they are neither necessary nor sufficient for a market to be classified as a digital market".*

features or multi-firm conduct (e.g. non-collusive parallel vertical agreements) that are more adequately addressed within the NCT framework; or an assessment that the remedies available under Articles 101 and/or 102 TFEU would not suffice to address the root cause of a competition problem. This explanation would not only allow for a public plausibility check whether the NCT is used for the purposes for which it was created. It would also serve as a legal reference point for potential early interim measures, and it could delineate the field in which the Commission would be barred from switching back to Articles 101 and 102 TFEU proceedings, thereby providing assurance to the undertakings concerned that their cooperation will be honoured (see below, c)).

c) Initiating infringement proceedings based on the findings in a NCT proceeding?

Where the Commission decides to initiate a NCT proceeding instead of an infringement proceeding, this decision will determine the subsequent investigatory procedure (see below). If, on the occasion of a NCT proceeding, the Commission finds evidence of clear breaches of Articles 101 or Article 102 TFEU (e.g. evidence of a cartel), the Commission must be free to open an infringement proceeding alongside the NCT proceeding. Information collected under the rules of the NCT proceeding must not be directly used as evidence in an infringement proceeding. But neither is the Commission "required to ignore the information disclosed to them and thereby undergo […] 'acute amnesia'".[24] Rather, the information can, where appropriate, be taken into account to justify the opening of an infringement proceeding[25] and, subsequently, a new request for information.[26]

It is a separate question whether the Commission, once it has decided to initiate NCT proceedings, can reverse that choice and switch over to an infringement proceeding because it finds that, contrary to its initial suspicion, the relevant competition problem rather follows from anti-competitive conduct, and not (primarily) from specific (structural) features of the market. Alternatively, a rule similar to Article 21(1) ECMR could bar the applicability of Reg. 1/2003 with regard to the core competition problem as defined in the NCT opening decision for a certain period of time.

Such a bar could reassure firms to cooperate with the Commission in the NCT proceedings[27] – despite the fact that private enforcement of Articles 101 and 102 TFEU, as well as a decentralised enforcement by national competition authorities, cannot be precluded.

The best option may be that the Commission binds itself by way of a soft-law approach: The Commission could signal that it will, apart from exceptional circumstances, refrain from opening infringement proceedings that relate to the competition problem that justified the opening of the NCT proceeding for the duration of the proceeding and, where remedies are imposed, a certain period afterwards. Should an infringement proceeding be opened, cooperation during a NCT proceeding should be taken into account in the calculation of fines.

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[24] See Case C-67/91, Asociación Española de Banca Privada and Others, EU:C:1992:330, at para. 39, referring to the judgment in Case C-85/87, Dow Benelux v Commission, EU:C:1989:379, at paras. 18 and 19.

[25] Case T-79/14, Secop v Commission, EU:T:2016:118, at para. 82; with reference to Case C-85/87, Dow Benelux v Commission, EU:C:1989:379, at paras. 18 to 20, and Case C-67/91, Asociación Española de Banca Privada and Others, EU:C:1992:330, at paras. 39 and 55.

[26] Case C-238, 244, 245, 247, 250-252, 254/99 P, Limburg Vinyl Maatschappij, EU:C:2002:582 and EU:C:2001:574, at paras. 304-305.

[27] Note, however, that drawing a line between those infringement proceedings that are barred and those infringements that are discovered "on occasion of" NCT proceedings may be difficult at times.

2. Interaction of the NCT with sector inquiries (Article 17 Reg. 1/2003)

The NCT bears some resemblance with a sector inquiry (Article 17 Reg. 1/2003): Both instruments shall comprise an analysis of the features of a market and the competition problems they may give rise to. However, the primary purpose of a sector inquiry is to detect potential infringements of Articles 101 or 102 TFEU.[28] The NCT, by contrast, shall allow the Commission to understand how specific features of a market may tend to produce anti-competitive outcomes irrespective of competition law infringements. Also, contrary to Article 17 Reg. 1/2003, a NCT Regulation would endow the Commission with remedial powers.

If one were to write on a clean slate, one might consider a regime with an initial investigation phase with a broad trigger (e.g. "significant impediment to effective competition"), irrespective of the type of action to be taken later. At the end of this phase, the Commission would decide how to proceed further (end the investigation, intiate infringement proceedings or initiate a NCT proceeding). In such a setting, the purpose of the Article 17-sector inquiry would need to be broadened and its procedural framework may need to be tightened to ensure a sufficiently timely proceeding. The inquiry would then provide a strong basis for the Commission to make an informed choice regarding its further enforcement strategy. This model would resemble the UK model where market investigation references frequently follow up on a "market study",[29] and "market studies" are meant to map the market including its supply and demand side features to uncover potential competition issues that are not necessarily linked to competition law infringements.

Currently, however, the Commission is not planning such a broader-scale overhaul of the entire enforcement system, including a reform of Reg. 1/2003, but is considering the introduction of a new self-standing instrument alongside the traditional competition law enforcement regime.

In principle, this does not preclude the Commission from opening a NCT proceeding as a follow-up to an Article 17 sector inquiry. Nevertheless, where one of the main reasons for introducing a NCT is to allow for a particularly timely intervention, a sector inquiry should not become a mandatory or quasi-mandatory first phase. Consequently, the Commission will frequently have to choose between a sector inquiry and a NCT proceeding. Again, this choice should turn on the type of competition problem that the Commission suspects and intends to address: Where it suspects a competition law infringement that could adequately be addressed by way of Article 7 Reg. 1/2003 remedies, infringement proceedings, potentially preceded by a sector inquiry, should remain the instrument of choice. If the Commission suspects a type of competition problem that would best be addressed by the NCT, the NCT would potentially comprise both a full-fledged investigatory phase and an exploration of potential remedies (see below, V.).

3. Effects of the EU NCT on national competition law and policy

a) Article 3 Reg. 1/2003 and national NCTs

[28] *See Article 17(1), 2nd sentence Reg. 1/2003 – the Commission's investigatory powers are limited to this purpose.*
[29] *On market studies, see Whish/Bailey, Competition Law, 2018, Chap. 11.4.*

Under Article 3 Reg. 1/2003, national competition law must currently not be stricter – nor more lenient – than EU competition law when it comes to agreements, decisions by associations of undertaking or concerted practices within the meaning of Article 101 TFEU which may affect trade between Member States. It may be stricter than EU competition law when it comes to unilateral conduct (see Article 3(2) Reg. 1/2003).

The introduction of the NCT at EU level would be based on a conviction that significant gaps exist in the current regime of effective protection of undistorted competition. Under options 3 and 4, the NCT would extend to non-dominance-based competition problems. This could prompt Member States to introduce similar instruments at national level. While in line with the general idea of parallel competition law and enforcement regimes at EU and national level, the conflict rule set out in Article 3(1), sentence 1 Reg. 1/2003 could thereby be undermined. Furthermore, decentralised NCT interventions at the national level could lead to an unwelcome fragmentation of the internal market, in particular as the NCT will endow competition authorities with a significantly broader discretion than the enforcement of the comparatively well-defined competition rules.

The following principles could contain these risks:

1. The national use of NCTs could be confined to competition problems that are overwhelmingly national in scope.

2. At the very least, the use of NCTs at EU and at national level should be integrated into the ECN reporting system such that the Commission and the NCAs are aware of the on-going investigations. This will also allow for the requisite coordination: The ECN regime for case allocation should be expanded to cover NCTs: Where a NCT investigation is envisaged in a context that is not purely national and more than one competition authority plans to start a NCT investigation, the ECN should seek to agree between the network members on who is best placed to handle the investigation successfully. In most settings, a NCT investigation into the same relevant market(s) should be done by a single competition authority ("one-stop shop"). Where a single action is not possible, the network members should coordinate their action and seek to designate one competition authority as the lead institution.30 The Commission shall be considered to be particularly well placed to handle NCT proceedings if more than three Member States are substantially affected by the suspected competition problem.

3. National competition authorities will have to make sure that the principles set out in Article 3 Reg. 1/2003 are complied with. The Commission should have a possibility to intervene where the use of a NCT at national level risks having the effect of undermining a uniform application of competition rules. Article 16(2) Reg. 1/2003 may need to be expanded to cover this scenario.

The coordination mechanism should not be limited to the use of the NCT at national level. Where the Commission makes use of the NCT in a context that relates to national markets with cross-border effects, NCAs should have the possibility to get involved in the investigation. One way of ensuring involvement would be to give the relevant NCAs a possibility to second officials to participate in the EU investigation.

b) Effects of the EU NCT on national infringement proceedings

[30] *See Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, paras 15-18, available at https://ec.europa.eu/competition/ecn/joint_statement_en.pdf.*

A NCT Regulation would not affect the applicability of Articles 101 and 102 TFEU. National competition authorities will continue to have full competence to apply Articles 101 and 102 TFEU. Given the different focus of the NCT compared to infringement proceedings, the initiation of a NCT proceeding would not relieve the competition authorities of the Member States from their competence to apply Articles 101 and 102 TFEU in cases relating to the same factual setting. Also, national courts will still be able to establish an infringement of Articles 101 or 102 TFEU and award damages, irrespective of an ongoing NTC proceeding, or of remedies imposed on the basis of a NCT proceeding.

While the private enforcement of competition rules should not and arguably cannot be excluded, frictions in the realm of public enforcement should be addressed. A rule analogous to Article 11(6) of Reg. 1/2003 may be legally contestable, given the primacy of the competition rules over the NCT. The Commission, when opening a NCT proceeding, should, however, coordinate with the NCAs. The NCT should be included in the mandate of the ECN. Based on the duty of loyalty (Article 4(3) TEU), NCAs may be required to suspend pending proceedings based on Articles 101 and/or 102 TFEU while the NCT proceeding is ongoing. Also, remedies imposed by the NCAs must not conflict with remedies imposed or contemplated by the Commission under the NCT regime (in analogy to Article 16 Reg. 1/2003).

IV. The institutional set-up of the NCT

On the institutional side, the proposed introduction of a NCT raises the following issues: (1.) With whom should the decision lie to make use of the NCT? (2.) Should there be a reference mechanism? (3.) Should there be a complaints mechanism?

Another important institutional aspect will be the interaction of the NCT with sector-specific regulation. This aspect is addressed in another report.[31]

1. Decision to make use of the NCT

The NCT is meant to complement the system of protecting undistorted competition. Under the European Treaties, the task to ensure that competition in the internal market is not distorted lies with the Commission. The decision to make use of the NCT should therefore be a decision of the College of Commissioners. As the NCT interacts in manifold ways with the traditional competition law enforcement, NCT investigations should be conducted by DG Comp.

2. NCT References to the Commission?

In the UK, certain institutions, including sectoral regulators and certain consumer protection bodies, are vested with a right to refer a market investigation to the CMA. Whereas the interaction between sectoral regulation and the NCT is the subject of another study,[32] a separate choice to be made in the EU is whether the Member States should be endowed with a right to make referrals.

[31] *See Larouche/de Streel, Interplay between the New Competition Tool and Sector-Specific Regulation, Study for the EU Commission, 2020.*
[32] *See Larouche/de Streel, Interplay between the New Competition Tool and Sector-Specific Regulation, Study for the EU Commission, 2020.*

Where a Member State suspects an infringement of Articles 101 or 102 TFEU, it is entitled to lodge a formal complaint under Article 7(2) Reg. 1/2003. This right derives from each Member State's legitimate interest in a coherent enforcement of competition rules as a basis of an internal market with undistorted competition.[33] According to Article 22(1) ECMR, one or more Member States may request the Commission to examine any concentration as defined in Article 3 ECMR that does not have a Community dimension, but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. The Commission may then decide to examine the concentration (Article 22(3) ECMR).

Obviously, information by the Member States on competition concerns resulting from structural features of a market and potentially affecting trade between the Member States will always be considered by the Commission. Nonetheless, a formalised referral procedure would raise some concerns. Within the overall competition policy framework, infringement proceedings under Articles 101 and/or 102 TFEU shall continue to be the standard way to proceed. The NCT shall merely address gaps or settings where competition law enforcement will likely be ineffective, and the Commission shall exercise its best judgment when its use is exceptionally required. A formalised referral procedure would oblige the Commission to allocate resources to deal, at a formal level, with any given request to initiate NCT proceedings. A more appropriate path to follow would be to deal with national propositions to employ the NCT in the course of an informal concertation. Where such suggestions would come from a national competition authority, the issue should be discussed in the ECN.

3. Complaints mechanism for private parties?

Similarly, it is not obvious that the complaint mechanism under Article 7(2) Reg. 1/2003 and Articles 5-7 Reg. 773/2004, which entitles any natural or legal person who can show a legitimate interest to ask the Commission to find an infringement of Articles 101 and/or 102 TFEU, should be extended to NCT proceedings.

An infringement of Articles 101 and 102 TFEU violates the rights of individuals. Within the enforcement regime established by Reg. 1/2003, the Commission – unlike civil courts – is not obliged to safeguard these individual rights whenever they may be infringed. For private persons harmed by anti-competitive conduct there are different routes to receive legal protection. Apart from turning to the Commission, there is the possibility to file private lawsuits or to turn to the Member States' competition authorities. An effective enforcement of competition law shall result from the interplay of these different enforcement regimes that complement each other. The Commission, as an administrative authority with limited resources, cannot investigate all possible infringements but must set priorities in its enforcement action. In exercising its discretion, it is guided by Union's interest.[34] It focuses its enforcement action on the most serious infringements and on cases which help to define the Union's competition policy, as well as on those cases that help to ensure a coherent application of the competition rules.[35]

[33] *Member States are therefore deemed to have a legitimate interest for all complaints they choose to lodge, see Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27.4.2004, C 101/65, para. 33.*
[34] *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27.4.2004, OJ 2004 No. C 101/65, para. 27-28*
[35] *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27.4.2004, OJ 2004 No. C 101/65, para. 11.*

However – with a view to the alleged infringement of his or her individual rights and the purpose of the overall enforcement regime to provide effective protection – the Commission is obliged to consider carefully the factual and legal issues brought to its attention by the complainant in order to assess whether those issues indicate an infringement of Articles 101 or 102 TFEU.[36] And where the Commission rejects a formal complaint, the complainant is entitled to a reasoned decision of the Commission which is appealable to the Court. The rights and duties are tied to a showing by the complainant that s/he is liable to be directly and adversely affected by an infringement of Articles 101 or 102 TFEU, and therefore harmed in his or her individual rights. There is no right to lodge a complaint "*pro bono publico*".[37]

The use of the NCT, on the other hand, does not presuppose a violation of individual rights. It is, as described above, a regime of "small-scale *ex ante* regulation". In such a setting, a right to lodge a formal complaint would introduce a right to complain "*pro bono publico*"[38] that is alien to the current system and would consume valuable resources that the Commission may better invest in an active competition law enforcement. Obviously, this does not exclude informal complaints.[39] Also, whenever the NCT overlaps with traditional competition law enforcement and an infringement of Articles 101 or 102 TFEU *is* suspected, a complainant can still lodge a "normal" Articles 101/102 TFEU complaint.

Similar considerations argue against creating a complaints mechanism for consumer protection bodies[40] comparable to the "super-complaints" mechanism in UK competition law.[41] Such a complaints mechanism would, again, risk to place a significant burden on the Commission.[42] The NCT's objective to allow for fast intervention might be compromised, if a significant part of the staff were kept busy with preparing fast-track reports. In addition – and while recognizing the manifold interactions –, the NCT is meant to be an instrument of competition policy that fills very specific gaps, not of consumer protection policy.

V. The procedural design of the NCT

The procedural set-up must be driven by the goal to ensure

[36] *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27.4.2004, OJ 2004 No. C 101/65, para. 53.*
[37] *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27.4.2004, OJ 2004 No. C 101/65, para. 38.*
[38] *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27.4.2004, OJ 2004 No. C 101/65, para. 38.*
[39] *For informal complaints regarding infringements of Articles 101 and 102 TFEU see Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27.4.2004, OJ 2004 No. C 101/65, para. 2.*
[40] *For example, a complaints mechanism for entities qualified to bring an action under Article 2 of Directive 2009/22/EC on injunctions for the protection of consumers' interests – see Directive 2009/22/EC of 23.4.2009, OJ 2009 No. L 110/30.*
[41] *See Section 11 UK Enterprise Act 2002: In the UK, designated consumer bodies can make "super-complaints" to the CMA where they find that a market for goods or services has a feature, or combination of features, that is or appears to be significantly harming the interests of consumers and should therefore be investigated. The CMA must respond to a super-complaint by publishing a 'fast-track' report on what action, if any, it intends to take within 90 days. Further on this: Whish/Bailey, Competition Law, 2018, Chap. 11.3. See also: Super-complaints: Guidance for designated consumer bodies, OFT 514, 2003, available at https://www.gov.uk/cma.*
[42] *For the UK experience see Whish/Bailey, Competition Law, 2018, Chap. 11.3. (D).*

- a **rigorous, robust analysis** of the features of a relevant market, of the competition problems that may possibly result, and of conceivable remedies;
- a **fair and transparent procedure** that effectively protects the procedural guarantees of the parties to the proceeding and ideally allows for an open and participative exchange;
- an **efficient procedure** that ensures **a timely and effective intervention** where needed; and
- the necessary degree of **flexibility** to adapt the procedure to the type of market and competition problem at issue.

This chapter shall first specify the general set-up of the NCT procedure (1.). Options for speeding up the procedure will be discussed separately (2.). It shall furthermore look at possible legal instruments to increase the incentives of the parties to a NCT proceeding to cooperate (3.) and at the need to provide for a possibility to modify the scope of a NCT proceeding (4.).

Generally speaking, the NCT procedure must find a sound compromise between flexibility, administrative efficiency and speed and the aim to create a participative procedure that allows for a more open and less adversarial exchange between the Commission and the undertakings concerned on the one hand, and respect for the formal procedural guarantees of undertakings potentially negatively affected by the NCT on the other hand.

The goal of an open exchange with market actors based on a shared interest in well-functioning markets may be easier to achieve in some settings than in others – depending not least on the remedies envisaged. NCT proceedings will arguably remain more or less adversarial the more the remedies intrude into strategic business interests of selected undertakings. A cooperative attitude becomes more likely the less intrusive and selective the remedies are.

To get the full benefit of an open and participative proceeding, it may therefore make sense to provide for two alternative procedural paths in NCT proceedings: Where market-wide, non-selective remedial measures are envisioned, some procedural guarantees as foreseen in Article 41 CFR may not be applicable, and be replaced by a transparency regime. Such a regime will allow for an earlier and more open exchange between the Commission and the market. Where the Commission considers the imposition of remedies on selected undertakings, the guarantees under Article 41 CFR will, however, apply and require a more formalised proceeding. The proposition for a two-pronged procedure will be further explained below. It will be discussed in particular under V.2.e) (access to the file).

1. The structure of NCT proceedings

As discussed above (see III.2.), the NCT is currently conceived of as a separate and self-standing procedure that will comprise both a full-fledged investigatory phase and an exploration of potential remedies. Different from the CMA market investigation which follows up on a market study,[43] the NCT is not meant to function as a second phase to a preceding “phase 1”-investigatory proceeding.

This has a number of implications:

[43] *See Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 11, available on ssrn.com.*

- The opening decision will frequently be rather preliminary, based on an informal scoping phase, and will provide a relatively rough sketch of the potential competition problem to be explored. As further investigations into the market can substantially change the understanding of the competition problem, it is important to provide for the possibility to modify the scope of the NCT proceeding[44] (see 5.).
- In such a setting, the CMA model to integrate the analysis and discussion of the competition problem and the discussion of potential remedies from the start will not work. A first evidence gathering phase (phase I) will be needed during which the focus is on understanding the special features of the relevant market and exploring the suspected competition problem. Only once the competition problem is – at least provisionally – specified and verified will it make sense to discuss potential remedies with the undertakings concerned in a second phase of the proceeding (phase II).
- In order to ensure a speedy proceeding, a NCT Regulation will need to set out clear deadlines. At the same time, a significant degree of flexibility will be needed, given the broad range of competition problems that the NCT may potentially address and the varying degree of complexity of NCT proceedings.

a) The basic structure of NCT proceedings – an overview

NCT proceedings will typically comprise the following stages:

1. An initial informal scoping phase
2. An opening decision
3. Depending on the type of remedies envisioned:

a. Where the remedies potentially envisioned are addressed to a selected group of undertakings active in the market

- An evidence gathering phase I of a maximum of 12 months (with a possibility of a one-off 6-months extension) which can end either with a closure of the proceedings or with a rough informal summary of the findings, of the theories of harm explored and presentation of bright-line principles for suitable remedies which will not necessarily be published, but provide a basis for state-of-play-meetings and commitment negotiations;
- A phase II of a maximum of 12 months (with a possibility of a one-off 6-months extension) during which further evidence gathering is accompanied by market consultation, discussions with the potential addressees of remedies and an informal market testing of the remedies envisioned;
- The sending out of a provisional draft of the decision to the potential addressees of remedies;
- Access to the file for the potential addressees of remedies and hearings;
- Publication of a decision adopting the final remedies.

b. Where market-wide remedies are considered

- An initial evidence gathering phase (phase I);

[44] *This notwithstanding, the Commission's commitment not to open Article 101 and 102 TFEU infringement proceedings where the relevant allegation coincides with the competition problem described in the original opening decision should continue to be honoured.*

- The publication of a provisional findings report that presents the evidence gathered during phase I, as well as the theories of harm explored and potential remedial options if a relevant competition problem appears to be corroborated by the evidence;
- Informal consultations on the findings and remedial options and – if needed – a continuation of evidence gathering (phase II);
- Publication of a decision adopting the final remedies.

4. Implementation of remedies

b) The scoping phase

NCT proceedings – like other competition policy proceedings – would normally be preceded by a preliminary, non-public investigation that would collate all the market information available and discuss the existence of a competition problem of the type to be addressed by the NCT. At the end of this phase, the Commission may decide to dismiss the suspected competition concerns, or to open an infringement proceeding, or to open a NCT proceeding.

c) The opening decision

In its opening decision, the Commission has to sketch the suspected competition problem, define the scope of the proceeding and explain why it has opted for the NCT (see above, III.1.b)(2)). The opening decision can be a relevant reference point for any interim measures (see below, VIII.) and it delineates the field within which the undertakings in the market will be subject to an obligation to cooperate (see below, V.2.d)) – but simultaneously protected from the opening of an infringement proceeding (see above, III.1.b)(2)).

The NCT can be used to address a competition problem specific to a given market, or it can address a specific type of market practice used across multiple markets that, combined with specific features of the relevant markets, leads to relevant competition problems in multiple markets.[45] The NCT procedure would be the same in both cases.

Contrary to the UK practice,[46] no consultation should be required before initiating a NCT proceeding. Given that, in the EU, the NCT will typically not be preceded by a sector inquiry or other form of formalised market analysis, there will not be enough substantial information on which to consult meaningfully.

Where a NCT proceeding primarily relates to national markets with cross-border impact, the opening decision can be preceded by an internal consultation within the framework of the ECN. Such a consultation should be mandatory if infringement proceedings or NCTs relating to the same factual setting are pending at the national level.

The opening decision will be published.

[45] *This mirrors the distinction between "ordinary references" and "cross-market references" in the CMA market investigation regime – see Section 131(6) UK Enterprise Act 2002.*
[46] *Section 169 UK Enterprise Act 2002.*

d) Two procedural options for NCT proceedings

Arguably, the Commission should be able to proceed along two alternative paths after the publication of the opening decision: where the Commission considers the imposition of remedies upon a limited number of selected market participants – e.g. on a dominant undertaking or on a small number of oligopolists – access to the file and hearing requirements will need to be observed, as they follow from Article 41 CFR (see below, V.2.e)(1)). To a relevant degree, these requirements will structure the proceedings: the potential addressees of a remedial decision will need to be able to express their view on the full findings of the Commission, as well as on the theory of harm on which the Commission has ultimately settled, and they will need to be granted access to the full file (except for confidential information). Where the Commission considers the imposition of market-wide remedies – e.g. a general obligation on all undertakings active in the market to provide information to consumers, a general portability or interoperability requirement or a generalised prohibition to make use of "most favoured nation" clauses ("MFNs") – Article 41 CFR will arguably not be applicable. A more open and participative approach to NCT proceedings may then be feasible (see below, V.2.e)(2)).

1) Proceedings which may result in the imposition of remedies upon a limited, selected group of undertakings

Where the Commission considers the imposition of remedies on selected market participants only, the procedural guarantees of Article 41 CFR will apply. After the publication of the opening statement – which should already consider the remedial options in this regard – the potential addressees of a remedial decision shall be informed that they will henceforth be treated as parties to the investigation. Before a final remedial decision is taken, the Commission will then be required to present the undertakings concerned with a document that is functionally similar to a "statement of objections" in infringement proceedings, and may, in the NCT context, take the form of a provisional draft of the NCT remedial decision. This draft decision will then be the basis of the hearings and for access to the file.

The provisional draft decision would be based on a two-step evidence gathering proceeding: An initial phase I of a maximum of 12 months (with a possibility of a one-off extension of 6 months based on justified reasons) would be fully dedicated to evidence gathering. Despite the fact that the NCT should ideally enable a less adversarial interaction between the Commission and the market actors as it does not involve the finding of an infringement, the Commission will not be able to rely solely on the voluntary cooperation of the market actors. Contrary to merger control proceedings, the undertakings potentially affected by NCT remedies will not necessarily have an incentive to provide the information requested in a timely fashion. The Commission will therefore need to dispose of the full set of investigative powers. It must be able to issue requests for information, it must have the power to take statements and the power to conduct inspections – essentially all the powers it would have in an infringement proceeding or a sector inquiry (see Articles 18 to 22 Reg. 1/2003). Furthermore, it must be able to enforce compliance by way of imposing sanctions (see below). After concluding the initial evidence gathering, the Commission should assess whether the evidence gathered and the remedial options available[47] justify a continuation of the proceeding.

[47] *For the need to consider remedial options early on, see: Motta/Peitz, Intervention trigger and underlying theories of harm, Report for the EU Commission, 2020, p. 5: "We shall stress that the EC should start thinking of remedies already at the very early stages of a NCT process. In particular, it should start thinking of remedies as soon as a theory of harm is formulated (…) and even before starting a NCT investigation*

In case the Commission decides to continue, it should, in a phase II, consult more broadly with the market and with the potential addressees of remedies. The latter should be able to discuss the preliminary findings and possible remedial options with the NCT team in the course of state of play meetings.[48] They should have the possibility to present their own remedial proposals. Commitment negotiations may take place at this point (see below, VII.). The Commission could also informally discuss remedial options with other market actors. Phase II should be limited to a maximum of 12 months (with a possibility of a one-off extension of 6 months based on justified reasons).

Based on the insights gained in phase I and II, the Commission will prepare a provisional draft decision and send it out to the potential addressees of the remedies envisaged. These undertakings must now be granted access to the file,[49] subject to the legitimate interest of undertakings in the protection of their business secrets (see Article 18(3)), and they must have an opportunity to present their views. A remedial decision can only be based on facts and theories of harm on which these parties have been able to submit their observations. In addition to the opportunity to submit their comments in writing, the parties should have a right to request an oral hearing.[50]

Other natural or legal persons may be heard insofar as the Commission deems it necessary. Applications to be heard on the part of such persons shall be granted where they show a sufficient interest.[51] In particular, a broad consultation with market actors on the suitability and proportionality of the remedial regime envisaged is desirable. Undertakings and stakeholders that are not addressees of the remedies envisaged will, however, not benefit from a right to access to the file.[52]

The final decision should normally be published within 2 years after the opening decision – where use is made of the possibility for an extension, the final decision would be published within no more than 3 years after the opening of the proceeding.

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officially (…)". Similarly: Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 13, available on ssrn.com, with a view to CMA market investigations: "(…) potential remedies are now considered from the start of the process, and sometimes even (informally) before the formal Market Investigation launch".

[48] On State of play-meetings in the context of infringement and merger proceedings see Wils, The Oral Hearing in Competition Proceedings Before the European Commission, (2012) 35 World Competition, 397 – updated version (last revised: 7 May 2020), at IX., p. 37-38, available on ssrn.com.

[49] Access to the file shall be limited to those parties. For access to the file in merger control and infringement proceedings, this is in line with Article 15(1) Reg. 773/2004 and Article 17(1) Reg. 802/2004: In these cases, access to the file is granted to the addressee of the statement of objections.

[50] Analogous to Article 12(1) of Reg. 773/2004 and to Article 14(1) of Reg. 802/2004. An oral hearing should arguably be offered irrespective of the fact that the fundamental right to be heard does not entail a right to be heard orally, as long as there is a possibility to effectively make known ones views in writing – for this, see Wils, The Oral Hearing in Competition Proceedings Before the European Commission, (2012) 35 World Competition, 397 – updated version (last revised: 7.5.2020), at II., p. 5-6, available on ssrn.com.

[51] See Article 27(3) Reg. 1/2003 and Articles 10, 11 and 13 of Reg. 773/2004; Article 18(4) ECMR and Article 11 Reg. 802/2004.

[52] A right to access to the file would not follow from the Transparency Regulation No. 1049/2001, either: the same general presumption that has been accepted in other competition law proceedings should apply: the disclosure of such documents would undermine the protection of the purpose of inspections and investigations as well as the protection of the commercial interests of the undertakings party to the proceeding as it has been accepted in other competition law proceedings (See Case T-677/13, Axa Versicherung v Commission, EU:T:2015:473, at para. 39; C-365/12 P, Commission v EnBW et. al., EU:2014:112, at para. 93). No specific examination of each document would hence be required. If access were granted under the Transparency Regulation No. 1049/2001, the careful balance between the protection of procedural rights of the parties, the legitimate interests of undertakings in the protection of their business secrets and other confidential information and the public interest in ensuring a manageable procedure, which underlies the NCT Regulation's access to the file regime, would be upset.

In some cases, a NCT proceeding may follow up on a sector inquiry or on an infringement proceeding that has convinced the Commission of the existence of a broader competition problem that cannot be adequately addressed based on the traditional competition rules, or it may otherwise be based on a substantial amount of information and evidence already available when the NCT proceeding is opened. In such a case, the Commission may be able to move much more quickly – in particular with regard to phase I. For such settings, in which the Commission already disposes of a good informational and analytical basis at the outset, a NCT Regulation may fix a legally binding deadline of 18 months from the opening decision to the final remedial decision.

2) Proceedings which may result in market-wide remedies

NCT proceedings may be structured differently where market-wide remedies are considered. This may be particularly appropriate where demand side problems – like asymmetric information or consumers' behavioural biases – play a relevant role. In these cases, Article 41 CFR may not be pertinent. Instead of formal "access to the file" proceedings, the Commission could and should ensure a high degree of transparency and opportunities for market participants to comment in other ways. NCT proceedings could greatly benefit from such an open and participative approach.

Again, the Commission would start with an initial phase I evidence gathering phase of no more than 12 (+ 6) months. At the end of this phase, it would decide whether to close proceedings or to proceed to phase II. In case of continuation, the Commission would publish a preliminary findings report that summarises the evidence (with full respect to confidentiality), explains the potential theories of harm and sets out bright line principles for suitable remedies.

The report would then be the basis for a broad consultation with market participants and stakeholders in a phase II of no more than 12 (+ 6) months. The final decision would follow.

The advantage of this proceeding would be its transparency and openness: The preliminary report would inform the market actors and stakeholders about the direction of the investigation early on. Phase II would benefit from an active and open exchange.

2. Options to promote a timely intervention in light of the fundamental guarantees of procedural fairness

Among the goals of introducing the NCT is to allow for a particularly timely intervention before competition problems become so entrenched that they are difficult to remedy. While there is some tension between the goal to identify and address the potentially highly complex competition problems that cannot be effectively addressed with the traditional competition rules, and to do so particularly fast, the CMA market investigation provides an example that the tension can be managed.

Compared to infringement proceedings, NCT proceedings may sometimes enable the Commission to move faster because no infringement needs to be proven.[53] This alone will not suffice, however. If the NCT is to allow for a significantly faster correction of

[53] *See on this: Motta/Peitz, Intervention trigger and underlying theories of harm, Report for the EU Commission, 2020, p. 34.*

relevant failures of competition, options for accelerating the proceedings need to be explored.

Time-savings could possibly result (a) from acknowledging that proving a relevant competition problem will not necessarily presuppose a formal market definition;[54] (b) from the introduction of strict and legally binding deadlines; and (c) from the adoption of some procedural innovations that would allow for a speedier course of action.

Overall, a lean, streamlined, yet sufficiently flexible procedural framework will be needed. This includes effective sanctioning powers (3.). Possibilities for strengthening the incentives of market actors to cooperate shall be explored in turn (4.). Finally, where the market analysis suggests a shifting of the focus of NCT proceedings as it was set out in the opening decisions, such a modification shall be possible without the need to open a new NCT proceeding (5.).

a) Structure of the analysis – need for a formal market definition?

Defining the relevant market(s) at the outset of a proceeding will frequently provide a helpful framework for the subsequent economic analysis. Generally, it serves to identify the relevant competitive constraints faced by firms in any given field of market activity. Also, it can help to identify barriers to entry, and thus provides a basis for assessing the market power of incumbent firms.

However, in some settings, market definition can become a highly complex and uncertain exercise. The Special Advisors' Report has expounded some of the conceptual difficulties that a traditional market definition faces in an environment characterised by strong network externalities, zero-price offers, business strategies based on the construction and expansion of ecosystems and in highly dynamic and fast-changing settings.[55] In such settings, established methods of market definition often fail to produce unambiguous results.[56] The problem can be particularly acute where the potential competition law intervention takes place not with a view to sanctioning past infringements but to preserve competition in the future. In fast changing, innovative markets, consumer perceptions of viable substitutes can quickly change.[57]

The NCT will combine an *ex post* analysis with a forward-looking perspective: It will frequently be based on the finding of an existing structural competition problem, but sometimes on a risk to competition. Where remedies are imposed, this will always be done with a forward-looking attitude.

[54] *If the EU legislator were to opt for a dominance-based NCT, a formal market definition will obviously be required.*
[55] *Crémer/Montjoye/Schweitzer, Competition Policy for the Digital Era, 2019, p. 42-48, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf. See also: Fletcher, Market Investigations for Digital Platforms: Panacea or Complements?, ccp-paper, 2020, p. 6, available on ssrn.com.*
[56] *See Franck/Peitz, Market Definition and Market Power in the Platform Economy, 2019, p. 19-67, available at https://www.cerre.eu/sites/cerre/files/2019_cerre_market_definition_market_power_platform_economy.pdf , for a discussion of the conceptual difficulties of a market definition in the platform economy.*
[57] *Crémer/Montjoye/Schweitzer, Competition Policy for the Digital Era, 2019, p. 47, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.*

In such a setting, a formal market definition with a clear drawing of the boundaries may not always be necessary.[58] Depending on the theory of harm to competition, it can be useful to allow the Commission to explicitly consider existing uncertainties and to acknowledge different degrees of substitutability which can then be considered in the subsequent competitive analysis. This may, *inter alia*, allow the Commission to better take account of the role that certain input factors (like data) can play across market boundaries, the role of ecosystems and forms of "conglomerate power".

b) Duty of expedition and/or binding deadlines

The goal to ensure a particularly timely intervention may argue for the fixing of binding deadlines for the various procedural steps that the NCT involves. The European merger control regime provides a good example for the accelerating effect that tight legal deadlines[59] can have – albeit in a setting where the parties to the concentration have strong incentives to cooperate and to submit all relevant information in a timely fashion. Likewise, the CMA market investigation regime provides for a tight time frame: the CMA must complete its investigations within 18 months of the date of the reference,[60] with a possibility for a 6 months extension for "special reasons".[61]

A NCT Regulation could adopt this model. However, consideration should be given to the fact that, unlike CMA market investigations, NCT proceedings will not be preceded by a market study and that the NCT can potentially require an analysis of many more national markets than the UK market investigation regime. The NCT may apply to very different settings, ranging from a European market whose competition problems are already well understood, to relatively novel – potentially interrelated – markets whose functioning is not yet well understood and that are national in scope. Consequently, some flexibility will be needed. Also, the goal of fast proceedings notwithstanding, the time frame must allow for a thorough and robust investigation of all relevant facts[62] and must allow for full respect of the procedural guarantees.

Against this background, it seems advisable that the NCT Regulation requires the Commission to normally complete a NCT procedure within 24 months from the date of the opening decision and within no more than 36 months under exceptional circumstances (see above, V.1.). A "stop the clock"-mechanism should be foreseen in case the parties to the proceeding delay the gathering of evidence.

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[58] *See also: Fletcher, Market Investigations for Digital Platforms: Panacea or Complements?, ccp-paper, 2020, p. 6, available on ssrn.com. For proposals for a more flexible approach to market definition within the realm of „traditional" competition law see Economic Advisory Group on Competition Policy, An Economic Approach to Article 82, p. 2-4, available at https://ec.europa.eu/dgs/competition/economist/note_eagcp_july_05.pdf; Salop, The first principles approach to antitrust, Kodak, and antitrust at the millennium, (2000) 68 Antitrust Law Journal, 187; Kaplow, Market definition: Impossible and counterproductive, (2013) 79 Antitrust Law Journal, 361; Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, p. 42 et seqq.*

[59] *See Article 10 ECMR.*

[60] *Section 137(1) UK Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013.*

[61] *Section 137(2A) UK Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013. According to the CMA, the inquiry period may be extended in complex cases, where for example there are multiple parties, issues or markets – see CMA's Supplemental guidance, para. 3.7.*

[62] *A potential judicial review of a Commission's final remedial decision will include a review whether "the evidence presented contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it" – see Case C-12/03 P, Tetra Laval, EU:C:2005:87, at para. 39.*

In addition, a statutory duty of expedition may be foreseen in a NCT Regulation. NCT proceedings can imply a significant degree of legal uncertainty for firms active in the relevant market. The duty of expedition would protect the interest of the parties to regain a sound basis for longer-term planning as soon as possible. Furthermore, a duty of expedition would lie within the logic of the NCT itself, namely the goal to protect undistorted competition in an effective and timely manner.

Procedurally, the time-sensitivity of NCT proceedings provides a justification for codifying binding deadlines for requests for information in order to disincentivise strategic delays from the start. However, the Commission must be able to modify the deadline where a request for information is particularly complex,[63] and undertakings must be able to request extensions if needed. The deadline "must enable the addressee of the decision not only to provide its reply in practical terms, but also to satisfy itself that the information supplied is complete, correct and not misleading".[64] When considering requests for an extension of the statutory deadline, the Commission must consider the economic situation of the addressee.[65] At the same time, the proportionality of the deadline will be affected by the duty of expedition.[66] The fact that the Commission will itself be subject to legally binding deadlines would influence the proportionality review.[67]

c) Importing information from other EU proceedings and information exchange with National Competition Authorities (NCAs)

1. Importing information from other EU proceedings (infringement proceedings, sector inquiries, merger proceedings)

In some settings, a NCT proceeding may follow up on an infringement proceeding (or a series of infringement proceedings with remedies that were not able to solve the underlying structural problem), or on information gained during a sector inquiry or a merger proceeding, or on investigations from regulatory authorities. In these settings, an abbreviated procedure (see V.1.d)(1)) above) may be an option – but only insofar as there is a possibility to draw on the information gathered in prior proceedings for the purposes of a NCT proceeding, instead of collecting the relevant information anew.

Both Reg. 1/2003 and the ECMR constrain such transfers of information: Information acquired as a result of the application of the rules of either of the two regulations shall be used only for the purpose for which it was acquired.[68] According to the Union Courts' established jurisprudence, these limits are intended to protect the rights of defence of the undertakings that submit information.[69] They also derive from the protection of professional secrecy.[70]

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[63] *According the Union Courts' jurisprudence, deadlines for requests for information must not impose a disproportionate burden – see, in the context of Article 18 Reg. 1/2003: Case T-306/11, Schwenk v Commission, EU:T:2013:123, at paras. 72 et seq.*

[64] *Case T-306/11, Schwenk v Commission, EU:T:2013:123, at para. 73.*

[65] *Case T-302/11, HeidelbergCement v Commission, EU:T:2014:128, at para. 107.*

[66] *Case T-306/11, Schwenk v Commission, EU:T:2013:123, at para. 81.*

[67] *See Case T-310/01, Schneider Electric, EU:T:2002:254, at paras. 94 et seq., para. 100: pointing to the "requirement for speed which characterises the overall scheme of Regulation No. 4064/89" for finding that the time-limit fixed was reasonable.*

[68] *See Article 28(1) Reg. 1/2003 and Article 17(1) ECMR.*

[69] *Case C-85/87, Dow Benelux v Commission, EU:C:1989:379, at para. 18: This requirement "is intended to protect the rights of the defence of undertakings, guaranteed by Article 14(3) [of Reg. 17/62]. Those rights would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof."*

[70] *Case C-67/91, Asociación Española de Banca Privada and Others, EU:C:1992:330, at para. 37: "Professional secrecy entails not only establishing rules prohibiting disclosure of confidential information but*

However, even if the information gathered under the Merger Regulation or under Reg. 1/2003 "may not be directly used as evidence in a procedure not governed by that regulation, they nevertheless amount to factors that may, where appropriate, be taken into account to justify the opening of a procedure under another legal basis [...]"[71] and, subsequently, a new request for information.[72] Neither the Commission nor the Member States are "required to ignore the information disclosed to them and thereby undergo [...] 'acute amnesia'."[73]

If the Commission has obtained information during a previous proceeding that indicates a competition problem, it could, under this case law, initiate a NCT proceeding, using that information as circumstantial evidence and verifying or supplementing it on the basis of the investigatory powers provided for in a NCT Regulation.[74]

In order to further facilitate the transfer of information, the rules on investigatory powers under Reg. 1/2003 could be amended such that information gained on that legal basis could also be used in a NCT proceeding that is based on the same factual setting – e.g. when an infringement proceeding is closed and a NCT proceeding is opened instead, or when a sector inquiry suggests the opening of a NCT proceeding. Such an amendment could turn investigations under the rules of Reg. 1/2003 into a first phase investigation where the Commission is initially in doubt on whether an infringement proceeding or a NCT proceeding is more appropriate (see above, III.2.).

By contrast, a direct transfer of information obtained during a NCT proceeding to an infringement proceeding will not be possible: to transfer information collected in a purely administrative proceeding to a quasi-criminal proceeding would violate the parties' rights of defence.

2. Exchange of information with National Competition Authorities

With a view to infringement proceedings, Article 12 Reg. 1/2003 sets out the rules to be followed when information is exchanged between the Commission and NCAs. In principle, the Commission and the NCAs shall have "the power to provide one another with and use in evidence any matter of fact or of law, including confidential information" (Article 12(1) Reg. 1/2003). However, information exchanged shall only be used in evidence for the purpose of applying Articles 101 or 102 TFEU and in respect of the subject-matter for which it was collected by the transmitting authority (Article 12(2) Reg. 1/2003). At the same time, NCAs may use the information exchanged also for the application of national law where national competition law is applied in the same case and in parallel to EU competition law and does not lead to a different outcome.

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also making it impossible for the authorities legally in possession of such information to use it, in the absence of an express provision allowing them to do so, for a reason other than that for which it was obtained". Furthermore, Articles 7 and 8 CFR require such a restrictive handling of data.

[71] Case T-79/14, Secop v Commission, EU:T:2016:118, at para. 82, with reference to Case C-85/87, Dow Benelux v Commission, EU:C:1989:379, at paras. 18-20, and Case C-67/91, Asociación Española de Banca Privada and Others, EU:C:1992:330, at paras. 39 and 55.

[72] Joined Cases C-238, 244, 245, 247, 250-252, 254/99 P, Limburgse Vinyl Maatschappij, EU:C:2002:582 and EU:C:2001:574, at paras. 304-305.

[73] See Case C-67/91, Asociación Española de Banca Privada and Others, EU:C:1992:330, para. 39, referring to Case C-85/87, Dow Benelux v Commission, EU:C:1989:379, at paras. 18 and 19.

[74] See Case C-85/87, Dow Benelux v Commission, EU:C:1989:379, at para. 19 (in the context of infringement proceedings): barring the Commission from doing so would "go beyond what is necessary to protect professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the performance by the Commission of its task of ensuring compliance with the competition rules in the common market and to bring to light infringements of Articles 85 and 86 of the Treaty".

A question arises whether an NCA can provide the Commission with information gathered in the course of an infringement proceeding where that proceeding and the NCT proceeding conducted at EU level refer to the same factual setting. According to fundamental principles of procedural fairness as guaranteed by Article 41 CFR, two conditions must be fulfilled for an exchange of information to be admissible: (1) the transfer of information must be provided for by law; and (2) the information transferred must not have been obtained under an investigatory regime that provides for a lower degree of procedural protection than the one that is applicable in the context in which the information shall be used after the transfer. Consequently, information collected in the course of a proceeding in which the further reaching guarantees of a quasi-criminal proceeding apply could be used in a NCT proceeding if a NCT Regulation would provide for a clear legal basis.

d) Information gathering in a data-driven economy: Duty to cooperate

Given the specific features of an economy driven by data-processing and algorithmic decision-making, the question arises whether the "normal" investigatory powers that the Commission disposes of in infringement proceedings and should likewise possess in NCT proceedings (see above, V.1.d)(1)) must be complemented by a duty of cooperation. Ever more frequently, the Commission will not only need access to information. Rather, it will need to understand data collection and processing strategies and the precise ways in which the algorithms employed by relevant market actors function. As observed by *Lord Tyrie* in a letter to the Secretary of State for Business, Energy and Industrial Strategy,[75] broad varieties of complex data, including usage data, are now frequently stored in the cloud, and pricing decisions, as well as other decisions, are delegated to algorithms. It may be technically impossible to transfer the algorithms, their historical input data and their decision outputs to the Commission in any way that would be useful for competition investigations. Also, it may be difficult to impossible for the Commission to understand the purposes for which data is used or the way an algorithm works, even if it is transferred to the Commission.[76] What the Commission will therefore need is support from the firms in understanding the ways in which data is collected, processed and stored, including the ways in which algorithms function. Such support may be a necessary precondition for drafting precise requests for information that help to clarify the relevant facts and that the addressees of such requests can sensibly answer.

A starting point may be the adoption of an expanded power to take statements as it is provided for in the ECN+ Directive 2019/1. According to Article 9(1) of that Directive, "Member States shall ensure that national administrative competition authorities at a minimum are empowered to summon any representative of an undertaking or association of undertakings, any representative of other legal persons and any natural persons, where such representative or person may possess information relevant for the application of Articles 101 and 102 TFEU, to appear for an interview". On this basis, the Commission could obtain oral or written explanations from any market actor

[75] *Letter by Lord Tyrie, Chairman of the CMA, to the Secretary of State for Business, Energy and Industrial Strategy, 21.2.2019, Annex, p. 32, Fn. 51, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.*

[76] *See Monopolkommission, Biennial Report XXIII, 2020, Chap. 1, Control of abusive practices in the digital platform economy, at para 98, available at https://www.monopolkommission.de/images/HG23/Main_Report_XXIII_Control_of_abusive_practices_in_the_digital_platform_economy.pdf.*

subject to the investigation or their representatives and staff[77] on which data is stored where and how to access it, which algorithms are employed and how they function.

A further reaching provision that could be adapted to the competition realm and be particularly useful in complex digital settings is Section 166 of the UK Financial Services and Markets Act 2000.[78] According to this provision, the financial regulator may require financial firms subject to its regulation to provide the regulator with a report on a matter of concern, or to appoint a skilled person to be approved by the regulator to provide the regulator with a report and to provide that person with all such assistance as the person may reasonably require.

Such provisions could be backed up by a broader duty of undertakings to cooperate with the Commission in a NCT proceeding. A duty to cooperate actively in the investigation is recognised already in infringement proceedings:[79] undertakings may be required to provide all necessary information concerning such facts as may be known to them and to disclose all documents in their possession that are related to the subject-matter of an investigation. However, in infringement proceedings, the Commission "may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement".[80] For example, the Commission may require the disclosure of factual information, but must not seek clarification of the objectives pursued by the undertakings if this would compel the undertakings to acknowledge a violation of competition rules.[81]

In a NCT proceeding, no infringement is at issue. It will be a purely administrative procedure, with no risk of self-incrimination.[82] A duty to cooperate may, therefore, include a duty to clarify the purpose of certain market actions, a duty to explain the functioning of an algorithm or to perform certain data-related tests on the Commission's behalf. Such a duty to cooperate would obviously be confined by a proportionality criterion.

A violation of the duty to cooperate could be sanctioned by fines. At the same time, it may, where appropriate, allow the Commission to conclude that a certain fact is to be regarded as proven[83] and preclude the party concerned from challenging that fact

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[77] *For such a right see also Article 11(1)(c) of the SSM Regulation (Reg. No. 1024/2013 of 15.10.2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013 No. L 287/63).*

[78] *See letter by Lord Tyrie, Chairman of the CMA, to the Secretary of State for Business, Energy and Industrial Strategy, 21.2.2019, Annex, p. 33, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf, who refers to this provision.*

[79] *See Case C-374/87, Orkem v Commission, EU:C:1989:387, at paras. 22 and 27; Case T-46/92, Scottish Football Association v Commission, EU:T:1994:267, at para 31: Individuals concerned by a request for information "must make available to the Commission all information relating to the subject-matter of the investigation (…). Consequently, the applicant's argument that the contested decision could only have been justified if it had manifestly obstructed the Commission in carrying out its task must be rejected. Given that the individuals concerned have such an obligation to cooperate actively in the initial investigation procedure, a passive reaction may in itself justify the adoption of a formal decision (…)."*

[80] *Case C-374/87, Orkem v Commission, EU:C:1989:387, at para. 35.*

[81] *Case C-374/87, Orkem v Commission, EU:C:1989:387, at paras. 38-39.*

[82] *For the right not to be compelled to admit a participation in an infringement as it is interpreted and applied in EU Competition law see Case C-374/87, Orkem v Commission, EU:C:1989:387, at paras. 35-40; Case C-301/04 P, Commission v SGL Carbon, EU:C:2006:432 and EU:C:2006:53, at paras. 40-44; Case T-371/17, Qualcomm and Qualcomm Europe v Commission, EU:T:2019:232, at paras. 177-194.*

[83] *For the legitimacy of such a conclusion see the German Bundesgerichtshof, decision of 14.7.2015, KVR 77/13 – Wasserpreise Calw II, at para. 30: A dominant company has an obligation "to transmit data from its sphere of influence to the competition authority which the authority cannot obtain in another reasonable way (…). If the company refuses to collaborate in this way, the competition authority may draw conclusions from this within the scope of its free assessment of evidence (…). In an individual case, it may conclude that a certain fact is to be regarded as proven on account of the company's refusal to cooperate".*

finding in an appeals proceedings (see below). Also, a violation of the duty of cooperation may be considered by the Commission when it evaluates whether to engage in commitment negotiations.

e) Access to the file in NCT proceedings

An essential part of the right of every person "to have his or her affairs handled impartially, fairly and within reasonable time" by the institutions of the EU is "the right of every person to have access to his or her file" (Article 41(2)(b) CFR). The right to access to the file is not limited to quasi-criminal proceedings but applies likewise in purely administrative proceedings. It is intended, in particular, to enable the parties to a proceeding "to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively" on the conclusions reached by the Commission.[84] While the relevant case law has developed in the context of infringement proceedings, its rationale will extend to NCT proceedings that – while purely administrative in nature – can negatively affect undertakings' rights and interests in potentially far-reaching ways. From the Commission's perspective, access to the file – as well as the right to be heard – can help to enhance the accuracy and robustness of the Commission's findings. Furthermore, the guarantees of procedural fairness can contribute to the general acceptance of the outcomes of administrative proceedings and can increase the willingness to comply.

At the same time, the granting of access to the file can be the most cumbersome and time-consuming part of the proceeding. This is so in particular because the Commission, when granting access to the file, is obliged to respect "the legitimate interests of confidentiality and of professional and business secrecy" (Article 41(2)(b) CFR and Article 339 TFEU[85]). The same is true for the right to anonymity of information providers at risk of reprisals.[86]

NCT proceedings can potentially be very complex proceedings, involving an extensive gathering of evidence. The process of first identifying confidential information in all those documents and subsequently weighing up the interests for and against disclosure and drawing up non-confidential versions of the documents or, where appropriate, sufficiently comprehensible and precise summaries of their content, as the Commission does in infringement and merger control proceedings,[87] can become an impossible exercise in NCT proceedings. It may have the potential to impair the ability of the Commission to manage NCT proceedings in an effective and timely manner.

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[84] *See Joined Cases C-238, 244, 245, 247, 250, 251, 252 and 254/99 P, Limburgse Vinyl Maatschappij, EU:C:2002:582, at paras. 315-316 – with a view to Statement of Objections in infringement proceedings. See also: Case C-51/92 P, Hercules Chemicals v Commission, EU:C:1999:357, at paras. 75-76.*

[85] *According to Article 339 TFEU, EU officials must not disclose "information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components".*

[86] *Case T-5/02, Tetra Laval, EU:T:2002,:264, at paras. 98-101, 105 and 107; Case T-221/95, Endemol Entertainment v Commission, EU:T:1999:85, at para. 70; Case C-145/83, Adams v Commission, EU:C:1985:448, paras. 34, 35 and 37. For further discussion and references: Wils/Abbott, Access to the File in Competition Proceedings before the European Commission, (2019) 42 World Competition, 255 – updated version (last revised: 15.5.2020), at III.B., p. 11-12, available on ssrn.com.*

[87] *See Wils/Abott, Access to the File in Competition Proceedings before the European Commission, (2019) 42 World Competition, 255 – updated version (last revised: 15.5.2020), p. 25, p. 29, available on ssrn.com, with further references. For a specification of the right to access to the file in light of these principles in infringement proceedings and in merger proceedings see: Article 27(2) Reg. 1/2003 and Article 15 Reg. 773/2004 (infringement proceedings); and Article 18(3) ECMR and Article 17 Reg. 802/2004 (merger control).*

What is more, depending on the type of remedy that the Commission envisions, the number of undertakings potentially affected and possibly requesting access to the file can be large.

A NCT Regulation will therefore need to deal carefully with "access to the file" issues. The question may, however, present itself in a different light depending on the remedial regime envisioned. It is not evident that Article 41(2)(b) CFR will apply in all settings.

Where the Commission considers the imposition of remedies on individualised market actors – e.g. on one, possibly dominant, undertaking or a limited number of large oligopolists in a market –, Article 41(2)(b) CFR will obviously apply. In such cases, procedures will be needed that allow the Commission to handle the "access to the file" process efficiently (1).

Where the Commission considers the imposition of market-wide remedies, on the other hand, Article 41(2)(b) CFR will arguably not be applicable. In these settings, a transparency regime will be needed instead (2).

1. Imposition of remedies on individualised market actors

Where the Commission contemplates the imposition of remedies on a limited number of selected undertakings in a market, these undertakings benefit from the guarantee laid down in Article 41(2)(b) CFR. A proportionate balance will need to be struck between the right to access to the file and the protection of confidential information.[88] Administrative efficiency is another relevant aspect to be considered in this balancing exercise, as has been recognised by the General Court.[89] This is true in particular where excessive demands upon the administration have the potential to compromise the Commission's ability to effectively protect a system of undistorted competition in the internal market – one of the EU's core aims.[90] In merger control proceedings, the General Court has furthermore recognised that the application of the principles governing the granting of access to the file "may reasonably be adapted to the need for speed […]".[91]

Given the goal of the NCT to ensure an effective and timely intervention, measures should be considered to keep the "access to the file" process manageable. In the context of infringement and merger proceedings, certain procedures have been developed in order to lessen the tension between the right to access to the file and the legitimate interest in preserving confidentiality. The data room procedure is one relevant example.[92] It may play a role also in NCT proceedings.

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[88] *See Wils/Abbott, Access to the File in Competition Proceedings before the European Commission, (2019) 42 World Competition, 255 – updated version (last revised: 15.5.2020), p. 25, available on ssrn.com.*

[89] *Case T-210/01, General Electric, EU:T:2005:456, at para. 694: „The need for the parties to have access to the Commission's case-file in order to be able to defend themselves, ultimately, against the objections raised by the Commission in the SO should not be interpreted as requiring the Commission to grant them access to its file in portions throughout the proceedings, a requirement which would represent a disproportionate burden on it".*

[90] *See Article 3(3) TEU with Protocol No. 27.*

[91] *Case T-221/95, Endemol Entertainment v Commission, EU:T:1999:85, at para. 68; Case T-210/01, General Electric v Commission, EU:T:2005:456, at paras. 631 and 684. See also: Wils/Abbott, Access to the File in Competition Proceedings before the European Commission, (2019) 42 World Competition, 255 – updated version (last revised: 15.5.2020), p. 30, available on ssrn.com.*

[92] *See DG Competition, Guidance on Data Room Procedures, available at https://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf; Wils/Abbott, Access to the File in Competition Proceedings before the European Commission, (2019) 42*

Confidentiality rings are another useful instrument to appropriately balance the right to access to the file and confidentiality interests. Voluntary confidentiality rings[93] have already been used to effectively manage access to the file in infringement proceedings under Article 7 Reg. 1/2003. These rings are based on negotiated agreements between the information providers and the addressees of the statement of objections ("SO addressees") by which both agree that a restricted circle of persons (the members of the confidentiality ring; for example external counsel) will get access also to confidential information and select from all documents those for which a non-confidential version must be prepared. While the Commission can propose a confidentiality ring to the information provider and the SO addressee, the conclusion of such agreement remains voluntary. A mandatory confidentiality ring is excluded by Article 27(2) Reg. 1/2003, according to which "the right of access to the file shall not extend to confidential information".

In the context of NCT proceedings, the EU legislator should consider whether to empower the Commission to mandate the formation of a confidentiality ring.[94] Obliging information providers to grant external counsel access to confidential information will interfere with the right to professional and business secrecy following from Articles 7, 8, 16 and 17 CFR, as well as from Article 339 TFEU. Under Article 52(1) CFR, the interference could be justified when provided for by law, and provided that it respects the essence of the rights and is proportionate to the legitimate aim of ensuring administrative efficiency and an effective and timely protection of undistorted competition. The essence of the right to confidentiality would be respected if access to the information were limited to a narrow circle of external counsel who would be subject to a duty of professional secrecy the violation of which would prompt sanctions.

Generally, the right to access to the file is limited to documents that are of relevance to the decision taken by the Commission. There must be an "objective link" between the document and the objections raised by the Commission.[95] Failure to communicate evidence that is *adverse* to the interests of a party can be successfully challenged only if the Commission relied on that evidence to support its theory of harm or remedial decision.[96] Moreover, if there is other documentary evidence that conclusively proves the Commission's findings and can be accessed by the party, a publication of further supporting evidence is not required.[97] On the other hand, a party must have access to all *evidence that is potentially favourable to it*, e.g. because it is not consistent with the inferences drawn by the Commission.[98] If there is at least "a small chance of altering the outcome of the administrative procedure", access must be granted.[99] The

World Competition, 255 – updated version (last revised: 15.5.2020), p. 44-45, available on ssrn.com, with further references.

[93] For the procedural design in such cases: https://ec.europa.eu/competition/antitrust/conf_rings.pdf; Wils/Abbott, Access to the File in Competition Proceedings before the European Commission, (2019) 42 World Competition, 255 – updated version (last revised: 15.5.2020), p. 46, available on ssrn.com.

[94] For this proposal – with a view to infringement proceedings – see Albers, Aktuelle Entwicklungen in der Praxis des Anhörungsbeauftragten, in: Schwerpunkte des Kartellrechts 2011 (2012), 35, p. 49.

[95] Joined Cases C-204, 205, 211, 213, 217 and 219/00 P, Aalborg Portland and Others v Commission, EU:C:2004:6, at paras. 126 and 128.

[96] Case T-53/03, BPB v Commission, EU:T:2008:254, at para. 42.

[97] See Joined Cases C-204, 205, 211, 213, 217 and 219/00 P, Aalborg Portland and Others v Commission, EU:C:2004:6, at para. 73; Case C-407/08 P, Knauf Gips v Commission, EU:C:2010:389, at para. 13; Case T-151/07, Kone v Commission, EU:T:2011:365, at para. 146; Case T-419/14, Goldman Sachs v Commission,EU:T:2018:445, at para. 215.

[98] Case C-407/08 P, Knauf Gips v Commission, EU:C:2010:389, at para. 23; Case T-441/14, Brugg Kabel and Kabelwerke Brugg v Commission, EU:T:2018:453, at para. 70.

[99] Joined Cases C-204, 205, 211, 213, 217 and 219/00 P, Aalborg Portland and Others v Commission, EU:C:2004:6, at para. 131.

same is true if access would facilitate the defence of the party's interests in the administrative proceedings.[100] These principles have been developed by the Union Courts in infringement proceedings. However, they likewise apply in merger proceedings. They are not limited to proceedings of a quasi-criminal nature but are based on Article 41(2)(b) CFR and follow from the fact that an individualised administrative measure intervenes into fundamental rights. It is therefore very likely that they will be applicable in NCT proceedings, too.

2. Transparency rules in case of market-wide remedies

The legal setting differs in proceedings where market-wide remedies are considered. According to Article 41(2)(b) CFR, every person has a right to access to "his or her file", as part of the right to have "his or her affairs handled impartially" and fairly. Consequently, Article 41(2)(b) CFR is applicable only where a person is *individually affected* by the decisions to be taken in an administrative proceeding. Where remedies of a market-wide nature are imposed that affect all undertakings active in the market equally, a strong argument can be made that none of these undertakings will be affected individually. According to settled case law in the field of state aid law, an undertaking will not have standing under Article 263(4) TFEU to contest a Commission decision that is not addressed to it directly if it is concerned by that decision solely by virtue of belonging to the relevant market in question.[101] Market-wide remedies imposed in a NCT proceeding would resemble sectoral regulation. Even if – contrary to the position taken here – the Union Courts would find Article 41(2)(b) CFR to be applicable in these types of cases, the lack of individualisation within the group of competitors active in the same market and the typically lower depth of intervention of market-wide remedies would justify more intense constraints on the right to access to the file under Article 52(1) CFR.

In such a setting, it would therefore appear to be justified to substitute the normal "access to the file" proceeding with a general transparency regime to be developed for such NCT proceedings, which could build on the experience of the transparency regime practiced in CMA market investigations.[102] For example, a preliminary findings report would be published following the phase I evidence gathering, hence relatively early on in the proceedings (see above, V.1d)(2)). This would enable a more intense interaction with undertakings in the market on the findings, their interpretation and potential remedies early on, and in a more participative setting. A high degree of transparency in the administrative proceeding would, in turn, attenuate the intensity of the intervention into fundamental rights. At the same time, a well-designed transparency regime would keep NCT proceedings more manageable for the Commission.

3. Additional incentives to cooperate

In principle, the burden of proving a relevant competition problem as well as the necessity and proportionality of any given remedy to the requisite legal standard will lie on the Commission.

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[100] *See references in Wils/Abbott, Access to the File in Competition Proceedings before the European Commission, (2019) 42 World Competition, 255 – updated version (last revised: 15.5.2020), p. 56, Fn. 243 and 244, available on ssrn.com.*

[101] *See from the area of state aid law Case C 367/04 P, Deutsche Post und DHL v Kommission, EU:C:2006:126, at paras. 40, 41; Case C-525/04 P, Spain v Lenzing, EU:C:2007:698, at paras. 32, 33.*

[102] *See CMA, Transparency and disclosure: Statement of the CMA's policy and approach, 2014, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270249/CMA6_Transparency_Statement.pdf.*

However, the parties to a NCT proceeding may be in possession of information and evidence which is essential for the correct understanding of the (mal-)functioning of the market. This is particularly true where information from inside a firm becomes relevant to the analysis. Sometimes, what *prima facie* appears to be a competition problem may ultimately benefit consumers.[103]

In an infringement proceeding, the burden of proving efficiencies is on the infringer. A NCT proceeding is not an adversarial proceeding. Nonetheless, it should be considered part of the general duty to cooperate (see V.2.d)) of the parties to the proceeding (and normally in their own best interest) to come forward with relevant evidence in time. As a matter of clarification, a NCT Regulation may specify that they bear the evidentiary burden for relevant information that clearly originates in their sphere.

In order to effectively dissuade firms from strategically delaying a NCT proceeding by withholding relevant information, a rule may be considered that would preclude parties from bringing facts and arguments at the appeal's stage when they could have been raised by the applicant during the administrative procedure but were not then raised.[104] While leaving the Commission's "best effort" obligation to base its decision on all relevant information unchanged, it would sanction undertakings that violate their duty of cooperation.

4. Modifications of the scope of the NCT

In the course of the more profound factual and economic analysis of a market, the initial understanding of the competition problem may change. Depending on the framing of the competition problem in the opening decision, the focus may then shift significantly. A future NCT Regulation should explicitly foresee that in such a case, a reframing of the competition problem is possible without a need to open a new NCT proceeding.[105]

VI. Remedies

1. The role and goal of remedies in NCT proceedings

The NCT procedure may have different outcomes:

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[103] *In parallel to Article 101(3) TFEU. The UK market investigation regime speaks of "relevant customer benefits" – see Section 134(7)-(8) UK Enterprise Act 2002 and UK Competition Commission, Guidelines for market investigations, 2013, p. 76 et seq., available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf.*

[104] *Such a rule would limit the parties' right to be heard and/or right to judicial review – see Case C-407/08 P, Knauf Gips v Commission, EU:C:2010:389, at paras. 90-92. In Knauf, the ECJ found that „[i]n the absence of a specific legal basis", the onus on a party „to react during the administrative procedure, or be faced with the prospect of no longer being able to do so before the Courts of the Union" would be a limitation on the exercise of the rights and freedoms recognised by the CFR and would need to be provided for by the law. It could, however, be justified under Article 52(1) CFR.*

[105] *See, for example, Section 135 UK Enterprise Act 2002 and UK Competition Commission, Guidelines for market investigations, 2013, at para. 27, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf.*

- It can end with the finding that no competition problems exist that justify taking specific measures under the NCT Regulation, or that a relevant competition problem exists but no adequate tools are available that could remedy the problem
- Possibly, it can end with a commitment decision (see below, VII.)
- It can end with the imposition of remedies of a structural, behavioural or hybrid kind
- Or it can end with non-binding recommendations addressed to companies,[106] sectoral regulators or the legislator

Where remedies are imposed, their goal would be to protect or re-establish competition – ideally by addressing the root cause of the competition problem that was found.

The different focus of the NCT as compared to infringement proceedings, namely on structural competition concerns, would be reflected in a different focus of the remedies. The objective of remedies under Article 7 Reg. 1/2003 is "to bring [the] infringement to an end." Remedies must be "proportionate to the infringement committed and necessary to bring the infringement effectively to an end". Remedies imposed under the NTC procedure, on the other hand, must be suitable to address the competition problem identified and proportionate to that concern. They will not try to undo the consequences of an allegedly unlawful conduct but will be forward looking and strive to make the market function competitively in the future. A focus will be on reducing barriers to entry and expansion for competitors, on ensuring the continued contestability of positions of market power, on reducing incentives to coordinate, or to impede or distort competition, and on maintaining or increasing the ability and incentives to compete.

2. General legal requirements: effectiveness, proportionality, legal certainty and duty to state reasons

NCT remedies will affect the freedom to conduct a business (Article 16 CFR) and the right to property (Article 17 CFR). They must, therefore, be provided for by law, respect the essence of those freedoms and rights and be proportionate. Also, they must genuinely meet objectives of general interest recognised by the Union and be necessary to achieve that goal (Article 52(1) CFR).[107]

Undistorted competition is a fundamental and high-ranking goal of the European Union (see Article 3 TEU with Protocol No. 27). Its effective protection justifies remedial intervention, provided that it is proportionate to the harm.

The NCT Regulation should provide for a remedial regime that is suitable to effectively address the types of market failures that the NCT is meant to address and to re-establish and safeguard the competitive process. Obviously, the imposition of remedies will only be lawful to the extent that the competition problem is proven to the requisite legal standard and that the remedies fit the theory of harm. The choice of a remedy (or of a package of remedies) should be guided by the aim of effectively and comprehensively addressing the competition problem. Where possible, the Commission should address the root cause of the problem. Remedies that merely

[106] *E.g. for a code of conduct.*

[107] *For the case law to Art 52(1) CFR: Case C-283/11, Sky Österreich, EU:C:2013:28, at paras. 42 et seq.; Case C-277/16, Polkomtel, EU:C:2017:989, at paras. 50-51; Case C-540/16, Spika and Others, EU:C:2018:565, at paras. 34, 36; Case C-534/16, BB construct, EU:C:2017:820, at paras. 34-37; Joined Cases C-184 and 223/02, Spain and Finnland v Parlament and Council, EU:C:2004:497, at paras. 51-52; Case C-544/10, Deutsches Weintor, EU:C:2012:526, at para. 54.*

mitigate the problem(s) may be considered where other measures are not available or practicable. Or they may be imposed as interim remedies where the final, more comprehensive remedy will need time to take effect. At the same time, the remedies must be practicable and proportionate. Also, competition should be re-established within a reasonably short period of time.

Remedies must meet the requirements of legal certainty: Undertakings must unambiguously know their rights and obligations. Any remedy imposed must therefore be precise and clear – both for the addressees and for other persons potentially affected by the remedy.[108]

The Commission has to provide for a mechanism that ensures an effective implementation and, if necessary, monitoring of the remedies.

Finally, Article 41(2)(c) CFR and Article 296 TFEU require the Commission to state the reasons that guided the imposition of the remedy in order to enable the Union courts to review the legality of the measure and provide the addressees with an adequate indication as to whether the decision is well-founded or whether it may be vitiated by some defect enabling its validity to be challenged.[109] A failure to sufficiently state reasons may lead to the quashing of a remedy.[110]

3. Types of remedies and choice between remedies

The NCT is meant to address a wide spectrum of potentially multi-faceted competition problems. The suitable remedy or remedial package will need to be found case by case. A broad degree of flexibility will be required to design remedies that fit the relevant theory of harm and market setting as precisely as possible. A NCT Regulation should not constrain the choice of remedies.[111]

Generally, a distinction is made between structural remedies, i.e. one-off measures that directly alter the competitive structure of a market, behavioural remedies, i.e. ongoing measures that regulate or mandate or constrain a certain conduct of market actors, and access remedies which may have characteristics of structural or behavioural remedies or both.[112] Whereas Article 7 Reg. 1/2003 states, with a view to remedying infringements of Articles 101 and 102 TFEU, that "[s]tructural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy", and thereby expresses a preference for behavioural remedies, the contrary is true for merger control, which is meant to preserve a competitive market structure, and where, consequently,

[108] *See Joined Cases C-92/87 and 93/87, Commission v French Republic et al., EU:C:1989:77, at para. 22.*
[109] *E.g. Case C-181/90, Consorgan v Commission, EU:C:1992:244, at para. 14; Case C-39/18 P, Commission v Icap and Others, EU:C:2019:584, at para. 23.*
[110] *Case T-395/94, Atlantic Container Line AB and Others v Commission, EU:T:2002:49, at paras. 412-416 (in the context of remedies under Article 7 Reg. 1/2003).*
[111] *For a similar experience in the CMA market investigation regime see Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, pp. 7-8, available on ssrn.com*
[112] *See, for example, Commission, Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at para. 17; Loertscher/Maier-Rigaud, On the Consistency of the European Commission's Remedies Practice, 2020, pp. 7-12, in: Gerard / /Komninos (eds.).), Remedies in EU Competition Law - Substance, Process and Policy, 2020, Wolters Kluwer, available on ssrn.com; UK Competition Commission, Guidelines for market investigations, 2013, p. 78, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf. The distinction is not always clear-cut, and in any given case, a remedy package may combine structural, behavioural and access elements.*

"divestitures are the benchmark for other remedies in terms of effectiveness and efficiency. The Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture".[113]

Depending on the competition concern identified, NCT remedies may need to focus on structure and/or conduct. Where the competition concerns to be addressed by the NTC are of a structural nature, the remedies imposed should have a structural effect. But depending on the market setting, structural effects may sometimes result from behavioural or access remedies. Where the features of the market that tend to produce anti-competitive effects are linked to specific business strategies, behavioural remedies may be required. Consequently, the NCT Regulation should neither express a preference for structural nor for behavioural remedies. Rather, the essential requirement is that the remedy fits the relevant competition problem.

a) Structural remedies / divestitures

Where the NCT is meant to address serious competition problems of a structural nature, it may require structural remedies, which may range from the removal of structural links with competitors – e.g. a divestiture of a minority shareholding in a joint venture or a competitor where they contribute to the competition concern[114] – to a full divestiture of a business to a new market participant or a pre-existing, but independent market participant, where this is necessary to maintain competition.

As the imposition of structural remedies intrudes into fundamental rights,[115] it will need to comply with the requirement of necessity and proportionality as set out in Article 52(1) CFR. While they are unlikely to become a standard remedy within the NCT framework, they may, depending on the competition problem identified, come with the advantage of changing the market dynamics and incentive structure for the firms durably, and with no further monitoring and enforcement costs once the measure has been implemented. They may, for example, be considered where earlier infringement decisions and remedies under Article 7 Reg. 1/2003 were not effective in restoring competition because they were unable to address the underlying competition concern. In any given case, the Commission will need to show convincingly that no other remedy is available that is less intrusive but likely to be equally effective.

The divestiture commitments negotiated under Article 9 Reg. 1/2003 indicate that structural remedies can at times be appropriate also from a business point of view. As one-off measures, they will not necessarily be more burdensome on firms than behavioural remedies: contrary to a behavioural remedy that may constrain the strategic choices of businesses over a long period of time and will typically involve constant monitoring, a structural remedy comes with the benefit that its addressee will enjoy full flexibility after the implementation of the remedy.[116] Where the only alternative would be a durable sector regulation, structural remedies should be seriously considered.

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[113] *Commission, Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at para. 61.*

[114] *See Commission, Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at para. 58.*

[115] *This is true for all remedies. However, structural remedies will typically imply particular strong forms of intervention, in particular into the right to property (Article 17 CFR) and into the freedom to conduct a business (Article 16 CFR).*

[116] *See Maier-Rigaud, Behavioural versus Structural Remedies in EU Competition Law, in: Lowe/Marquis/Monti (eds.), EU Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law, 2016, p. 207-224, at p. 210-211, available on ssrn.com.*

b) Behavioural remedies

Behavioural remedies will require a certain conduct or omission from the addressees of the remedial order. A relatively simple and clear-cut behavioural remedy would be an obligation imposed on companies to terminate or change certain types of agreements[117] or to refrain from using certain types of contract clauses.[118] Other behavioural commitments can be significantly more complex and will require further specification and ongoing monitoring. This could be true, for example for a remedial order to facilitate switching or multi-homing, or for an order addressed to a vertically integrated or conglomerate firm to avoid self-preferencing in certain situations.

In merger settings, the Commission accepts behavioural remedies "only exceptionally in very specific circumstances".[119] A main concern is that it can be difficult to design and implement an effective compliance and monitoring mechanism for such remedies. Compliance costs and monitoring needs and costs will need to be considered in the NCT context, too. Also, behavioural remedies that directly intervene into business decisions over longer periods of time may reduce economic efficiency, dynamic incentives to invest and innovate and may come with the side-effect of constraining competitive rivalry.[120]

Whether behavioural remedies are nonetheless suitable to address the relevant structural competition problem effectively and comprehensively and at reasonable cost to both the addressee of the remedy and the Commission[121] will need to be determined case by case.

c) Access remedies

Access remedies seek to address the competition concern by mandating specified firms to grant access to key infrastructure, networks, key technology, patents, know-how,[122] or other essential input like, possibly, data, at appropriate terms and conditions. Interoperability remedies which are much debated in the context of the digital economy are another sub-category of access remedies.

Access remedies may be considered where access to a certain input is essential for the competitive opportunities of existing and/or the entry of new competitors. In certain settings, the granting of access can remove or lower barriers to entry or expansion and effectively contribute to opening up competitive opportunities and markets.

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[117] *For example to terminate distribution agreements between competitors or agreements resulting in the coordination of certain commercial behaviour between competitors; or to terminate or change existing exclusive agreements – see Commission, Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at paras. 60 and 67-68.*

[118] *For example MFN clauses.*

[119] *Commission, Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at para. 17.*

[120] *For this concern see UK Competition Commission, Guidelines for a market Investigations, 2013, at paras. 336 and 352, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf.*

[121] *For the limited power of the Commission to delegate monitoring powers to a trustee see Case T-201/04, Microsoft v Commission, EU:T:2007:289, at paras. 1251-1279.*

[122] *Commission, Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at para. 62.*

In order to effectively implement access remedies, complex monitoring and enforcement regimes may be necessary, however. Like in merger control, the effectiveness of access remedies imposed within the NCT framework will frequently depend on whether market participants themselves can effectively monitor and enforce these remedies – e.g. via access to a fast dispute resolution mechanism. Like in merger control, the Commission should therefore only impose access remedies where the complexity does not lead to a risk of their ineffectiveness from the outset and where monitoring instruments ensure that remedies will be implemented and enforced in an effective and timely manner.[123]

d) Other types of remedies in NCT proceedings / overlaps between the NCT and legislative competences

Contrary Article 7 Reg. 1/2003 remedies and remedies imposed under the ECMR regime, NCT remedies can address specific features of the market as such, with no link to a potential infringement or concentration. The Commission can therefore impose different and further reaching remedies. The UK Guidelines for Market Investigations mention "enabling measures" in particular, and distinguish between (a) "market-opening measures" that, inter alia, "limit parties' abilities to require their customer to enter into long-term or exclusive contracts or to otherwise create switching costs for customers"; (b) "informational remedies, which are aimed at giving customers information to help them make choices and thereby increase competitive pressure on firms in the market"; and (c) "remedies that restrict the adverse effects of vertical relationships", such as "restriction of access to confidential information ('firewall provisions')", or FRAND obligations.[124]

Where market-wide remedies are imposed, they can at times resemble legislation. Within certain limits,[125] the EU legislator can delegate legislative powers to the Commission and has already done so in the field of competition law.[126] In order to avoid a potentially excessive expansion of legislative powers of the Commission and an inappropriate overlap of competences of the Commission and the EU legislator, a NCT Regulation could require that rule-like market-wide remedies come with a sunset clause. The Commission would then be able to provide for a fast fix for the relevant competition problem. But any such remedy would cease to have effect after a maximum of, say, 5 years, unless further legislative action is taken.

1. Procedure for the imposition of remedies

a) Timing of consultation on remedial options

In a proceeding that comes with strict time limits, the question of when the exploration and discussion of remedial options should start becomes crucial: while the competition problem must be sufficiently clear and well understood before the

[123] *Commission, Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at para. 66.*
[124] *UK Competition Commission, Guidelines for market investigations, 2013, para. 376, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf.*
[125] *Craig/De Búrca, EU Law: Text, Cases and Materials, 2015, at p. 114-116.*
[126] *See e.g. Council Reg. No. 19/65 of 2.3.1965 amended by Council Reg. No. 1215/1999 of 10.6.1999 and Council Reg. No. 1/2003 of 16.12.2002; Council Reg. No. 2821/71 of 20.12.1971 amended by Council Reg. No. 2743/72 of 19.12.1972 and Council Reg. No. 1/2003 of 16.12.2002.*

exploration of potential remedial options can start, it should not begin too late.[127] In the course of NCT proceedings, the Commission should have a sound understanding of the competition problem and remedial options by the end of phase I. The parties to the proceeding should then have the possibility to comment and to propose and discuss other remedial options. Such propositions on alternative options should be possible even outside the framework of commitment negotiations (on commitments see below under VII.): they bring important information to the proceeding regarding the range of possibilities and will allow for a better assessment of which option is most appropriate and proportionate.

At the same time, the General Court's finding that, where under Article 7 Reg. 1/2003 several remedies exist for bringing an infringement to an end, "it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty",[128] while already questionable in the Article 7-context, should not apply in the NCT setting: it is not for the firms, but for the Commission to exercise judgement on what is the best way to address a specific competition problem. Given that the NCT will normally relate to economically complex facts and involves a prognostic element, the Commission will enjoy a significant margin of appreciation in designing the remedial regime. Simultaneously, it will be required to clearly state the reasons for its choice.

Discussions about remedies must not unreasonably delay the closing of the NCT procedure. Therefore, clear deadlines for remedial proposals by market participants must be fixed.[129] Only in exceptional circumstances may the Commission accept that proposals are submitted for the first time after the expiry of this period. The Commission should be available to discuss any proposals already in advance of the end of this period.

b) Mandatory market test for remedies and consultation of outside experts

There is a question whether remedies that the Commission proposes to impose on only a limited number of selected undertakings should be subjected to a mandatory market test, analogous to the market test foreseen in Article 27(4) Reg. 1/2003.[130] Under Reg. 1/2003, the market test is only foreseen for commitment decision (Article 9 Reg. 1/2003). Within the framework of NCT proceedings, an argument may be made that the informal market consultation prior to the provisional draft decision will suffice.

A feature that could significantly contribute to the suitability of the remedial regime to address the competition concerns identified, as well as to its robustness and credibility, would be the involvement of outside expertise, be it economic or technical,

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[127] *The CC lost two cases before the Competition Appeal Tribunal (CAT) on remedies in 2009 – once in the Groceries Market Investigation (CAT, Tesco v Competition Commission, Case 1104/6/8/08 [2009] CAT 6, summary available at https://www.catribunal.org.uk/judgments/11046808-tesco-plc-judgment), a second time in the Payment Protection Insurance Market Investigation (CAT, Barclays Bank PLC v Competition Commission, Case 1109/6/8/09 [2009] CAT 27, summary available at https://www.catribunal.org.uk/judgments/11096809-barclays-bank-plc-2009-cat-27-judgment-16-oct-2009).*

[128] *Case T-24/90, Automec v Commission, EU:T:1992:97, at paras. 51-52.*

[129] *Some guidance may be taken from the Commission's Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation 802/2004, OJ 2008 No. C 267/1, at para. 88, although the deadlines in NCT proceedings could arguably be shorter.*

[130] *This has also been considered for Article 7 Reg. 1/2003 remedies – see Hellström/Maier-Rigaud/Bulst, Remedies in European Antitrust Law, (2009) 76 Antitrust Law Journal, 43, at 62; and Monti, Behavioural Remedies for Antitrust Infringements, Opportunities and Limitations, in: Lowe/Marquis/Monti, European Competition Law Annual 2013, 2016, p. 185-206, at p. 199.*

in the remedy design. Ideally, a NCT Regulation should provide for a consultation with an external expert panel at a relatively early point of time – i.e. early during phase II. Due to institutional differences, the EU NCT regime will not involve independent expertise to the same extent as the CMA market investigation does.[131] Incorporating a mechanism that provides for a "fresh pair of eyes" at this crucial stage may, however, significantly contribute to the quality of the outcome and turn out to be an important neutrality check at the same time.

Whenever remedies are imposed in a regulated sector, the sectoral regulators should be involved in the discussion on remedies.

c) Possibility to adjust remedies in the case of a material change in the facts on which the remedies were based

The Commission can order a remedy with a limited duration – for example by specifying an end date in a "sunset-clause" – where it has concluded that the competition problem will be of a limited duration or where a specific remedy in a broader remedy package shall only provide for a temporary arrangement.

With a view to cases where the competition problem to be addressed was found to be durable, a NCT regulation should provide for a possibility to waive or alleviate a remedy either upon the request of an addressee of a remedy or *ex officio* where there has been a material change in any of the facts on which the remedial decision was based, such that the remedy becomes obsolete or disproportionate.

In the context of infringement proceedings, such a possibility is foreseen with a view to commitment decisions (Article 9(2)(a) Reg. 1/2003). Likewise, non-divestiture merger remedies usually include a review clause that allows the Commission, upon request by the parties showing good cause, to waive, modify or substitute the commitments in exceptional circumstances. According to the Commission's Remedy Notice[132], it is "more relevant for non-divestiture commitments, such as access commitments, which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption of the Commission decision".

Where a waiver or adjustment of a remedy is requested by the addressee of a remedy, the burden of showing exceptional circumstances should be on him/her. Exceptional circumstances will be accepted where market circumstances have changed significantly and on a permanent basis or where the addressees can show that the experience gained in the application of the remedy demonstrates that the objective pursued with the remedy will be better achieved if modalities of the commitment are changed. Like with merger remedies, a sufficient long time-span – normally at least several years – between the Commission decision and a request by the parties will normally be required. Where the waiver request entails complex economic assessments, the Commission will have a certain discretion in its assessment.[133]

Vice versa, where the remedies imposed prove to be inadequate with a view to the goals pursued, i.e. where they turn out to be ineffective or pose other significant problems at the implementation phase, a possibility should be foreseen to revisit the

[131] *See, for example, Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 11, available on ssrn.com.*
[132] *Commission Notice on remedies acceptable under Council Regulation No. 139/2004 and under Commission Regulation No. 802/2004, OJ 2008 No. C 267/1, at para. 74.*
[133] *Case T-712/16, Deutsche Lufthansa v Commission, ECLI:EU:T:2018:268, at para. 38.*

remedies *ex officio* within a fixed period of time while continuing to rely on the substantive findings regarding the competition concern. Such a mechanism is currently discussed for the CMA market investigation.[134] As *Amelia Fletcher* has pointed out, such a flexibility may be especially important in dynamic markets which are subject to fast and significant changes. "In such markets, the identified concerns may be fairly persistent (…), but the appropriate remedies may well require flexing as the markets and technologies change".[135] Such a flexibility may ultimately benefit firms as well as consumers: "no one gains from costly, ineffective regulation".[136]

d) Mandatory ex post evaluations

The legislator should think about providing for a mandatory ex post evaluation of remedies/commitments after a period of – say – 5 years, in order to allow the Commission to learn from past experience over time and to improve the framework. The evaluation may be done by independent outside experts in order to safe on the Commission's resources and to ensure a "fresh pair of eyes".

VII. Voluntary commitments by market actors within the framework of the NCT

Following the example of Article 9 Reg. 1/2003 (for infringement proceedings) and of the ECMR, a NCT Regulation should legally provide for the possibility of accepting commitments offered by market actors and making them binding.

1. Justification for a commitment procedure within the NCT proceeding

Commitment proceedings are based on considerations of procedural economy: they shall allow for a more rapid solution to competition problems than would be feasible if the Commission were required to proceed by way of a formal remedial decision, and they shall thereby allow the Commission to make the most efficient use of its limited enforcement resources.

In the context of NCT proceedings, commitment decisions could somewhat abbreviate the market investigation phase (albeit to a limited extent – see VII.2.). More importantly, they could help to abbreviate the proportionality analysis linked to the comparison of different remedial options. While parties potentially affected by remedies will be able to come forward with their own remedial proposals anyhow, making a consensual solution binding may come with increased incentives of the parties to implement their proposed solution effectively. In addition, lengthy appeal proceedings will normally be avoided as the voluntary commitments would benefit

[134] *On this see Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 14, available on ssrn.com; referring to the letter by Lord Tyrie, Chairman of the CMA, to the Secretary of State for Business, Energy and Industrial Strategy, 21.2.2019, at Fn. 27, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.*

[135] *Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 11, available on ssrn.com.*

[136] *Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper,2020, p. 11, available on ssrn.com.*

from a presumption of proportionality.[137] Last but not least, a well-organised commitment procedure would widen the opportunities for a participative, non-adversarial style of proceeding and invite a productive cooperation between the Commission and the companies affected. The concerns sometimes raised against commitment proceedings under Article 9 Reg. 1/2003[138] would not apply to commitment negotiations in the course of NCT proceedings: since a finding of an infringement and fines are excluded from the start, companies will be under no perceived pressure to cooperate. Where the Commission and the companies have come to a shared understanding of the competition concerns on the other hand, they may have a joint interest to avoid lengthy follow-up investigation and legal uncertainty.

Which role there will be for commitment proceedings in practice remains to be seen. The UK experience cautions against too high expectations.[139] Where parallel commitments would need to be negotiated with a large number of companies, commitment proceedings may become burdensome. Potential efficiency gains of a commitment decision over a formal remedial decision are then reduced and commitment negotiations may rather delay than accelerate the finding of a solution. Commitment decisions may be more relevant where a competition problem arises from the conduct of one or very few firms.

2. Timing

In the UK, commitments can be accepted at two different points of time: they can be accepted "in lieu of a market investigation reference", such that a market investigation will not take place (Section 154(2) UK Enterprise Act 2002);[140] or they can be accepted at the end of a market investigation.

In the European setting, commitment negotiations should not start before phase II, in order to ensure a sufficient informational basis for assessing the relevant competition concern and the menu of remedial options.

3. Procedural rules for commitment negotiations

The procedural rules to be followed when negotiating commitments should be specified in guidelines. Given the strict time limits that NCT proceedings will be subject to, time limits should also be fixed for commitment negotiations. Merger control proceedings provide a useful template in this regard.

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[137] *Opinion of Advocate General Kokott in Case C-441/07 P, Commission v Alrosa, EU:C:2009:555, para. 55.*
[138] *See e.g. von Kalben, Verpflichtungszusagen im EU-Wettbewerbsrecht, 2016, at p. 21-27; Dunne, Commitment Decisions in EU Competition Law, (2014) 10 Journal of Competition Law and Economics, 399, at 435-442).*
[139] *See OFT, Guidance on Market investigation references, para. 2.21, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf: "(…) trying to negotiate undertakings with several parties in circumstances in which possible adverse effects on competition have not been comprehensively analysed, is likely to pose serious practical difficulties". Also: Whish/Bailey, Competition Law, 2018, Chap. 11, at p. 483-484.*
[140] *Where the CMA accepts undertakings in lieu of a reference, it will not be able to make a reference within the following 12 months – Section 156(A1) Enterprise Act 2002 – cross-market references; and Section 156(1) Enterprise Act 2002 – ordinary references; except where an undertaking has been breached – Section 156(2)(a) Enterprise Act 2002.*

In analogy to commitment proceedings under Article 9 Reg. 1/2003, commitments should only be accepted if they are unambiguous and self-executing.[141]

As procedural economy is one of the major justifications for a commitment procedure, accepting commitments should be conditional on the parties accepting that access to the file will only be granted to the main documents on which the Commission relies for the identification of the relevant competition problem.[142]

Before the Commission decides to make commitments binding, the commitments shall be subjected to a market test procedure.[143]

In its commitment decision, the Commission should be required to summarise the findings of the market investigation and competition analysis and explain the appropriateness of the commitments in addressing the relevant competition concerns. This will be an important benchmark in case an adjustment of the commitments is needed later on.

Following a commitment decision, the Commission shall not be allowed to make use of the NCT again within the following 12 months with a view to the same competition problem, unless there is a breach of the commitments or unless the commitments were accepted on the basis of false or misleading information.[144] It should, however, be allowed to make use of the NCT afterwards in case the competition problem would persist despite the implementation of the commitments.

The parties who have offered the commitments shall be allowed to request the reopening of the proceedings where there has been a material change in any of the facts on which the decision was based (see above, VI.4.c)).

VIII. Interim measures within the framework of the NCT

1. The need for interim measures in the NCT setting

The NCT shall address severe gaps in the protection of the competitive process. Among other things, it shall allow the Commission to prevent specific *risks* for competition from materialising, in particular the risk of market "tipping". Also, protecting competition in fast-moving markets characterised by strong economies of scale and network effects may be an important area of application of the NCT. In such settings, serious and irreparable harm to competition can occur quickly in the absence of a timely and effective intervention. While NCT proceedings are meant to be relatively fast, they can nonetheless take up to (possibly) 3 years before a final decision is taken. The Commission must dispose of an instrument that ensures that no

[141] *See* Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011 No. C 308/6, para. 128.
[142] *In analogy to Article 9 Reg. 1/2003 proceedings – see* Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011 No. C 308/6, para. 123 and *Wils/Abbott, Access to the File in Competition Proceedings before the European Commission, (2019) 42 World Competition, 255 – updated version (last revised: 15.5.2020), p. 13, available on ssrn.com.*
[143] *For the Article 9 market test procedure see Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011 No. C 308/6, para. 129.*
[144] *For such a rule see Section 156(1)-(2) UK Enterprise Act 2002.*

irreparable damage occurs in the meantime while the necessary investigations are carried out. Otherwise, the added value of NCT proceedings may turn out to be limited.

The introduction of interim measures into the "markets regime" is also discussed in the UK.[145] In this context, *Lord Tyrie* has argued that the power to impose interim measures pending full investigation would "provide a stronger incentive for these firms to listen, engage and take steps to address the CMA's concerns in advance of formal work, than currently".[146] This is in line with the French experience in infringement proceedings: The more active use of, and greater ease in adopting interim measures which is characteristic for the French model has tended to increase the companies' willingness to cooperate and their interest in a consensual settling of the proceedings by way of voluntary commitments.[147] In the EU, the *Broadcom* proceedings[148] appears to confirm this experience: following the imposition of an interim measure, Broadcom has proposed commitments. Finally, this is in line with the experience in the field of enforcement of intellectual property rights, where provisional measures for the immediate termination of infringements[149] will frequently lead to a settlement of the case.

Given this experience, it is all the more important to ensure the proportionality of any interim measure and to provide for fast and full judicial review. Where these guarantees are available, interim measures may, however, come to play an important role.

2. A legal framework for effective interim measures

In infringement proceedings, the European Commission has rarely made use of interim measures so far. Up until now, there are only 10 interim measures decisions in total, 9 of which were passed between 1980[150] and 2001.[151] Only one interim measure has been imposed under Reg. 1/2003, namely in the *Broadcom* case.[152] Three features of the interim measures regime as it is now laid down in Article 8 Reg. 1/2003 are considered to have contributed to a rather hesitant use of this instrument: (a) the substantive standard for imposing interim measures is considered to be rather high; (b) the high procedural requirements that have to be met before ordering an interim measure; (c) the substantial risk that the General Court will suspend the interim measure for the duration of an action for annulment. As these features might also affect the effectiveness of NCT interim measures, they shall be considered in turn.

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[145] *See Letter by Lord Tyrie, Chairman of the CMA, to the Secretary of State for Business, Energy and Industrial Strategy, 21.2.2019, Annex, p. 10 and p. 12, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.*

[146] *See Letter by Lord Tyrie, Chairman of the CMA, to the Secretary of State for Business, Energy and Industrial Strategy, 21.2.2019, Annex, p. 17, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.*

[147] *Lowe/Maier-Rigaud, [2007] Fordham Comp. L. Inst., 597, 610.*

[148] *Case AT.40608 – Broadcom (ongoing proceeding).*

[149] *See Article 9 and rec. 22 of the Directive 2004/48/EC of 29.4.2004 on the enforcement of intellectual property rights, OJ 2004 No. L 157/45.*

[150] *Case C-792/79 R, Camera Care Ltd v Commission of the European Communities, EU:C:1980:18.*

[151] *Case COMP D3/38.044 – NDC Health/IMS Health.*

[152] *Case AT.40608 – Broadcom (ongoing proceeding).*

a) Substantive preconditions for imposing interim measures

Article 8 Reg. 1/2003 requires a *prima facie* finding of a competition law infringement and a showing of urgency due to the risk of serious and irreparable damage to competition. As regards the evidentiary burden for establishing a *prima facie* finding of an infringement, the General Court has found that a "*prima facie* infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy."[153] At the same time, when considering the adoption of an interim measure the Commission must have "regard to the legitimate interests of the undertakings concerned by them"[154] and to the public interest in effective competition which may be negatively affected where interim measures are adopted without good cause.

It seems that under French competition law,[155] where interim measures are ordered much more frequently,[156] the requirements are similar on paper, but the test of "immediate harm" is interpreted more leniently.[157] In principle, however, the EU case law on interim measures in competition law provides for a substantial degree of flexibility: according to the European Court of Justice, the ordering of interim measures is based on an overall assessment and weighing up of the interests concerned – the interest in the protection of competition and the interest of the companies affected by the interim measure.[158]

In a NCT proceeding, interim measures would need to be based on a substantiated *prima facie* finding of a competition problem of the type that the NCT is meant to address and limited to cases of urgency due to a risk of serious and irreparable harm to competition. The Commission should be required to assess the extent of the harm to competition and the degree of certainty by which the harm will materialise. While the requirement of a *prima facie* competition problem would certainly call for a relevant minimum degree of substantiation that a relevant risk exists, the precise demands on the Commission could differ depending on the size of the potential harm.

Consequently, the Commission could – depending on the facts of the case – order interim measures already at an early stage of a NCT proceeding, provided it can substantiate the competition concern. The less comprehensive the evidence, the more cautious should the interim measures be. Where the competition problem is already well established and backed up by substantial proof, further reaching measures would be acceptable if necessary to avoid serious and irreparable damage to competition. Such measures may include behavioural or even access obligations being imposed on an undertaking (see below, d)).

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[153] *Case T-44/90, La Cinq SA v Commission, EU:T:1992:5, at para. 61.*
[154] *Case C-792/79 R, Camera Care Ltd v Commission, EU:C:1980:18, at para. 19.*
[155] *See L. 464-1 of the code de commerce: The main preconditions are the likelihood of a competition law infringement and serious and immediate harm to the general economy, the economy of the sector, the interest of consumers or the interests of the claimant.*
[156] *Giraud/Blanc, Les mesures conservatoires à la francaise: Un modèle réellement enviable?, Concurrences No. 3-2018, available at https://fr.lw.com/thoughtLeadership/mesures-contradictoires-une-solution-souhaitable.*
[157] *Both with regard to the test of "immediate harm" and with a view to the evidentiary burden regarding the infringement ("likely to infringe" competition law compared to "prima facie breach" of competition law) – see Thill-Tayara, Presentation, at p. 3, available at https://www.concurrences.com/IMG/pdf/concurrences_presentations_180608.pdf?42722/9476cb9c0f55ec6994e463bc4a719ac9a3d3b173; cf. Burnside/Kidane, Interim Measures: An overview of EU and national case law, p. 7, available at https://www.concurrences.com/IMG/pdf/alec_j._burnside_adam_kidane_-_interim_measures_-_an_overview_of_eu_and_national_case_law.pdf?42067/88ef3e2932cc547cc56d9630b273aca4582c3a7a.*
[158] *Case C-481/01 P (R), IMS Health v Commission, EU:C:2002:223, at para. 63.*

b) Procedural safeguards

In proceedings under Article 8 Reg. 1/2003, the procedural requirements are high, as they are part of the Commission's toolbox in quasi-criminal infringement proceedings: Before adopting an interim measure, the European Commission must issue a statement of objections, grant access to the file, give the opportunity to comment, hold a hearing and consult the advisory committee. Interim measures under Article 8 of Reg. 1/2003 therefore risk to tie up substantial additional resources, affecting the rapidity of main proceedings.[159]

As NCT proceedings will not be of a quasi-criminal nature and consequently do not implicate the presumption of innocence, a somewhat lighter degree of procedural guarantees may therefore be justified. For the UK, the Furman-Report for example recommended to restrict access to the file to documents clearly relevant to the interim measure.[160]

The Commission will, however, require to provide a reasoned decision that justifies the need for an interim measure and can be challenged before the General Court.

c) Suspension decision by the General Court

Actions for annulment do not have an automatic suspensory effect. However, the Court has a wide leeway in deciding whether the contested measure should be suspended for the duration of the action for annulment (Article 278 TFEU).[161]

The suspension of the interim measure in the *IMS Health* case has been taken as an indication of a high risk of suspension, particularly in novel cases or cases based on a change in the interpretation of the competition rules. Recently, there have been calls to limit judicial review of interim measures to a plausibility check.[162] Constraining judicial review of interim measures would, however, not only require a change of primary law. It would also interfere with the fundamental right to an effective remedy and a fair trial under Article 47 CFR and be hard to justify under Article 52(1) CFR.[163] Given that interim measures may intervene severely into a company's freedom to conduct a business (Article 16 CFR), as well as into the right to property (Article 17 CFR) – including by measures that will have effects on the market that cannot be undone later – tight judicial review will rather be needed.

At the same time, *IMS Health* should not be read to stand in the way of an effective use of interim measures, in particular to generally disallow interim measures in cases of previously untested theories of harm. Rather, in the eyes of the Union Courts, the case combined an interpretation of Article 102 TFEU that the Courts found to be *prima facie* unconvincing with a far-reaching remedy, and therefore failed the balancing test.

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[159] *Lowe/Maier-Rigaud, [2007] Fordham Comp. L. Inst., 597, 609.*

[160] *Furman/Coyle/Fletcher/McAuley/Marsden, Unlocking digital competition, 2019, at para. 3.127, available at https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.*

[161] *With respect to the standard of judicial review, Case C-481/01 P(R), IMS Health v Commission, EU:C:2002:223, at paras. 57 et seqq.*

[162] *Art, (2015) 2 Italian Antitrust Review, 55, at 69; with respect to the UK: Furman/Coyle/Fletcher/McAuley/Marsden, Unlocking digital competition, at paras. 3.128 et seqq., available at https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.*

[163] *Likewise, Article 6 ECHR may be involved – see Micallef v Malta ([GC], §§ 80-86): Article 6 applies to interim measures where (1) a civil right within the meaning of the Convention is at stake, and (2) the interim measure can be considered to effectively determine the civil right or obligation at stake.*

d) Proportionality of the interim measures

As interim measures will, in one way or another, interfere into fundamental rights, care must be taken that the intervention is necessary to genuinely meet recognised objectives of general interest, and that it is proportionate (Article 52(1) CFR). In the context of NCT proceedings, interim measures must be limited to what is strictly necessary to ensure that the identified risk to competition does not materialise in an irreversible way (e.g. in the case of a risk that a market will tip) or that the competitive process is irreversibly harmed (e.g. because the continuation of a specific business strategy will lead to durable barriers to entry).

According to the General Court's existing case law on interim measures in infringement cases, these measures must be of a temporary and conservatory nature and restricted to what is required in the given situation.[164]

This requirement cannot and should not be strictly upheld when it comes to NCT interim measures: obviously, where competition can be protected by a measure that is merely conservatory in nature and can later be undone if no competition problem is found, interim measures must go no further. Also, very far-reaching remedies like a divestiture must not be ordered by way of an interim measure. The interests of the addressee(s) of an interim measure must always be taken into account and given weight.

However, interim measures should not be strictly limited to preserving the status quo.[165] The types of competition problems that the NCT is meant to address will sometimes require the imposition of positive obligations that go beyond the status quo ante – otherwise a market may, for example, tip and competition may durably fail. Consequently, interim measures like the imposition of duties to temporarily ensure a vertical unbundling, to grant access to certain resources or to ensure interoperability should be possible where necessary to maintain competition. In each single case, the proportionality of the measure will need to be carefully verified.

e) Duty of expedition

In NCT proceedings, the Commission will be under a general duty of expedition (see above, V.2.b)). This duty will apply in a reinforced manner where interim measures have been imposed, so as to confine the burden on the addressees of the interim measures as much as possible.

IX. Sanctions in case of non-compliance with remedies, commitments or interim measures

The Commission will need to keep the implementation of any remedies, commitments made binding or interim measures under review to ensure that they are complied

[164] *Case 792/79 R, Camera Care Ltd v Commission, EU:C:1980:18, at para. 19. See also the highly restrictive approach in Case T-184/01 R, IMS Health v Commission, EU:T:2001:200, at para. 25.*
[165] *See, however, Case T-184/01 R, IMS Health v Commission, EU:T:2001:200, at para. 25.*

with. Where remedies are imposed in a regulated sector, the monitoring function may be delegated to the national regulatory authorities.[166]

In case of non-compliance, the Commission – or, if applicable, a regulatory authority – must possess sanctioning powers with a sufficient deterrent effect.[167] The fining powers set out in Articles 23 and 24 of Reg. 1/2003 and in Articles 14 and 15 of the ECMR can serve as a role model.

In the UK, the duty to comply with orders and commitments is owed to anyone who may be affected by a breach, such that breaches of the duty are actionable where they cause a loss or damage to another person.[168] This may also be a model for the EU.

X. Judicial review

1. Decisions subject to judicial review

According to Article 47 CFR, everyone whose rights and freedoms guaranteed by EU law are violated has the right to judicial review. Likewise, a right of access to a court is guaranteed under Article 6(1) ECHR. Under Article 263(4) TFEU, any natural or legal person can institute proceedings against any procedural act addressed to him or her before the Union Courts. Consequently, any addressee of a NCT remedy will be able to bring an action. The same is true for the addressee of an investigatory measure or where procedural rights in the administrative procedure are violated.

Other decisions taken in the course of the NCT will not be subject to judicial review. In particular, the opening of NCT proceedings cannot be appealed as it is only an intermediate measure.[169] Nor should a decision by the Commission not to open a NCT be subject to judicial review: Contrary to infringement proceedings, no individual rights are involved when it comes to NCT proceedings. The use of the NCT is therefore entirely at the Commission's discretion.

There is a question whether proceedings against a final NCT decision can be instituted also by other market actors who consider that the Commission, in its decision closing a NCT proceeding, does not comprehensively address the competition problem identified, or has failed to identify the competition problem accurately, and who are thereby negatively affected. Under Article 263(4) TFEU, a right of action is limited to those who are directly and individually concerned. While a final decision will be of *direct* concern to third party market actors,[170] an *individual* concern is questionable. According to the well-known *Plauman*-formula, "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person

[166] *For this proposition see Larouche/de Streel, Interplay between the New Competition Tool and Sector-Specific Regulation, Study for the EU Commission, 2020.*
[167] *For the insufficiency of the CMA's enforcement powers in this regard see Fletcher, Market Investigation for Digital Platforms: Panacea or Complement, ccp Working Paper, 2020, p. 15, available on ssrn.com.*
[168] *Enterprise Act 2002, Section 167(2)-(3).*
[169] *Case T-902/16, Heidelberg Cement, EU:T:2017:846, at paras. 14-17.*
[170] *See Case T-3/93, Air France v Commission, EU:T:1994:36, at paras. 80-81.*

addressed".[171] According to settled case law, an undertaking cannot contest a Commission decision if it is concerned by that decision solely by virtue of belonging to the relevant market in question.[172] Nor would the fact that a person has participated in the administrative procedure based on which the Commission has adopted its decision afford that person standing to bring proceedings contesting the legality of that decision in terms of its substantive content. Rather, "[t]he precise scope of an individual's right of action against a Community measure depends on his legal position as defined by EU law with a view to protecting the legitimate interest thus afforded him".[173] As has been discussed above (see IV.3.), the NCT – contrary to Articles 101 and 102 TFEU – will not be based on or backed up by individual rights. The underlying model rather is one of "small-scale ex ante regulation" to protect the system of undistorted competition more effectively and completely.

2. Standard of judicial review

The Commission's remedial decision will be subject to the regime of legality control under Article 263 TFEU. Where a Commission decision is appealed, the Union Courts will – depending on the grounds of the appeal – review whether the relevant competition problem has been proven to the requisite standard of proof and whether the remedies imposed appropriately address the relevant competition problem, are necessary to achieve this goal, and proportionate with a view to the corresponding intervention into fundamental rights. The focus of judicial review in NCT settings will arguably differ depending on how the legal intervention criterion is drafted (see above, III.1.b)(1)): where the legal intervention criterion specifies the type of competition problem and threshold that justify intervention, the Union Courts will verify whether the these criteria are proven to the requisite legal standard, but they may leave more leeway to the Commission regarding the design of remedies. Where the intervention criterion remains vague, judicial review will likely focus on the proportionality of the remedies and leave less leeway to the Commission in this regard.[174]

The Court will also review charges that the Commission has violated procedural rights. A defect in this respect can lead to the decision in question being quashed.

Both in infringement and in merger control proceedings, the Union Courts recognise that the Commission possesses a margin of appreciation in complex economic matters and confine the review to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.[175] The same must hold with regard to the NCT. Legality control is nonetheless demanding: "Not only must the Community Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it".[176]

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[171] *Case C-25/62, Plauman v Commission, EU:C:1963:17, at para. 107.*
[172] *See from the area of state aid law Case C-367/04 P, Deutsche Post und DHL v Commission, EU:C:2006:126, at paras. 40, 41; Case C-525/04 P, Spain v Lenzing, EU:C:2007:698, at paras. 32, 33.*
[173] *Case T-381/11, Eurofer v Commission, EU:T:2012:273, at para. 35; Case C-355/08 P, WWF-UK v Council, EU:C:2009:286, at para. 44.*
[174] *For the UK experience with a focus on the propoertionality review see Whish, New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK's market investigation tool, Study for the EU Commission, 2020, Chap. 4.*
[175] *Joined Cases C-501, 513, 515 and 519/06 P, GlaxoSmithKline V Commission, EU:C:2009:610, at para. 163. See generally: Marc Van der Woude, (2019) 10 Journal of European Competition Law & Practice, 415.*
[176] *Case C-12/03 P, Tetra Laval, EU:C:2005:87, at para. 39.*

Contrary to infringement proceedings, the NCT is not of a quasi-criminal nature. The presumption of innocence will be of no relevance in these proceedings. Also, the choice of remedial action has an important prognostic element. The Union Court's legality review of the NCT proceedings may therefore resemble the type of legality review currently exercised in merger proceedings. Considering that the remedies imposed under the NCT can intensely interfere with fundamental rights, judicial review of questions of fact will and should be intense. Arguably, the Commission's evidential burden with regard to the competition problem and the proportionality will rise with the harshness of the remedy imposed.

When it comes to the review of the Commission's assessment of the competition and the necessity and proportionality of the remedy, the standard of judicial review must be appropriate to the subject-matter of the dispute. For example, where the Commission reacts to a potential problem of tipping, the prognostic uncertainties will need to be recognised. The same will be true with regard to the necessity and effectiveness of a remedy. Nonetheless, the harsher a remedy intervenes into individual rights, the more intense will the judicial review arguably be.

3. Expedited proceedings in divestiture cases?

Actions brought before the EU courts do not have suspensory effect (Article 278 TFEU). This will also be true for appeals against NCT decisions. The decisions will continue in force pending the judgment of the General Court on the substance. An applicant can, however, apply for the decision to be suspended or for any other interim measure to be ordered. The standard for interim relief is a high one: The applicant must establish a *prima facie* case *(fumus boni iuris)* and show that the suspension or other interim measure is urgently needed to avoid serious and irreparable damage for the applicant. The test is applied strictly – pure financial loss will normally not suffice. In case of a divestiture, it would, however, normally be met. Arguably, the NCT Regulation should, for these cases, include a rule that the expedited procedure is to be followed.[177]

[177] *For the expedited procedure see Amendments to the Rules of Procedure of the Court of First Instance of the European Communities, OJ 2000 No. L 322/4.*

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