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New Competition Tool inspired by the CMA: a project worth revisiting

Master's thesis

Author: Tatiana Podstolna, student ID s2612917

Supervisor: Prof. Dr. Ben Van Rompuy

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Leiden Law School

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Name Typed: Tatiana Podstolna

Student ID Number:s2612917

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Table of abbreviations

Art(s) – article(s)

B2B – business-to-business

B2C – business-to-consumer

CC – Competition Commission

CFI – Court of First Instance

CJEU – Court of Justice of the European Union

CMA – Competition and Markets Authority

Commission – European Commission

DG Comp – Directorate-General for Competition

Digital Markets Act – DMA

ed. – edition

EA 2002 – Enterprise Act 2002

ERRA 2013 – Enterprise and Regulatory Reform Act 2013

EU – European Union

EUMR – European Union Merger Regulation

GC – General Court

NCT – New Competition Tool

OFT – Office of Fair Trading

OJ – Official Journal of the European Union

s. – section

Sherman Act – Sherman Antitrust Act 1890

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

UK – United Kingdom

US – United States of America

Executive summary

The impetus for this thesis was the European Commission's proposal to complement the EU's existing competition law framework by a New Competition Tool.

The Initial Impact Assessment for the New Competition Tool initiative highlighted a series of competition problems which cannot be adequately addressed within the existing framework: the oligopoly problem, the monopolization problem and the tipping markets problem. These issues are not specific to any particular sector of the economy – yet, the Commission has decided against initiating a horizontal NCT and has instead moved forward with the Digital Markets Act drafted to address a very narrow issue of gatekeepers in the digital sector. This thesis explains that the problems highlighted by the Initial Impact Assessment remain topical to this day. They are concerned with structural market features and with conduct by undertakings which does not currently constitute an infringement, but which does nonetheless harm competition.

From the very outset of the NCT proposal, the possibility of drawing inspiration from the CMA's market investigation tool was being considered. This thesis returns to that idea and explains that the horizontal investigation tool as used by the CMA could in principle make a good model for the NCT. However, adopting any legal provision from a foreign legal system is a task to be approached with caution. The CMA's tool should be viewed as an inspiration rather than a framework to be completely copied. In particular, this thesis advises against conferring on the Commission the power to impose structural remedies in absence of finding an infringement of Articles 101 or 102 TFEU.

The thesis finds that most concerns about giving the Commission too much discretionary powers to interfere *ex-ante* to remedy or prevent market features are overstated. With the availability of judicial review and sufficiently detailed guidelines about the ways this discretion is likely to be exercised, the NCT has the potential to have a positive influence on the competitive landscape in the EU.

Main findings

- The Initial Impact Assessment of the NCT indicated a series of threats to competition in the EU which the current competition law framework is ill-equipped to address. These concerns remain topical, for reasons stated below.
- Firstly, Article 101 TFEU is not sufficiently effective at addressing situations where, due to structural market features such as high transparency, undertakings are able to act in parallel. Whereas the broad definition of 'concerted practice' goes a long way to help this problem, the investigatory burden on the Commission to prove the existence of concerted practice is still high.
- Secondly, the EU competition law framework has no tools to address monopolizing strategies by non-dominant undertakings. Yet, where an undertaking that was originally not dominant acquires said dominance by means of exclusionary practices, such behaviour may be as harmful to competition as similar practices by dominant undertakings.
- Thirdly, the EU competition law framework has no tools to address the problem of tipping markets, where tipping occurs in absence of an exclusionary practice. Tipping can be dangerous per se, because it leads to the establishment of a super-dominant undertaking which, particularly in markets with high barriers to entry, can then continue to behave inefficiently, because the customers will have nowhere to switch.
- The CMA's market investigation framework could be valuably used to address the types of concerns highlighted by the Commission in the Initial Impact Assessment. On the other hand, it must be noted that the CMA's dual mandate of competition and consumers authority is different from that of DG COMP. Thus, in the context of EU law, the enforcement focus should remain the maintenance of the efficient competitive process.
- The CMA has the power to impose both behavioural and structural remedies on undertakings on markets affected by features with have adverse effect on competition. The power to impose structural remedies, while only exercised once by the CMA, has been highly controversial. It is recommended that the EU does not adopt this power.

- The CMA uses a two-tier framework of investigations before remedies can be imposed, consisting of market studies and follow-up references for market investigations. It is suggested that such a framework, if transplanted to EU law, would be too bureaucratically cumbersome and would abridge the usefulness of the NCT. To that end, it is suggested that where the Commission has enough information to conclude that certain market features are likely to have or are already having adverse effects on competition, and that use of NCT would be a proportionate response, it should be empowered to use the NCT without preliminary recourse to a sector inquiry.
- Concerns have been raised about the discretion of the Commission in using the NCT over the established competition law enforcement tools, in particular Articles 101 and 102 TFEU, but also the existing sectoral regulations. The present thesis suggests that this discretionary power is not only in line with the Commission's efficiency-oriented approach, but would also not be prejudicial to the undertakings concerned.
- In order to compensate for the broad discretion conferred by the NCT, and to instill in the undertakings operating in the EU a sense of legal certainty, the Commission should, together with the introduction of the NCT, promulgate appropriate guidelines, explaining how this discretion is likely to be exercised.

Introduction

In 2019 the European Commission began consultations with the view of harnessing stakeholders' opinion on the eventual introduction of a New Competition Tool.[1] The Commission was considering a tool which would tackle features of the market that impede or hamper competition rather than focus on conduct of individual undertakings. As highlighted in the Inception Impact Assessment for this initiative, the NCT was to tackle problems that cannot be solved by applying Articles 101 and 102 TFEU, including in particular tacit collusion, monopolization and tipping markets.[2] As contemplated by Crawford, Rey and Schnitzer in their report to DG COMP, the NCT would have allowed to impose remedies on a particular market in absence of an infringement, but based merely on the desirability of remedying certain structural deficiencies leading to anti-competitive results.[3]

From the outset, there were two main directions that the NCT could have taken: the Commission contemplated either a horizontal enforcement tool encompassing means of ex-ante market intervention, or a sectoral intervention into digital markets.[4] The Commission received feedback from 73 entities, including market players, consultancies, NGOs and governmental bodies. The stakeholders' views can be broadly divided into three categories: those who believed that no new tool is necessary at all; proponents of sectoral intervention; and proponents of a broad legal tool for ex-ante interventions. Views of the prominent undertakings active in the digital sector diverged considerably on the issue. Undertakings such as Facebook or Deliveroo took a stand against the introduction of any new tool at all.[5] In comparison, the stances of Apple,

[1] Commission, 'Single Market – new complementary tool to strengthen competition enforcement' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement> accessed 02 May 2021.
[2] Commission, 'Inception Impact Assessment: New Competition Tool' Ref.Ares(2020)2877634, 2.
[3] Gregory Crawford, Patrick Rey, Monika Schnitzer, '*An Economic Evaluatino of the EC's Proposed "New Competition Too*l"' (Publications Office of the European Union 2020) < https://op.europa.eu/cs/publication-detail/-/publication/f4f0013b-35e3-11eb-b27b-01aa75ed71a1/language-en> accessed 02 May 2021, 13.
[4] ibid, 3.
[5] *NCT consultations* (n 1), feedback reference F535697 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement/F535697> accessed 02 May 2021, feedback reference F535674 <https://ec.europa.eu/info/law/better-regulation/have-your-

Google or Microsoft were much more nuanced, recognizing the need for *a* legislative intervention but raising practical concerns mainly connected to legal certainty and preservation of the undertakings' ability and willingness to innovate.[6]

The Commission has finally decided against introducing a horizontal tool for ex-ante market interventions, choosing instead to focus on one of its current enforcement priorities: the digital markets. The planned Digital Markets Act[7] will be a competition law complement to a broader package of legislative reforms in the digital sector, including most notably the Digital Services Act[8] and the P2B regulation.[9]

The choice to table the NCT notwithstanding, the concerns raised by the Commission in the Initial Impact Assessment have not disappeared. The specific characteristics of the digital (and digitally-enabled) markets, including the prevalence of network effects leading to a "winner-take-all" result on many digital markets,[10] and the proliferation of platforms that operate as essential infrastructure for the conduct of commerce, may indeed call for sector-specific legislative intervention. However, by focusing on sectoral intervention in innovative markets, the Commission risks leaving behind the markets whose structure also lends itself to anti-competitive results and which are considerably more stagnant than the digital sector.

The purpose of this thesis is to examine 1) whether the Commission should reconsider its choice and initiate the introduction of a horizontal NCT and 2) what form should such an NCT take. The introduction of such a far-reaching tool would presuppose the existence of enforcement

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say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement/F535674> accessed 02 May 2021.

[6] *NCT consultations* (n 1), feedback reference F535705 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement/F535705> accessed 02 May 2021, feedback reference F535597 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement/F535597> accessed 02 May 2021, feedback reference F535558 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement/F535558> accessed 02 May 2021.

[7] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM/2020/842 final.

[8] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM/2020/825 final.

[9] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57.

[10] Jacques Crémer, Yves-Alexandre de Montoye, Heike Schweitzer, '*Competition policy for the digital era'* (Publications Office of the European Union 2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 02 May 2021, 22-23.

gaps in the current competition law toolkit comprised of Article 101 and 102 of the Treaty on the Functioning of the European Union.[11] Therefore, Part I of this thesis will tackle the limits of the enforcement framework under Article 101 and 102 TFEU, as originally contemplated by the Commission: the oligopoly problem, the monopolization problem and the problem of tipping markets. Case law of the CJEU will be used to demonstrate that the current EU competition law framework, although very broad, is not well suited to regulating structural deficiencies of markets or behaviours of non-dominant undertakings. Part II will describe the experience of the UK Competition and Markets Authority with a tool for ex-ante market interventions. It will be argued that the CMA's competence to impose remedies for structural or conduct features of the relevant market that are harmful to competition could be, with some modifications, usefully transplanted to EU law in order to tackle the Commission's concerns. Finally, Part III will then focus in more detail on what shape could the CMA-inspired NCT take as part of the EU competition law framework. It will be concluded that safeguarding the legitimate interests of stakeholders, while creating a tool that would permit the Commission to act quickly to remedy or prevent harm to competition, will require a cooperative approach to stakeholders and an increased reliance on soft law guidelines.

1 Is there a case for an NCT?

1.1 The limits of enforcement framework under Article 101 TFEU

Article 101 TFEU prohibits certain anti-competitive agreements, decisions and concerted practices. In other words, in order to fall within the Article 101 analysis, the anti-competitive conduct in question must be attributable to at least two undertakings acting in concert. There has been a long-standing concern about a possible loophole in this enforcement framework: if undertakings act in parallel without any evidence of an agreement, decision or concerted practice, their behaviour will fall outside the ambit of Article 101 even if it does lead to anti-competitive results.[12] This phenomenon has been called 'the oligopoly problem', 'tacit collusion' or 'conscious parallelism'.

[11] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202/1.
[12] Nicolas Petit, 'The Oligopoly Problem in EU Competition Law' in Ioannis Lianos, Damien Geradin (eds) *Research Handbook in European Competition Law* (Edward Elgar 2013); Edward J. Green, Robert C. Marshall, and

Section 1.1.1 of this thesis will give an overview of the academic debate on this topic. Section 1.1.2 will analyze the decisions of the Commission and the CJEU to show that the Article 101 concept of agreement and/or concerted practice is sufficiently fine-tuned to distinguish between situations where high market transparency a) is artificially increased by undertakings, generating anti-competitive results; or b) leads to parallel conduct of undertakings but without harming competition. Furthermore, while no such case has been brought before a competition authority before, it will be suggested that Article 101 could even be used to analyze instances of algorithmic collusion. Therefore, it will be concluded that nothing about the current interpretation of Article 101 by the Commission or the CJEU urgently calls for an introduction of the New Competition Tool. On the other hand, it will be conceded that such a tool could decrease the Commission's investigative burden by dispelling with the need to prove concerted practice in the first place.

1.1.1 The problem with oligopolies

One of the competition problems that NCT was supposed to tackle according to the Commission's Initial Impact Assessment was structural lack of competition, including oligopolistic markets with increased risk of tacit collusion.[13] As explained by Whish and Bailey, labeling the issue simply as 'the oligopoly problem' may be misleading: oligopolistic markets are not all the same and, depending on other market characteristics, may be competitive despite having only a few players.[14] For example, in markets with prominent economies of scale, it might make sense for undertakings to compete more aggressively even for small increases in market share: those small increases may bring the undertaking closer to its optimum size for minimizing long-term average cost – and thus maximizing its profits.[15] Also, undertakings on an oligopolistic market for the primary product might not always engage in price competition but may still compete in non-price aspects, such as adjacent services which add to the overall experience of the customer.[16] Depending on the circumstances of each specific case, these

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Leslie M. Marx, 'Tacit Collusion in Oligopoly' in Roger D Blair and Daniel Sokol (eds) *The Oxford Handbook of International Antitrust Economics Volume 2* (OUP 2014).

[13] *Inception Impact Assessment* (n 2).

[14] Richard Whish, David Bailey, *Competition Law* (OUP 2018), 1167.

[15] See e.g. Commission, 'Economies of Scale: Impact on competition and scale effects' (1997) V(4) The Single Market Review, 9-11, or George Stigler, 'The Economies of Scale' [1958] 1 The Journal of Law & Economics 54.

[16] See e.g. Hamed Markazi Moghadam, 'Price and non-price competition in an oligopoly: an analysis of relative payoff maximizers' (2020) 30(2) Journal of evolutionary economics 507.

adjacent services may either exist on separate secondary markets (e.g. a market for spare parts[17]) or, if there is no separate demand for them, they may be part of the market for the primary product.

An oligopoly can, however, become a problem when the relevant market is characterized not only by a small amount of market players with a similar market share, but also by high market transparency – i.e. a situation where undertakings can easily apprise themselves of the conduct of competitors.[18] Notably, a small number of market players and market transparency will not always go hand in hand. Especially in B2B markets involving high-value transactions, where customers value an individualized, tailored approach, the oligopolistic sellers may prefer to maintain non-transparent pricing, so as to encourage negotiations and potentially extract a higher price.[19] On the other hand, market transparency may be more prevalent e.g. in B2C transactions where it is more efficient from the marketing standpoint to communicate one price to the largest amount of consumers possible, or in markets where transparency is imposed by regulation.

Transparency itself is a complex term which can relate to different parts of the undertakings' strategy and different aspects of the market. From the competition standpoint, there is a general consensus that more consumer-oriented transparency tends to yield pro-competitive efficiencies, whereas transparency that exists purely amongst competitors but does not extend to the consumers tends to yield anti-competitive results.[20] Transparency between competitors as to strategically important, specific, future-oriented and price-related data is

[17] Case T-712/14 Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission, ECLI:EU:T:2017:748.
[18] Antonio Capobianco, 'Unilateral disclosure of information with anti-competitive effects (e.g. through press announcements' (2012) OECD Working Party no 3 on Co-operation and Enforcement, DAF/COMP/WP3(2012)1, 13.
[19] See e.g. Yasin Ozcelik, Zafer Ozdemir, 'Market Transparency in Business-to-Business (B2B) E-Commerce', MWAIS 2008 Proceedings 4, <http://aisel.aisnet.org/mwais2008/4> accessed 20 June 2021.
[20] See e.g. Simon P Anderson and Regis Renault, 'Pricing, Product Diversity, and Search Costs: A Bertrand-Chamberlin-Diamond Model' (1999) 30(4) The RAND Journal of Economics 719; and Helmut Bester, Emmanuel Petrakis, 'Price competition and advertising in oligopoly' (1995) 39(6) European Economic Review 1075 on lowering search costs intensifying competition; cf with George J Stigler, 'A Theory of Oligopoly' (1964) 72(1) The Journal of Political Economy 44; and Kai-Uwe Kühn and Xavier Vives, '*Information Exchanges among Firms and their Impact on Competition*' (Office for Official Publications of the European Communities 1995) on anti-competitive effects of competitor-oriented transparency.

generally more likely to harm competition than transparency in relation to aggregated, historic and non-price data.[21]

In EU law, the definition of tacit collusion was first established in relation to the EUMR,[22] because prevention of establishing market structures that might lend themselves to this phenomenon is one of the goals of the EU merger control regime. The CJEU in *Airtours* considered that there will be a risk of tacit collusion where the conditions of the market enable and make it economically rational for competitors to start behaving in the same way. This will be the case where the market conditions 1) allow each undertaking to monitor others; 2) incentivize undertakings to abide by the common line of behaviour; 3) make it impossible for current or potential competitors or consumers to jeopardize the results expected from the parallel behaviour.[23]

The incentive to act in parallel is what makes it rational for the undertaking to follow in its competitors' footsteps rather than try to come up with a divergent commercial strategy. At its most rational, the incentive may simply be profitability, whereby undertakings adopting parallel strategies of behaviour may be able to reach the same profit margins as they would in a price-fixing cartel.[24] Alternatively, the incentive may actually be irrational from the economic perspective, with undertakings choosing to forego the risks of sharp competition and potentially higher profits in favour of a more comfortable and more risk-averse strategy. As for stability of the practice of tacit collusion, it may be related e.g. to high barriers to entry, stagnation of the relevant market or lack of countervailing buyer power on the side of the consumers.

Where this situation arises due to inherent features of the market structure, parallel behaviour will constitute a rational business choice and will, as such, *prima facie* fall outside the

[21] Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2011) OJ C 11/1, paras 86-93.
[22] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), (2004) OJ L 24/1.
[23] Case T-342/99 Airtours plc v Commission, ECLI:EU:T:2002:146, para 62.
[24] The first oligopoly model and the idea of oligopolistic equilibrium were introduced by Augustin Cournot, *Researches into the Mathematical Principles of the Theory of Wealth,* (Macmillan 1929). For more discussion see e.g. Richard Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach', [1969] 21 Stanford Law Review, 1562, or James Friedman, *Oligopoly Theory* (CUP 1983).

scope of Article 101 TFEU. [25] However, the following section will seek to demonstrate that in practice, the definition of agreements and concerted practices is broad enough to account for situations where increased market transparency yields anti-competitive results. Therefore, it will be argued that in respect of oligopolies, there is no gap in the enforcement framework that would need to be filled by an NCT.

1.1.2 Agreements, decisions and concerted practices under Article 101 TFEU

The Commission and the CJEU have adopted a broad, effects-oriented approach to the definitions of agreements, decisions and concerted practices. This has been predicated mainly by practical concerns. Article 101 TFEU is one of the most practical tools in the Commission's toolkit and one of the few tools that permit it to interact with undertakings directly rather than through the Member States as the intermediary. Like all instruments of EU law, it has enjoyed a teleological interpretation: the protection of competition in the internal market would be unduly hindered if undertakings could avoid responsibility under Article 101 by relying on formalities. As technological achievements become increasingly complex, the meetings in smoke-filled rooms are substituted for more complex forms of infringement.[26]

The CJEU has therefore reaffirmed that the finding of an agreement can be made in absence of formality or writing.[27] Furthermore, in view of the difficulty of giving a precise descriptor to a complex infringement, the CJEU has recognized that the Commission may, in its decision, categorize behaviour as "either agreement or concerted practice".[28] This does not render the category of "agreement" completely obsolete, as it will still be a useful category for straightforward contracts or explicit oral agreements, but it does make the Commission's job easier in cases where behaviour of undertakings may fall short of an explicit agreement, such as in cases of tacit approval.[29]

[25] Joined Cases 40/73, 41/73, 42/73, 43/73, 44/73, 45/73, 46/73, 47/73, 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, para 174.
[26] Ariel Ezrachi, Maurice Stucke, *'From Smoke-Filled Rooms to Computer Algorithms – The Evolution of Collusion'* (2015) < https://clsbluesky.law.columbia.edu/2015/05/14/from-smoke-filled-rooms-to-computer-algorithms-the-evolution-of-collusion/> accessed 02 May 2021.
[27] Case 136/79 National Panasonic (UK) Limited v Commission, ECLI:EU:C:1980:169.
[28] Case C-49/92 P Commission v Anic Partecipazioni SpA, ECLI:EU:C:1999:356, para 6.
[29] Case C-277/87 Sandoz prodotti farmaceutici SpA v Commission, ECLI:EU:C:1990:6.

More controversial has been the CJEU's approach to defining "concerted practice". From the plain meaning of the word "practice" one may expect an on-going state of affairs. However, the Commission and the CJEU have made clear that a one-off occurrence may constitute an infringement of Article 101, such as a one-off instance of exchange of strategic information, which is then presumed to be used by the undertakings concerned in absence of public distancing.[30] Thus, in the CJEU's case law, the word "practice" acquires a different meaning: rather than a recurring habit of communicating with competitors, it denotes any materialization in the real world of such communication - i.e. anything that does not remain a mere idea but is put into practice.

With this broad definition of practice, the CJEU recognizes that a single instance of communication may generate anti-competitive results if the contents of that communication are pernicious. Such a definition permits to nip the anti-competitive behaviour in the bud, without forcing the enforcement authority to wait until actual anti-competitive effects have materialized on the market.

One of the most expansive examples of defining an agreement or concerted practice was seen in *Eturas.*[31] The CJEU was referred questions by the Lithuanian Supreme Court in a case concerning an online booking platform which communicated a discount cap to the travel agencies using the platform and then proceeded to implement it in absence of reactions by the travel agencies. The CJEU held that as long as there is consistent indicia of finding that the travel agencies were aware, or ought to have been aware, of the message at issue, they should be found to have participated in the practice.[32] Hence, an infringing overture made by one undertaking and followed by inaction on the part of undertakings receiving the communication can constitute agreement or concerted practice.

The decision in *Eturas* demonstrates that the concept of concerted practice is nearly unlimited in scope. The two caveats that remain are the *Bayer* and the *Woodpulp* scenarios.

[30] Case C-8/08 T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit ECLI:EU:C:2009:343.
[31] Case C-74/14 Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba, ECLI:EU:C:2016:42.
[32] Ibid, para 38.

In *Bayer*[33] the CJEU made a careful distinction between two situations: 1) communication by A followed by tacit acknowledgment or inaction by B and 2) communication by A followed by non-compliance by B. Despite the CJEU's overall insistence on the necessity of genuinely open public distancing,[34] the decision in *Bayer* suggests that open acts of non-compliance,[35] in absence of verbal refusal to participate in an infringing scheme, will suffice to disprove existence of an agreement or concerted practice.

If *Bayer* is a caveat based on behaviour of undertakings, then *Woodpulp*[36] is a more systemic caveat concerned with market structure. In *Woodpulp* the CJEU reaffirmed the well-accepted competition law maxim that undertakings are allowed to adapt themselves intelligently to the situation on the market, even when that leads them to choosing a line of behaviour similar to that of competitors.[37] Yet, a more recent Commission decision in *Container Shipping* demonstrates just how narrow the *Woodpulp* caveat is.

In *Container Shipping*[38] the Commission accepted commitments from undertakings involved in the liner shipping business, after investigation into their practice of price announcements. The Commission effectively distinguished *Woodpulp* as a case involving genuinely public announcements for the benefit of consumers. By comparison, the *Container Shipping* announcements were organized in such a way as to benefit fellow competitors without allowing the consumers to inform themselves on the price.[39] In line with the earlier *T-Mobile*[40] and *Dole Food*[41] judgments, the Commission in *Container Shipping* effectively presumed price announcements to be anti-competitive in absence of pro-consumer benefits. This approach is in line with the General Court's judgment in *CISAC*[42] whereby undertakings will be allowed to bring a plausible, rational explanation of the putatively infringing conduct – but should they fail

[33] Case T-41/96 Bayer AG v Commission, ECLI:EU:T:2000:242.
[34] Case C-373/14 P Toshiba Corporation v Commission, ECLI:EU:C:2016:26, para 127.
[35] *Bayer* (n 33), para 163.
[36] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 A. Ahlström Osakeyhtiö and others v Commission, ECLI:EU:C:1988:447.
[37] *Suiker Unie* (n 25).
[38] Container Shipping (Case AT.39850) Commission Decision C(2016) 4215 final.
[39] ibid paras 41-44.
[40] *T-Mobile* (n 30).
[41] Case C-286/13 P Dole v European Commission, ECLI:EU:C:2015:184.
[42] Case T-442/08 International Confederation of Societies of Authors and Composers (CISAC) v Commission, ECLI:EU:2013:188, paras 97-102.

to bring it, the Commission is not itself bound to consider all the possible non-infringing interpretations, where a *prima facie* infringement is made out.

The abovementioned case law suggests that the enforcement gap is very small, if not non-existent. This conclusion is further suggested by practice studies which have shown that the ease of aligning commercial strategies decreases sharply with each new market participants: in artificial markets with more than 4 participants, undertakings were no longer able to align without communication.[43] Furthermore, it was demonstrated that even a short time frame during which undertakings are allowed to communicate vastly improves their ability to collude in the long-term, even after all communication has ceased.[44] It is therefore likely that markets with more than 5 market players engaged in parallel behaviour are in fact markets which had been affected by an infringement – which only needs to be proven.

1.1.3 Algorithmic collusion: a reason for concern?

More recently, academics have raised concerns that the use of algorithms and AI in price-setting, price-publishing and price-comparison may lead to collusion of the sort that would escape Article 101 scrutiny. Ezrachi and Stucke have argued that in situations where multiple competitors unilaterally decide to use algorithm to achieve profit maximization, the AI in question will, through self-learning, eventually independently determine that collusion is the most rational outcome.[45]

Such algorithmic collusion may be difficult to fit into the Article 101 framework, as concerted practice requires from a co-infringer, if not active communication, then at least the awareness of the content of the communication by the initiating infringer and the failure to reject this communication.[46] Ezrachi and Stucke suggest that in case of algorithmic collusion, where machines could hypothetically communicate amongst themselves, e.g. by browsing the internet for prices of competitors and adjusting their own prices accordingly, it may be difficult to

[43] R Mark Isaac, Stanley Reynolds, 'Two or four firms: does it matter?' in C Holt and R M Isaac (eds) '*Research in Experimental Economics*' (JAI Press 2002); Steffen Huck, Hans-Theo Normann, Jörg Oechssler, 'Two are few and four are many: number effects in experimental oligopolies' (2004) 53 (4) Journal of economic behaviour & organization 435.
[44] Miguel A Fonseca, Hans-Theo Normann, 'Explicit vs tacit collusion: The impact of communication in oligopoly experiments' (2012) DICE Discussion Paper, No 65, <http://handle.net/10419/62592> accessed 02 May 2021, 21.
[45]Ariel Ezrachi and Maurice E Stucke, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition' (2017) 2017 U Ill L Rev 1775, 1795.
[46] *Eturas* (n 31).

attribute their actions to their human developers in absence of strongly evidenced anti-competitive intent.[47]

However, with price-setting being one of the most crucial strategic decisions that an undertaking may make, it is unlikely that, over a period of time, there would be no supervision of pricing strategies by the human management. Especially an undertaking which has grown big enough to attract attention of competition authorities is likely to have a sophisticated mechanism for performance reviews and market analyses – the data for which may be gathered by machines, but which will ultimately be reviewed by people. It is therefore doubtful that the management could plausibly claim that they had no idea that their undertaking was engaged in signaling and consequential alignment of prices. This would resolve the problem of lack of awareness.

The second potential problem is the alleged rationality of such conduct. In such respect, it is notable that EU competition law has never equated rationality with pure profit maximization. The prisoners dilemma games show clearly that in a situation where undertakings are able to collude on a stable basis, they each reap higher profits than in case of competition.[48] A monopolist might be able to charge an even higher price, but not every market could be easily subject to monopolization and few undertakings will ever take the risk and adopt aggressive enough market strategies to monopolize. In comparison, collusion is the comfortable, 'lazy' solution – one which, might well be considered rational in layman terms, but not so in terms of competition law.

Price alignment is to an extent natural in markets with high degree of transparency. Competitors will not want to race to the bottom in terms of price because each will be interested in maintaining a profit margin that would incentivize them to remain in business and hopefully to recoup sunk costs sometime down the line. However,

- where market transparency is created artificially with help of machines,
- in a situation where the overseers of these machines could not in good faith claim that they were ignorant of the effects these machines would have on the market,
- and evidence is accumulated that over a representative period, the prices (or non-price related offers) in the market concerned have aligned to the detriment of consumer,

[47] *Ezrachi and Stucke* (n 45) 1798.
[48] *Isaac and Reynolds* (n 43).

there is a strong argument for viewing the colluding AI as an extension of its creators, for which its creators bear full responsibility.

Overall, the analysis above shows that the enforcement gap in relation to oligopolies is small. It appears to concern only markets with very tight oligopolies (4 or less undertakings and no credible threat of entry). In markets with more market players, including markets affected by algorithmic collusion, the problem lies not so much with a conceptual enforcement gap but rather with the need to find proof of a concerted practice. Taking into account the broad definition of concerted practice and the willingness of the Commission in *Container Shipping* to treat parallel behaviour that increases market transparency as concerted practice depending on its actual effect on competition, the exercise of proof-finding is also not too onerous for the enforcement authorities. Furthermore, the Commission can make use of presumptions which, albeit rebuttable, make it easier to reach the requisite standard of proof. What an NCT could plausibly achieve is to dispel with the need to prove concerted practice *altogether*, allowing the Commission to intervene purely on the basis of some degree of negative effect on competition. For an institution with finite resources and manpower, this may be of help, permitting it to prioritize solving the oligopoly problem without giving up on its other enforcement priorities. The question that for now remains open is whether such a step would not constitute a mere circumvention of Article 101 TFEU – the sort to imperil, by its very nature, the undertakings' right of defense. This question will be considered more fully in Chapter 3.

1.2 The limits of enforcement framework under Article 102 TFEU

When introducing the NCT project, the Commission highlighted two problematic market occurrences resulting from unilateral conduct of undertakings: monopolization and the problem of tipping markets.[49]

The essential distinguishing factor between these two problems is the issue of culpability of the undertakings concerned. In the US, where monopolization is an offence under s2 of the Sherman Act,[50] it is understood to entail a specific intent to destroy competition and/or build a monopoly.[51] By contrast, some markets can tip in favor of a single super-dominant undertaking

[49] *Inception Impact Assessment* (n 2).
[50] Sherman Anti-Trust Act, 2 July 1980.
[51] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993), 456.

purely as a result of a successful (but not anti-competitive) business strategy in tandem with certain market characteristics, such as the presence of network effects.[52] The conduct of the undertakings in these two scenarios different, but the end-result is the same: prevalence of a super-dominant undertaking and destruction or marginalization of competitors. In both cases, Article 102 TFEU is powerless: it can neither be used against non-dominant undertakings, nor against dominant undertakings who do not engage in abusive conduct.

The following two sections will examine, in turn, the concepts of monopolization and tipping markets. It will be argued that the NCT could be designed as a valuable tool to prevent both.

1.2.1 Monopolization by non-dominant undertakings

Monopolization is a concept foreign to EU law, whereas in the US, s2 of the Sherman Act prohibits attempts and conspiracies to monopolize. S2 therefore covers three phenomena, two of which are also reflected in EU law and one of which is not. An anti-competitive conspiracy between undertakings is prohibited under Article 101 TFEU, and the concept of abuse of dominant position under Article 102 TFEU covers both exploitative and exclusionary abuses – the latter being abuses which have as the object or effect the exclusion of competitors,[53] i.e. the abusive creation of a monopoly or a quasi-monopoly. What Article 102 TFEU does not extend to is the anti-competitive conduct of non-dominant undertakings.

What caused such a different approach between the US and the EU? Eleanor Fox reminds that the Sherman Act, adopted much earlier than the TFEU, was drafted in the context of industrial revolution and the period of consolidation of large corporations at the expense of smaller business.[54] In contrast, the European Communities were – and the EU still is – preoccupied with the goal of increasing the competitiveness of European businesses worldwide. Against the background of such overarching policy, it would have been counter-intuitive to introduce any provisions that might threaten to stunt the growth of EU companies.

[52] HM Treasury, 'Unlocking digital competition' (2019) Report of the Digital Competition Expert Panel, paras 1.80-1.83.
[53] Andrea Renda, 'Treatment of exclusionary abuses under Article 82 of the EC Treaty' (2009) Final Report of a CEPS Taskforce, 15.
[54] Eleanor Fox, 'Monopolization and Abuse of Dominance: Why Europe is Different' (2014) 59 (1) The Antitrust Bulletin 129.

In the EU, therefore, the concept of a "special responsibility"[55] of dominant undertakings emerged, i.e. of undertakings which can, to an appreciable extent, behave on the market independently of competitors, consumers and suppliers.[56] This definition, albeit well familiar in the competition law circles, may raise some eyebrows in the circle of businessmen: very few people would daresay that they have made it so far in business that they no longer need to watch out for what the competitor is doing. Even extremely successful undertakings such as Microsoft or Google have argued that they do feel competitive constraints despite their overwhelming market share in relation to multiple of their flagship products.[57] A dominant position, however, does not imply complete absence of actual or potential competition. Rather, it entails such market power that the ability of other market players to discipline the dominant undertaking is diminished.[58] The undertaking in question must therefore discipline itself where competition law is concerned – or else face the discipline of a competition authority.

The problem with making special responsibility of dominant undertakings the threshold for intervention in the Article 102 TFEU framework is fourfold.

Firstly, the Article 102 approach will not always adequately reflect the culpability of the undertaking concerned. If an exclusionary strategy is successfully implemented by an undertaking which newly acquires dominance as a result, then this may be suggestive of a particularly aggressive strategy – as a matter of a simple logic that, unless the large market players are inefficient, it will take more effort for a smaller undertaking to replace them.

Secondly, from the standpoint of market effects, it does not follow that an exclusionary scheme begun when an undertaking was non-dominant will be less harmful to competition. If successfully implemented, it will then be of little solace for the as-efficient competitors to know that their business is declining because of a formerly small market player which is now quickly growing, rather than because of a large, well-established incumbent.

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[55] Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) OJ C 45/7.
[56] Case C-27/76 United Brands and United Brands Continental v Commission, ECLI:EU:C:1978:22, para 65; Case 85/76 Hoffmann-La Roche v Commission, ECLI:EU:C:1979:36, para 38; Case T-201/04, Microsoft v Commission, ECLI:EU:T:2007:289, para 229.
[57] See e.g. Microsoft (COMP/C-3/37.792) para 412 and 535-538, and Google Search (Shopping) (AT.397400) paras 300-308.
[58] Case 85/76 Hoffmann-La Roche & Co. AG v Commission of the European Communities ECLI:EU:C:1979:36, paras 39-41.

Thirdly, leaving the dominant undertakings to shoulder the special responsibility ignores the fact that important competitive processes take place also amongst undertakings with smaller market shares.[59] It would be too simplistic to assume that all undertakings on a particular market compete for the entirety of the market at all times. Particularly in markets where large investments in infrastructure are required, undertakings will not be able to quickly gain a large market share: capacity constraints would prevent them from handling the sudden increase in demand. Undertakings in such markets will not seek to push out *all* competitors from the market in one go, but they may seek to push out certain smaller and/or similarly-sized competitors. It is then conceivable that, even after implementing a successful exclusionary scheme, their market share would remain short of 50% and they would escape the Commission's attention altogether. Yet, such cases should not be left solely to the discretion of the national legislature, because trade between Member States may still be affected if the relevant undertakings engage in cross-border transactions. Some such cases could be brought under the auspices of Article 102 TFEU by way of defining a smaller geographical market, but that will not always be possible, e.g. where the relevant cross-border transactions occur online and the undertakings actively advertise to consumers across the EU.

Fourthly, for the undertakings concerned, there is no clear dividing line between the state of dominance and non-dominance.

While the Commission has sought to adopt a predictable method to assessing dominance, this effort has not been fully successful. Some predictability is gained by the use of presumptions: the undertaking will be presumed to be dominant if it has a durable market share of over 50%.[60] In the rare cases when an undertaking with a smaller market share was found to be dominant, cogent reasons were required to explain this finding. For instance, the General Court has found British Airways to be dominant on a market in which it held a mere 39.7% market share.[61] The General Court took into account in particular the relative position of BA on

[59] Note the existence of debate on the role of small firms for economic welfare. E.g. Ken-Ichi Shimomura, Jacques-Francois Thisse 'Competition among the big and the small' (2012) 43 (2) RAND Journal of Economics 329 suggests that maintenance of a large number of small firms on the market is actually less efficient than encouraging entry/expansion of large firms. However, the more widely accepted view is that SMEs do have an important role to play in ensuring innovativeness of the market, as seen e.g. in OECD, 'Promoting innovation in established SMEs', (2018) Policy Note of the SME Ministerial Conference.
[60] Case C-62/86 AKZO Chemie BV v Commission, ECLI:EU:C:1991:286, para 60.
[61] Case T-219/99 British Airways plc v Commission, ECLI:EU:T:2003:343.

the UK market for air travel agency services, where BA's share was almost 8x as large as that of its strongest competitor. Having regard to such discrepancy, not even evidence of a 7% decline of BA's market share in the reference period of 7 years could displace the finding of dominance.[62]

However, assessing market share is not in itself always straightforward: e.g. in zero-price markets, the Commission will need to have regard to metrics other than sales. Furthermore, apart from the market share, the Commission and the CJEU will also take into account factors such as the strength of the undertaking's brand,[63] dominance on a closely interlinked market,[64] the availability to the undertaking of particularly well-developed infrastructure or networks,[65] or even the internal perception of the undertaking's market strength by its employees.[66] These considerations permit to make a conclusion as to dominance even in case of novel markets where market shares are not yet firmly established. Furthermore, it is evident from the Commission's recent Google decisions that the Commission will not base its decision purely on market shares even where it could conceivably do so without judicial censure. While digital markets are often heralded as markets with volatile market shares, the Commission did in fact collect evidence of Google's market shares from eight years, all of them firmly pointing to the conclusion that Google's market shares in EU member states have steadily remained over 90%.[67] Nonetheless, the Commission also undertook to examine factors such as barriers to entry, trends in market entries and exits, as well as consumer tastes in multi-homing. The trend within Commission has therefore been in favor of a well-rounded approach to defining dominance – which is laudably comprehensive, but not always predictable.

The second element of unpredictability is tied precisely to the fact that the obligation for the undertakings to learn about these rules does not start until after they become dominant. It may then be jarring for the leadership of a barely dominant (39-55% market share) undertaking to learn that the strategy they had been using with great success has suddenly become illegal. With these barely dominant undertakings, the Article 102 TFEU framework both 1) fails to act as

[62] ibid paras 211-219.
[63] Case 322/81 NV Nederlandsche Banden Industrie Michelin v Commission, ECLI:EU:C:1983:313, para 55.
[64] Case T-83/91 TetraPak International SA v Commission, ECLI:EU:T:1994:246, para 106.
[65] Case C-27/76 United Brands and United Brands Continental v Commission, ECLI:EU:C:1978:22.
[66] *Akzo Chemie* (n 60).
[67] Google Search (Shopping) (AT.397400), para 188-189.

a deterrent, because there is no clear-cut event, such as e.g. concentration in merger control, which the undertaking might watch out for to determine the start of its new duties; and 2) fails to compensate for the entire harm, which may have begun already at the pre-dominance stage.

With these four concerns outlined, the case for a monopolization-type offence is strong. On the other side of the scale stands the evergreen concern about over-deterrence and chilling innovation.

The harmful effect on competition of exclusionary abuses even by dominant undertakings has not been a universally accepted fact. For example, the Chicago School scholars in the US advocated for a more anti-interventionist approach to competition law enforcement and warned against the risk of condemning 'suspicious looking practices' which might in fact turn out to be benign.[68] More recently, Easterbrook has pointed out that anti-competitive effects from exclusionary conduct have not been studied empirically enough and most of our discussion about their anti-competitive effects stems from possibility theories and experiments in stylized setting.[69] These concerns in principle relate also to the Article 102 TFEU framework and have clearly not deterred the Commission from its enforcement; however, they do hold more weight when it comes to non-dominant undertakings, stunting whose growth is a risk that should not be taken lightly.

Furthermore, it is noteworthy that in the US, where the broad monopolization offence exists, the focus of antitrust enforcement under s2 of the Sherman Act has still been on the conduct of dominant undertakings.[70] The 3d Circuit Court in *United States v Dentsply Int'l, Inc.*[71] also noted that s2, while applicable to both dominant and non-dominant undertakings, may affect them differently, to the extent that exclusionary practices by 'aspiring monopolists' might not have the same effect on the market as same practices by established monopolies. The US Supreme Court in *Copperweld Corp. v. Independence Tube Corp* was careful to warn about the

[68] See e.g. Richard A Posner, *Antitrust Law: an economic perspective* (University of Chicago Press 1976).
[69] Frank H Easterbrook, 'Limits of Antitrust' (1984) 63 (1) Texas Law Review 1, 9-14.
[70] William F Adkinson, Karen L Grimm, Christopher N Bryan, 'Enforcement of section 2 of the Sherman Act: theory and practice' Working Paper (3 November 2008), 9-11.
[71] United States v. Dentsply Int'l, Inc., 399 F 3d 181 (3d Cir 2005), 187.

possible chilling effects that over-deterrence might have on aggressive entrepreneurs that drive the business world forward.[72]

The US enforcement example is actually good news for both the EU proponents and the critics of the idea of introducing a monopolization-type offence for non-dominant undertakings. S2 enforcement by the Federal Trade Commission and the US federal courts shows that even where the wording of the legal instrument permits to do so, competition authorities and judicial system will not suddenly direct all their focus towards small market players. Indeed, the US courts have been even more restrictive than the CJEU in defining dominance/monopoly power, typically requiring a much larger market share than 50%.[73] The difference is that under s2, monopoly power (or rather, the acquisition or the strengthening thereof)[74] is the end result rather than the pre-condition to enforcement. Similarly, for reasons outlined above, the EU would benefit from the introduction of a tool that would permit the competition authority to focus on the likely end-result of the undertaking's scheme. To ensure that over-deterrence does not occur, factors such as the undertaking's market power could be taken into account at the *effects on competition* stage.

1.2.2 Tipping markets

Whereas the previous section focused on anti-competitive conduct, the present section is concerned with a systemic market problem – which may be exacerbated by abusive conduct, but may also arise without it.

Tipping is a situation where one market player becomes super-dominant, dwarfing its competitors by far. Berdre-Defolie and Nitsche (2020) have identified six key factors which may make a market more likely to tip: positive network effects, single-homing and switching costs, free services, data-enabled learning, trust between customers of a multi-sided platform, and platforms' complementary offerings.[75] In markets characterized by significant network effects and high entry barriers, an undertaking's growth can become exponential. The product of the

[72] Copperweld Corp. v. Independence Tube Corp, 467 US 752 (1984), 767–769.
[73] See e.g. United States v. Dentsply Int'l, Inc., 399 F 3d 181, 187; Eastman Kodak Co. v. Image Technical Servs., Inc., 504 US 451 (1992), 481; Bailey v. Allgas, Inc., 284 F 3d 1237 (2002), 1250.
[74] US Department of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), chapter 2, < https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2#N_23_ > accessed 05 June 2021.
[75] Özlem Bedre-Defolie, Rainer Nitsche, 'When Do Markets Tip? An Overview and Some Insights for Policy' 2020 11(10) Journal of European Competition Law & Practice 610, 611.

undertaking in question becomes a 'must-have', shaping the industry's standard. Particularly where the product in question is also protected by IP rights, this may lead to a situation where the barriers to entry become so high, that no one could conceivably enter such a market and constrain the incumbent. For the incumbent to lose its quasi-monopolistic position, a small technological revolution may be necessary – the introduction of a technology so different, that it would render the incumbent's product fully obsolete.

Recently, the phenomenon of tipping has been predominantly discussed in relation to digital markets. The Digital Markets Act initiated by the Commission already addresses the issue of digital gatekeepers. [76] However, it will be argued that this does not fully resolve the problem with tipping markets. The thresholds set out in Article 3(2) for designation as gatekeeper will certainly be satisfied by the biggest players in the digital sector (GAFAM: Google, Amazon, Facebook, Apple, Microsoft). On the other hand, based on publicly available data, social media platforms such as LinkedIn, Tik Tok or Twitter do not currently meet the criteria. Neither do intermediation service platforms such as Booking.Com or Uber.[77] In other words, these thresholds mostly confine the DMA to undertakings operating *inter alia* on markets in which tipping has already occurred.

To that extent, e.g. the obligation set out in Article 5(c) DMA which is intended to facilitate multi-homing by end users may be too little too late to revive effective competition on these markets. Conversely, where the gatekeeper is active not just on the market for its core platform service but also on other markets which may be subject to tipping, obligations such as in Article 5(b) DMA intended to facilitate multi-homing on third party online intermediation services, may prevent the market for the online intermediation service from tipping in favor of the gatekeeper. Overall, Article 5 DMA appears to be a codification of borderline cases of abuse of dominant position under Article 102 TFEU: behaviours which would not straightforwardly fall under any of the previously used exclusionary theories of harm, such as refusal to supply or tying and bundling, but which were nevertheless felt by the Commission to cause adverse effects on competition.

[76] While the DMA is not solely focused on preventing or remedying harm to competition, it does contain provisions which have been clearly motivated by competitive concern.
[77] Cristina Caffara, Fiona Scott Morton, 'The European Commission Digital Markets Act: A translation' (05 January 2021), <https://voxeu.org/article/european-commission-digital-markets-act-translation> accessed 07 June 2021.

Even though the DMA goes some way to address the problem of tipping markets, it is important to point out that 1) other markets with platforms and other types of gatekeepers may be similarly vulnerable to tipping; 2) the DMA will mostly operate to preserve the status quo in relation to market power of the current quasi-monopolists in the digital sector, but may not succeed in preventing other undertakings from gaining quasi-monopolistic position on markets that have not yet tipped.

As noted by the CFI in *Microsoft*, in a situation where competitors are pushed out to the margins, effective competition will be harmed even if the competitors have not completely exited the market. In assessing the practices of Microsoft in tying its media player to the Windows OS, the CFI considered the actual likelihood of an average consumer – back at the time when the majority of the population was considerably less tech-savvy than it is today – going online and downloading a competitor's media player.[78] Similarly, the Commission, in assessing the detrimental impact on competition of Google's algorithmic self-preferencing, took into account the fact that click rates drop dramatically for general search results not displayed on the first page of Google Search:[79] if a competitor is further down the list of viable search results, it might as well not have an online presence at all. Overall, when it comes to assessing abuse, the Commission maintains a very realistic outlook on the behavioural traits of consumers. Yet, the DMA, same as Article 102 TFEU, does not give it the option to take that outlook to its logical conclusion: the fact that where all effective competition is already eliminated (by anti-competitive means or not), there may be nowhere to switch.

An undertaking which is dominant on a market with naturally high entry barriers may behave in ways which are inefficient for the consumer without being abusive within the meaning of Article 102 TFEU. An interesting example is e.g. Microsoft's choice to introduce Microsoft Office 365 on a subscription basis instead of selling licenses. On one hand, Microsoft's office suite has undergone considerable technological development, the cloud storage permitting to access the office suite from multiple devices, including smartphones – a clear innovation. On the other hand, Microsoft aggressively advertised its Microsoft Office 365, sending users of the older versions persistent reminders to make the switch, as well as eventually discontinuing

[78] Case T-201/04 Microsoft Corp v Commission, ECLI:EU:T:2008:289, para 1050.
[79] *Google Search (Shopping)* (n 67), para 460.

technical support for its license-based products.[80] Yet, for an average MS Office user, the experience of Office 365 may be near-indistinguishable from that of the license-based product. Users who access work files from both their home computer and work computer are the only category of users who may derive practical benefit from the seamless cloud storage experience on a daily basis. On the whole, the deal is therefore inefficient for the consumer who, however, has no viable options to switch, since Office 365's biggest competitor, Google's G Suite, offers a very different user experience and requires internet access.

An even starker example of inefficiency is the decision of YouTube to introduce the paid YouTube Premium. On one hand, purchasing the Premium is not compulsory. On the other hand, YouTube has been steadily increasing the length, frequency and the number of advertisements that a user must watch before accessing content for free. In other words, rather than improving the experience of Premium users in order to make Premium more attractive, YouTube is choosing the easier but less innovative option of making its free service less and less user-friendly. In a more competitive market, users faced with such policies might switch. However, YouTube currently holds more than 70% of the worldwide market for video-sharing services.[81] Furthermore, this market is strongly affected by network effects, with large numbers of users attracting a larger number of content-creators and vice versa. One of YouTube's main attractions is the sheer scope of its content which, given the fact that YouTube may store the uploaded videos indefinitely, is likely to keep growing and to remain unchallengeable by newer platforms.

To the extent that there is a greater risk of inefficiency once the market tips definitively in favor of one undertaking (or a group of similarly-sized undertakings that have no real incentive to compete with each other), there is an important enforcement gap that neither the DMA nor Article 102 TFEU address. This is particularly unfortunate because the DMA *is* what came out of the original NCT proposal and yet stops short of addressing the issues highlighted by the Commission in the Initial Impact Assessment.

2 CMA's experience with ex-ante intervention: lessons learnt

[80] Based on data regarding update reminders and software support from the official Microsoft website <https://www.microsoft.com> accessed 26 June 2021.
[81] Based on data from Datanyze, <https://www.datanyze.com/market-share/online-video--12/youtube-market-share> accessed 26 June 2021.

Chapter 1 has demonstrated that the areas of concern highlighted by the Commission in its Initial Impact Assessment to the NCT continue to pose a threat to the competitive process in the EU. Research conducted under the auspices of the Commission[82] as well as external academics[83] have contemplated the possibility that the framework of market investigations used in the United Kingdom by the Competition and Markets Authority could be 'transplanted' – with some modifications – into EU law, precisely in order to tackle the Commission's concerns.

The CMA is currently the only competition authority in the world that boasts the power of ex-ante market intervention. The present chapter will begin with an introduction of the CMA's powers in conducting market investigations. It will be shown that the legal framework for these investigations gives the CMA a broad competence to intervene for the purpose of stopping, or even preventing, adverse effects on competition. The power so broadly conceived can be used to address both structural market problems and any unilateral or multilateral behaviours of undertakings which impede the competitive process. It will also be suggested that the investigatory powers of the CMA go not only beyond the Commission's current powers but also beyond the powers envisaged in the NCT proposal, insofar as the CMA is also empowered to base its findings of adverse effects on competition primarily on the basis of consumer behaviour.

Secondly, the CMA's extraordinary powers to impose both structural and behavioural remedies in absence of competition law infringement will be considered. It will be shown that the power to impose structural remedies in absence of an infringement of competition law has led to controversial results, whose repetition in EU law should be avoided.

2.2 CMA as market investigator

The CMA began its operations in 2014, largely assuming the functions of its predecessors, the Competition Commission and the Office of Fair Trading. Section 5(1) of the EA 2002 confers on the CMA the general competence to obtain, compile and keep under review information about matters relating to the carrying out of its dual function of the competition authority and consumer protection authority. The two more specific emanations of this general

[82] Heike Schweitzer, 'The New Competition Tool: Its institutional set-up and procedural design' (2020) Expert report for DG Competition.
[83] Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement' (2020) Centre for Competition Policy of the University of East Anglia; Helen Ralston, 'What problems can the European Commission's New Competition Tool fix?' (31 July 2020) <https://www.oxera.com/insights/agenda/articles/what-problems-can-the-european-commissions-new-competition-tool-fix/> accessed 24 June 2021.

competence are the power to conduct market studies[84] and market investigations.[85] These are in principle part of the CMA's competition law enforcement mandate,[86] even though the CMA may also take consumer protection into account in this sphere.

The decision to conduct a market study is the first official indicator that a potential market might not be working well. [87] Because of this the CMA will in practice preface the official notice of market study with communications with stakeholders, in order to determine the subject and scope of the study. However, it is only once the official market study has begun that the CMA becomes empowered to oblige all relevant persons to produce documents or to attend meetings,[88] and to impose administrative penalties for the obstruction of the study.[89] The market study may in principle lead to

- a finding of "a clean bill of health";
- non-binding communication to market participants and/or the government about changes that ought to be implemented in the market concerned;
- taking enforcement action;
- or making a market investigation reference.[90]

The market study is a phenomenon also known in EU law, albeit under a different name: pursuant to Article 17 of the Regulation 1/2003, [91] the Commission may conduct inquiries into a particular sector of the economy or a particular type of agreements across economic sectors where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market. The Commission may request undertakings to provide information and to carry out inspections for that purpose. Where the Commission decides to request information by way of a decision under Article 18(3), and the undertakings in question refuse to cooperate or obstruct the inquiry, an

[84] EA 2002, s 130A.
[85] ibid, s 131.
[86] Apart from that, the CMA also has a consumer protection law mandate – and to that extent, its situation is different from the Commission, which divides competition law and consumers across two Directorates-General: DG COMP and DG JUST.
[87] CMA, 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach' (2017), para 2.1.
[88] EA 2002, s 174.
[89] ibid, s 174A.
[90] *CMA Supplemental guidance* (n 87), para 1.6.
[91] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1.

imposition of a fine and/or period penalty payment may follow under Articles 23 and 24, respectively.

The inquiry itself is an important opportunity for the Commission to communicate with stakeholders, and to clarify the Commission's enforcement priorities,. This gives the undertakings operating on the relevant markets a chance to adapt their behaviour in these matters. Such a chance is particularly important in relation to behaviours whose anti-competitive character may not have previously been clear.

Nothing precludes the Commission to proceed with an investigation of specific undertakings once the inquiry has finished: this, however, is limited to the investigations of Article 101 or 102 TFEU infringements rather than structural concerns. By contrast, the CMA has the additional power, within 12 months after issuing the notice of a market study, to make a decision to follow up with a market reference.[92]

A reference for market investigation is conditioned by "reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom".[93] Section 131 EA 2002 permits the CMA to follow a hybridized approach to market supervision, directing its activities not only to the conduct of individual undertakings but also to generally under-performing markets.[94] The purpose of market investigations is then to uncover and remedy any actual or potential adverse effects on competition.[95] Pursuant to the OFT511 guidance,[96] which is still in use although the OFT itself is now defunct, a market reference will be appropriate only where it would be a proportionate response to the market feature suspected of adversely affecting competition.[97] The requirement of proportionality will be satisfied where the feature in question affects a significant proportion of the market and is therefore likely to lead to significant

[92] EA 2002, s 131B(4).
[93] EA 2002, s 131(1).
[94] Niamh Dunne, 'Between competition law and regulation: hybridized approaches to market control' (2014) 2(2) Journal of Antitrust Enforcement 225, 232.
[95] Competition Commission, 'Guidelines for market investigations: Their role, procedures, assessment and remedies' (April 2013) (CC3), paras 28-30.
[96] Office of Fair Trading, 'Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act' (2003) (OFT511).
[97] ibid, para 1.3.

consumer detriment. Before any such reference is made, the CMA is bound to consult all persons whose interests are likely to be substantially impacted.[98]

The CMA's investigation method is to make a well-rounded consideration of all market features and then assess them against the benchmark of a 'well-functioning market' – which is typically a counterfactual market as envisioned without the putatively problematic features.[99] Section 131(2) of the EA 2002 defines that the relevant "feature" of the market to which a market reference must relate is either:

- The structure of the market concerned or any aspect of that structure
- Any conduct, whether or not in the market concerned, of one or more than one person who supplies or acquires goods or services in the market concerned
- Or any conduct relating to the market concerned of customers or any person who supplies or acquires goods or services.

The CMA provides soft law guidance as to features which are likely to be identified as harmful to competition and whose remedy may therefore be sought. [100] These features greatly overlap with the areas of concern that the Commission had highlighted in the Initial Impact Assessment for the NCT. Due to the dual focus on both conduct and structure, the CMA is empowered to intervene both in cases

- where inefficiency of competitive process is attributed to some specific practice(s) on the relevant market which, however, falls short of an infringement;
- or where individual problematic practices cannot be identified but a preliminary market analysis suggests that there may be lack of efficient competition.

The former scenario could conceivably encompass, inter alia, a monopolization strategy by a non-dominant undertaking. The latter scenario could encompass cases of purely parallel behaviour of undertakings on a transparent market, or cases of markets which are on the verge of tipping.

[98] EA 2002, s 169.
[99] *CC3* (n 95), para 320.
[100] ibid, paras 157-161.

The CMA has 18 months from the date of reference to complete a market investigation and publish a report. This period may be extended once by further 6 months.[101] If during this time, the CMA finds adverse effects on competition, it must consider the imposition of remedies. It has further 6 months after the publication of its report to decide whether and which remedies are appropriate.[102] In the meantime, it may adopt interim measures and accept interim undertakings.[103]

The breadth of the definition of adverse effects on competition – and, by extension, the breadth of cases in which the CMA may impose remedies – is well demonstrated in its Retail Banking Market Investigation.[104] The RBM Investigation concerned several product markets in the broader retail banking sector, including the market for personal current accounts, business current accounts and certain lending products. To take personal current accounts as an example, the CMA found that 90% of consumers were overpaying for products of below-average quality and would be better-off switching. It found that, depending on their use of different account facilities such as overdraft, switching might save an individual British consumer anywhere between 92 and 564 GBP a year.[105] Despite this, consumers were not responding to variations in price and quality of service and preferred to stay on a long-term basis with their incumbent bank rather than switch. The CMA considered this to be a sign of a badly functioning market and proposed a series of remedies. While the remedies will be considered in more detail in section 2.2 of this thesis, at this point it is noteworthy that the crux of the CMA's concern was not so much the conduct of the undertakings but the conduct of their clients. CMA's logic behind the RBMI Final Report amounts to the following: we cannot expect the consumers to be more careful with what is good for them, but we still want to ensure that they get a good deal, and therefore we have to raise the standard of behaviour of the undertakings.

The more recent Investment Consultants Market Investigation[106] sends out an even stronger pro-consumer message. The CMA here investigated two types of service: investment consultancy services and the fiduciary management services. During the investigation, the CMA

[101] ibid, paras 54-56.
[102] EA 2002, s 134(4). See also OFT511, paras 2.20–2.26 and paras 2.30–2.31.
[103] EA 2002, ss 157-158.
[104] CMA, Retail banking market investigation final report (2016).
[105] ibid, paras 57-59.
[106] CMA, Investment Consultants Market Investigation final report (2018).

took no issue with the structure of the market. According to its findings, neither market was highly concentrated and the barriers to entry were not high, although the market for fiduciary management services fared slightly worse in both these respects.[107] CMA's concern related to the low level of engagement by consumers who, due to lack of readily available information about alternative service providers, would be less able to evaluate the quality of services provided by their current provider as compared to the competitors.[108] The identified adverse effect on competition therefore consisted of reduced competition as a result of consumer inertia, lack of education and low probability of switching or multi-homing.

The CMA's approach to the consumer in the ICM Investigation is almost paternalistic. For example, it criticized the practice of investment consultants to steer clients into their own fiduciary management services, suggesting that this may lead to the consumers not getting the best deal.[109] Arguably, one of the main reasons for CMA's concern was the fact that 90% of the revenues of investment consultants in the UK comes from pension schemes;[110] thus, the stability of the national pension policy was concerned. However, if in the earlier RBM Investigation, the typical client of the banks concerned was either a private person or a small business, then in the ICM Investigation, the typical client of the UK investment consultants would be an institutional investor expected to take pro-active steps in the interests of its clients. By placing the burden of this pro-activeness on the investment consultant instead of the institutional investor, the CMA effectively stepped in to modify the existing market practice, making an executive policy choice in favour of one institution over the other.

The power conferred on the CMA under s131(2) EA 2002 and used to account for behaviour of both the undertakings and their customers must be understood in light of s25(3) of the ERRA 2013, which obliges the CMA to promote competition within and outside the United Kingdom *for the benefit of consumers*. Yet, while the Commission is also bound under Article 12 TFEU to take consumer protection into account in implementing Union policies and activities, it has not gone so far as to use competition law to try to make up for consumer inertia. Insofar as the framework of Articles 101 and 102 TFEU is centered on the behaviour on undertakings rather

[107] ibid, paras 15-19.
[108] ibid, paras 30-38.
[109] ibid, 218.
[110] ibid, 29.

than more general market failures, the Commission does not have the power to do so. In this respect, we see that the market investigation tool allows the CMA to act as market and competition regulator, whereas the Commission, at least where Articles 101 and 102 TFEU are concerned, retains merely an enforcing role.

If the Commission was to model the NCT on the CMA's market investigation powers, this difference in mandates would have to be taken into account. DG COMP should not and, indeed, cannot follow in the CMA's footsteps completely. If an NCT is introduced, it should operate primarily in the problematic areas as highlighted by the Commission in the Initial Impact Assessment, *not* as a tool to countervail pure consumer irrationality/inertia. On the other hand, actual behaviour of consumers does have a place in assessing adverse effects on competition; effects on competition cannot be understood in abstract without taking the demand-side of the market into account. In practice, there may therefore be a thin demarcation line between 1) treating consumer inertia as harmful *in itself* and requiring undertakings to account for it; and 2) treating undertakings' behaviour as harmful *in light of* consumer inertia. To that end, it might be preferable to operate with the concept of significant detriment to the *competitive process* rather than to the consumer. On such an approach, the Commission would be empowered to conduct investigations in case of prima facie evidence that, as a result of some market characteristics, products are not competing on merit.

2.3 CMA's powers to impose remedies

The biggest diamond in the CMA's regulatory crown is its power to impose remedies in the wake of a market investigation. This power is conferred on the CMA by s134(4) EA 2002 – and does not amount to a duty. Similarly to the wording of Article 23 Regulation 1/2003, which sets out the circumstances in which the Commission *may* impose fines in competition law proceedings, so does s 134(4) leave the CMA with a discretion.

The discretion is two-fold: firstly, the CMA has to decide whether, following a market investigation, any action should be taken at all, and secondly, whether this action should take the form of recommendation to others, or action by the CMA itself. The action can entail acceptance of undertakings – the equivalent of commitments in Regulation 1/2003 – pursuant to s 159, and, should these undertakings be breached, the imposition of orders pursuant to s160 EA 2002. Section 139 then serves to further flesh out CMA's duties in case that it does decide that action is

necessary. In particular, the CMA is to take such steps as it considers to be reasonable and practicable to remedy, mitigate or prevent the identified adverse effect on competition and any detrimental effects on customers, having regard to the need to achieve a comprehensive solution of the problem.

In its Guidelines the CMA explains that, in choosing a remedial measure, it will in particular consider whether it is capable of effective implementation, monitoring and enforcement.[111] An ideal remedy will require little monitoring on part of the CMA and produce tangible effects in a short period of time. The CMA will also make a proportionality assessment of the remedies: its Guidelines set out a proportionality test[112] notably similar to that enunciated by Lord Sumption in *Bank Mellat,*[113] one of the seminal cases of the UK Supreme Court on proportionality in administrative law. Thus, the CMA is bound to use the least intrusive measure of all the alternatives available to achieve the aim of remedying the adverse effect on competition, and the measures adopted must not be disproportionate to the benefits gained.

In the wake of its market investigations, the CMA has predominantly imposed behavioural remedies. The remedies imposed in the wake of the RBM Investigation provide a good example of the CMA's flexibility. In cooperation with the banks concerned, it worked out a detailed plan of remedies, including the obligation to create a common entity for the implementation and maintenance of common banking standards, the obligation to publish service quality indicators and to publish detailed information about services provided in the sphere of personal and business accounts.[114] With the emphasis on data sharing and publication, it is indeed questionable whether such remedies might risk, instead, to promote so much market transparency that the banks in question would find it easier to collude. However, the CMA has decided that the consumers' interest in increased transparency and ease of comparison between the services of different banks ought to prevail. Furthermore, the continued engagement of the CMA with the stakeholders, as well as the power to vary the remedial order, allow to ensure the pro-competitive nature of the remedy.

[111] *CC3*(n 95), para 336.
[112] ibid, para 344.
[113] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38.
[114] CMA, Retail Banking Market Investigation Order (2017).

Much more controversial is the CMA's power to impose structural remedies. The extent of it is extraordinary: it is a power to order divestiture, i.e. to interfere with property rights, in absence of any illegal behaviour by the undertaking concerned. This power is enshrined in s 161 EA 2002 which permits the CMA to make an order containing "anything permitted by Schedule 8" of the Act. Pursuant to s 13(1), an order may provide for the division of any business or any group. CMA's enforcement powers in relation to remedying adverse effects on competition following a market investigation are therefore identical to its powers in the area of antitrust or merger control.

So far, the CMA has preferred behavioural remedies over structural. However, the only market investigation case in which structural remedies were ordered demonstrates how far-reaching that power can be. The BAA airports market investigation[115] was concluded in 2009 and focused, from the outset, on investigating one single undertaking: BAA plc, the privatized successor to the British Airports Authority and the owner of seven airports across the UK, including Heathrow, Gatwick and Stansted. The CMA found that, in cases of overlap of catchment areas between the airports owned by BAA, there would be potential for competition if the airports were owned by different undertakings.[116] It has also criticized BAA's inefficiency in terms of implementing long-term infrastructure projects, noting a detrimental impact on the services provided.[117] It concluded that common ownership was the main cause of the adverse effects on competition and ordered, inter alia, the divestiture of three airports – both Gatwick and Stanstead, and either Edinburgh or Glasgow.[118]

Dunne pointed out that, had the CMA exercised its antitrust enforcement powers instead, it would have been unable to impose such far-reaching remedies, due to the lack of blameworthy conduct by the BAA.[119] The BAA case has shown is that the CMA can take it upon itself to essentially punish corporations for inefficient but otherwise perfectly legal business management. In so doing, the CMA has imposed on BAA a burden of responsibility that goes not just beyond legislation but even soft law such as the UK Corporate Governance Code. While no such remedies have ever been ordered by the CMA again, the mere possibility of such

[115] CMA, BAA Airports Market Investigation final report (2009).
[116] ibid, para 5.42.
[117] ibid, paras 4.86-4.89.
[118] ibid, paras 10.1-10.2.
[119] *Dunne* (n 94), 241.

occurrence is a concern when it comes to legitimate expectations of business owners and managers in terms of freedom to conduct their business on a for profit basis.

The potential that the Commission may be given the powers to impose structural remedies was one of the most prominent concerns raised during the consultations.[120] Overall, the problem with structural remedies is that their imposition might cause irreparable harm to the undertaking concerned in a way that behavioural remedies cannot. The undertaking may appeal to the GC, requesting an expedited procedure. However, if the GC is to make a full review of the Commission's case, then there is only by so much that the procedure can be expedited. The undertaking may demand suspension of the Commission's order. If denied, this would again risk causing irreparable harm to the undertaking. If granted, this would risk jeopardizing the purpose behind the new tool which, particularly in case of monopolization and tipping markets, is to *prevent* harm to competition rather than punish it. On balance, considering how controversial has been the instance of use of structural remedies within the CMA's market investigation system, and the procedural difficulties it might cause in the EU, it may be preferable to only grant the Commission power to impose behavioural remedies.

3 Implementing the NCT

The analysis in Chapter 1 has demonstrated that the areas of concern highlighted by the Commission in the Initial Impact Assessment of the NCT continue to pose a threat to the competition process in the EU. The oligopoly problem is the least urgent issue of the three, because a lot of oligopoly-related behaviours can be addressed within the framework of Article 101 TFEU, but the NCT could nonetheless be of use to lessen the administrative burden on the Commission. The problem of tipping markets has been only insufficiently addressed by the DMA. The problem of monopolization by non-dominant undertakings remains completely unaddressed in EU law.

By contrast, the CMA's market investigation system, which permits the imposition of remedies to prevent or alter structural and conduct-based market features that have adverse effect on competition, could be used to address all three of the IIA issues. Based on that premise, the

[120] See e.g. Feedback reference F535683 < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement/F535683_en> accessed 22 June 2021.

following chapter will examine what the NCT might look like in practice, with the UK legislative framework being used as inspiration and as contrast.

Firstly, the place of the NCT in the existing competition law framework will be discussed. It will be argued that the NCT should not only exist as part of a two-tier investigatory system, but should be available to the Commission in any case where it amasses enough evidence in favour of using it. It will also be argued that the Commission should be left with a broad discretion whether to have recourse to Article 101 or 102, or to the NCT procedure.

Secondly, the threshold for intervention will be discussed. It will be argued that the NCT will only create a workable investigatory system without chilling competition if the Commission gives more guidance to undertakings than the CMA currently does, as to when will these powers be used. To that end, the benchmarks of 'significant proportion of the market' and 'significant consumer detriment' used by the CMA are too open-ended and liable to create too much uncertainty.

3.1 What place for the NCT?

3.1.1 A case against compulsory two-tier investigation structure

The analysis in Chapter 1 has shown that, contrary to the view expressed by some commentators during the NCT consultations,[121] Articles 101 and 102 TFEU do not exhaustively cover all threats to competition in the EU: this is not just a matter of the Commission's limited resources, but a matter of structural deficiencies of the current competition law framework. The question that follows is where in the framework is the gap that needs to be filled by a new tool.

The market investigation reference in the UK competition law framework is the second tier to an investigation structure which operates completely separately from the infringement procedures such as investigations of cartel offences under Part 6 of the EA 2002 or investigations of abuses of dominant position under the Competition Act 1998. The main benefit of keeping the two procedures so conceptually separate lies in solidifying the market investigation as a tool that does not censure the undertakings as wrongdoers.

[121] See e.g. Feedback reference F535685 < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Jednotny-trh-novy-komplementarni-nastroj-k-zajisteni-zprisneneho-prosazovani-pravidel-hospodarske-souteze/F535685_en> accessed 22 June 2021.

If we take, once again, the Retail Banking Market Investigation for an example, we see that in its language, the CMA firmly stops short of alleging that there was anything illegal or even morally wrong about the banks' actions. Rather, the CMA focuses on the actual effects that the banks' conduct, together with consumer inertia, have had on the market and consumer welfare.[122] Such non-censorial approach, of course, does not make the remedies imposed on the undertakings concerned any less binding – or any less cumbersome. It may, however, serve to lessen the sting of being subject to a market investigation as opposed to an infringement investigation. This social aspect should not be underestimated. Competition authorities are not regulators and have limited capacity; they do not have the tools to oversee step-by-step the implementation of remedies. As such, they need the good faith cooperation of the undertakings concerned to make the whole system workable. This cooperation is more likely to be achieved if the undertakings are made to feel like parties to a process that promotes fair competition for all, rather than 'picks' on them.

If the EU wanted to take the route of following, as precisely as possible, the CMA's example, then the appropriate way to incorporate the NCT into the existing framework would be by way of creating a second-tier to the existing market inquiry system in Regulation 1/2003. Immediately, it must be pointed out that this solution is not perfect: it detracts from one of the most desirable goals of the NCT, which is quick intervention to prevent irreparable harm to competition.[123] At present, the process of market investigation in the CMA takes roughly 18 months. On top of that, the Commission's sector inquiries themselves take anywhere between 1-2 years.[124] That is a long stretch of time during which significant changes can occur on the market: markets may tip, negatively affected undertakings may leave the market etc. By the time the second round of investigations is concluded, it is conceivable that the competitive landscape may look entirely different than the landscape that initially prompted a sector inquiry.

Shortening the second round of investigations – i.e. the NCT process, as modelled after the market investigations framework – would be ill-advised. In the UK, the largest part of the market investigation process is taken up by numerous rounds of interactions with stakeholders,

[122] *Retail Banking* (n 114), e.g. at para 53.
[123] *Schweitzer* (n 82), 7.
[124] Based on the information from the Commission's website at < https://ec.europa.eu/competition/antitrust/sector_inquiries.html> accessed 24 June 2021.

whereas the more bureaucratic parts (such as drawing up of the report itself) only take up a negligible amount of time.[125] Shortening the time for consultations would risk creating a system embodying precisely the worst fears of the respondents to the Commission's NCT consultations: a system in which undertakings would be open to stringent interference on the basis of unclear theories of harm and with little chance to defend themselves.[126]

The argument in favour of keeping the two-tier structure is that the Commission may want to have a solid amount of information on which to base the in-depth investigation in the first place, so that it can make informed decisions about which cases to prioritize. However, in cases which relate to problematic conduct of undertakings (such as monopolization) rather than structural problems, this could be potentially achieved even without a market inquiry, e.g. via concerns systematically raised by various stakeholders. Furthermore, there is no reason to treat the use of NCT differently than an infringement investigation, whereas the opening of antitrust proceedings may also be preceded by requests for information under Article 18 Regulation 1/2003, so that the Commission may amass preliminary information to help it determine the scope of its case. Hence, it is proposed that as long as the Commission is able to identify with sufficient precision the relevant markets, the problematic market features and justify a conclusion that the market investigation is a necessary and proportionate response to the problem, *then* the preliminary sector inquiry should not be necessary.

3.1.2 Existing tools v the new one: a case for broad discretion

One of the concerns raised e.g. by Freshfields Bruckhaus Deringer LLP during the consultation phase was one concerning the ability of the Commission to choose between the existing competition law tools such as Articles 101 and 102 on one hand, and the NCT on the other.[127] The Freshfields team pointed out that insofar as the purpose of the NCT is not only to respond to structural competition problems, but also to respond to competition problems in a more timely manner, the Commission might be tempted to resort to the NCT at all times, thereby

[125] Helen Ralston, 'What problems can the European Commission's New Competition Tool fix?' (31 July 2020) <https://www.oxera.com/insights/agenda/articles/what-problems-can-the-european-commissions-new-competition-tool-fix/> accessed 24 June 2021.
[126] See e.g. Feedback reference F535425 < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement/F535425_en> accessed 24 June 2021, 5-7.
[127] ibid.

rendering Articles 101 and 102 redundant. They were also concerned about the potential for legal uncertainty caused by the large overlap between the old tools and the new.

On the other hand, Schweitzer[128] viewed the overlap as a non-threatening phenomenon or, indeed, a virtue. She argued that nothing about the framework of the Treaties requires the NCT to be subsidiary to the application of Articles 101 and 102. Her rationale for rejecting a subsidiarity approach was rooted in efficiency concerns: the usefulness of the NCT might be impaired if the Commission was first obliged to consider the application of either Article 101 or 102.[129]

In addition to the concern about overlaps within the competition law framework, Larouche and De Streel have also discussed the question of the NCT overlapping with sector-specific regulation.[130] They have not condemned this overlap, recognizing the potential of the horizontal, cross-sectoral NCT to play a gap-filling role, and arguing that no problems should arise as long as all the relevant regime share a common theoretical basis and methodology rooted in solid economic analysis.[131]

Overall, the concern that the Commission might switch to using the NCT at the cost of using some older tools is not far-fetched: the Commission's approach to competition law enforcement has always been goal-oriented, and so it is only natural that it would use the most cost- and time-efficient route. Already under its current framework, it sees is role not in punishing offenders but mainly in ensuring the competitive process.[132] Therefore, even though finding an infringement may allow the Commission to impose fines and penalty payments, it may choose to forego those if there is a chance that commitments or remedies ordered under the NCT would allow it to bring the infringement to an end faster.

The question is whether such an 'opportunistic' approach to the choice of an enforcement framework is even a problem. This thesis suggests that there is nothing inherently problematic about it. Indeed, if the undertakings concerned have in truth committed an infringement which

[128] *Schweitzer* (n 82).
[129] ibid, 8-10.
[130] Pierre Larouche, Alexandre De Streel, 'Interplay between the New Competition Tool and Sector-Specific Regulation in the EU' (2020) Expert study for DG COMP.
[131] ibid, 15.
[132] This is best seen demonstrated by the development of the leniency program for cartel-participants. Furthermore, Regulation 1/2003 does not *oblige* the Commission to impose fines, but uses permissive language and leaves the Commission large discretion.

the Commission chooses not to investigate, then the infringing undertaking will actually be benefitted by use of the NCT. Under the NCT, it will be subject to an order or may choose to make commitments, but all this without damage to reputation that a protracted antitrust case would bring.

Also, the financial consequences for such an undertaking will be lesser, not least due to the impact that the Commission's choice of the NCT may have on further private enforcement. At present, pursuant to Article 9 of the Directive 2014/104/EU, a finding of an infringement of either Article 101 or 102 TFEU by the Commission constitutes irrefutable evidence of such an infringement for the purposes of a private action for damages.[133] However, where the Commission makes use of the NCT and therefore makes no conclusion on the existence of an infringement, it would be up to the private enforcer to attempt to prove an infringement based on any publicly available information from the NCT investigation and any other evidence that he could demand in court on the basis of Articles 5 and 6 of the Directive 2014/104/EU. Overall, the investigated undertaking would therefore be more shielded.

Furthermore, if the tool is modeled after the CMA's powers, then it is relevant that the market investigation procedure is largely a cooperative one and involves a lot of communication with stakeholders.[134] Certainly, the stakeholders have no choice to participate if they do not wish to receive a fine for non-cooperation but, they do also get a much bigger say about the contents of the final order than they could ever get in an infringement procedure.

Concerns about overlaps will be further diminished when the role of judicial review is taken into account. As the law currently stands, any act of the Commission which is a decision – i.e. which is intended to produce legal effects and brings about a change in the claimant's legal position – is subject to judicial review.[135] If we follow the logic of the CJEU's rulings to refuse status of a 'decision' to the Commission's statement of objections[136] then *a fortiori*, a decision to open a market investigation with the view of investigating problematic market features should

[133] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014) OJ L 1/349.
[134] CMA, 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach' (2017), 3.41-3.62.
[135] Case T-3/93 *Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v Commission*, ECLI:EU:T:1994:36.
[136] Case 60/81 *International Business Machines Corporation v Commission*, ECLI:EU:C:1981:264.

not be subject to review. On the other hand, any requests for information issued by way of a decision, or orders addressed to specific undertakings, would be subject to review in the same manner as they are within the existing legislative framework. Hence, the undertakings' right of defence or right to fair trial would not be imperilled by the addition of NCT.

3.2 Threshold for intervention

Given the wide variety of concerns identified in Chapter 1, it is clear that the NCT should confer broad investigatory powers on the Commission – i.e. powers which are not limited to a list of specific sectors, but rather are defined by reference to a goal that the powers are supposed to be used for. The goal that is 'remedying adverse effects on competition' has the benefit of being a technologically neutral one: it is sufficiently open-ended to react to new, improved understandings of what market features harm competition.[137] It is also in line with the Commission's 'more economic approach' of recent years, with the Commission being increasingly more concerned with actual effects of undertakings' conduct on the market, taking into account all market characteristics.[138]

On the other hand, the criterion of 'adverse effects' may be too broad. The CMA itself limits it by way of benchmarks such as 'substantial proportion of the market' and 'significant consumer detriment', which it uses to assess whether an investigation is necessary.[139] However, the interpretation of the words such as substantial or significant, both in general English law and specifically in relation to competition, has generated copious jurisprudence. In *R. v Monopolies and Mergers Commission Ex p. South Yorkshire Transport Ltd,*[140] Lord Mustill has candidly pointed out that there is inherent ambiguity in the word 'substantial' which not only cannot be remedied by reference to the plain meaning of the word, but will sometimes remain vague even with addition of context.[141] The English doctrine of *Wednesbury* unreasonableness[142] was

[137] *Larouche, De Streel* (n 130), 16.
[138] For the debate on the merits and de-merits of the more economic approach see e.g. Anne C Witt, *The More Economic Approach to EU Antitrust Law*, (2016, Hart Publishing) or, more recently, Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64 (2) The Antitrust Bulletin 172; Jan Blockx, 'The Limits of the 'More Economic' Approach to Antitrust' (2019) 42 (4) World Competition Law and Economics Review 475.
[139] *OFT511* (n 96), 2.27.
[140] [1993] 1 W.L.R. 23.
[141] ibid, [29].
[142] Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223.

therefore applied to the case of CMA's interpretation of significance, whereby a large margin of appreciation was left to the CMA to make this determination.

Since *Wednesbury,* the understanding of 'reasonableness' has changed in England, and there has been a rich academic and indeed judicial debate concerning the breadth of administrative discretion, the appropriate degree of judicial deference and the appropriate legal tests to be used in administrative law cases.[143] The overarching judicial tendency has been to intensify the scrutiny of administrative acts, whether still in the framework of the reasonableness test, or a more structured proportionality test.[144] The CMA reflects this idea by self-limiting to making references where doing so would be *proportionate* to the situation on the relevant market(s).[145] *A fortiori* in EU law, in which proportionality counts amongst general principles, this more exacting standard ought to be used.

The question is at what stage does this proportionality come to be assessed. As mentioned in the section above, decisions to open proceedings are not in principle subject to review in EU law. This must be contrasted with the UK approach, where s179(1) EA 2002 provides that any person 'aggrieved by a decision' of the CMA may apply to the Competition Appeals Tribunal for judicial review. S179(2) then contains a list of CMA's acts which do not constitute a 'decision' for the purposes of that section, with making a reference for market investigation *not* being included on that list. Furthermore, the act of making a reference is consistently referred to as a 'decision' in Part 4 of EA 2002 (e.g. in s 131A and 131B). Even though a decision to *make* a reference has never been so challenged, Whish[146] points out three instances where a decision *not* to make one have been brought before the Tribunal[147] - indicating that the converse will also undoubtedly be possible. This thesis suggests that the UK approach should not be followed in this instance, as it would destabilize the EU approach to the concept of admissibility of disputes.

[143] See e.g. Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423; Paul Craig, 'Proportionality, Rationality and Review" (2010) Articles by Maurer Faculty 2455; Tom Hickman, 'Problems for Proportionality' (2010) N.Z. L. Rev. 303.
[144] See e.g. R (Ann Marie Rogers) v. Swindon Primary Care Trust [2006] EWCA Civ 392 or Kennedy v The Charity Commission [2014] UKSC 20 for a more intense reasonableness scrutiny, or Huang v Secretary of State for the Home Department [2007] UKHL 11 and Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39 for the proportionality analysis.
[145] *OFT511* (n 139).
[146] Richard Whish, 'New Competition Tool: of existing competition tools aimed at Legal comparative study Prof. Richard Whish addressing structural competition problems with a particular focus on the UK's market investigation tool' (2020) expert study for DG COMP.
[147] See e.g. Case 1052/6/1/05 Association of Convenience Stores v OFT [2005] CAT 36.

However, to safeguard the rights of defence of the undertakings, proportionality ought to become reviewable the moment that the rights or duties of any specific undertaking become concerned.

The second problem is that the proportionality test itself also in practice gives little guidance to the undertakings concerned. For instance, in relation to decisions to request information from an undertaking pursuant to Article 18 of the Regulation 1/2003, the CJEU has set low demands on the Commission: there is well-founded fear that the Commission's investigatory powers would be limited if undertakings were encouraged to appeal any request for information or any decision to conduct a dawn raid.[148] Similarly, if the CJEU was to use strict scrutiny to determine the appropriateness of recourse to an NCT, the purpose of this tool would be frustrated. Therefore, the best solution would be for the Commission to avoid waiting for a judicial determination of what constitutes a proportionate intervention, but to promulgate soft law guidelines, indicating its enforcement priorities.

The CMA does not operate with any numerical thresholds for intervention by way of market reference, nor does it create any safe harbours. Such margin of discretion has a procedural benefit. The CMA is not required, at the outset of the market reference, to set out a precise theory of harm or even give a precise market definition, although it should give a preliminary view on these matters.[149] This allows it to proceed to the investigation itself faster than if it had to make a pre-judgment challengeable by way of judicial review. Furthermore, this prevents situations where the CMA might uncover, in the midst of the market reference investigation, that a wider spectrum of markets and/or market features are affected, but remain unable to pursue this wider inquiry due to the original self-limiting pre-judgment.

On the other hand, one of the biggest concerns raised even by the pro-NCT stakeholders during the consultation phase initiated by the Commission, was protection of legitimate expectations and certainty. Within the existing framework of Regulation 1/2003, the Commission does enjoy discretion in terms of e.g. organizing dawn raids and issuing demands for information. However, the concept of market features adverse to competition is an even more obscure one than the concept of infringements – the latter being elaborated with more detailed in the published Guidelines. By contrast, the concept of market features adverse to competition is a

[148] Case C-247/14 P HeidelbergCement v Commission, ECLI:EU:C:2016:149.
[149] *OFT511* (n 96), paras 3.6-3.14.

much vaguer one. Hence, the introduction of an NCT would have to be followed up by a system of soft law guidelines in order to preserve the legal certainty ever so necessary for the undertakings to thrive.

Conclusion

This thesis has considered whether the NCT project contemplated by the Commission ought to be revived, and whether the CMA's experience with ex-ante market interventions can be used as a model for a similar tool in EU law. In conclusion, the NCT is indeed a project worth implementing, because none of the existing competition law tools are well suited to responding to structural market problems or behaviours by the non-dominant undertakings.

The initiative would not have been recommendable merely on the basis of tacit collusion-related problems, because in relation to oligopolies, Article 101 TFEU will often be usable to intervene against cases of parallel behaviours of undertakings which bring no benefit to the consumers. The NCT here would mainly serve as a way to ease the investigatory burden on the Commission. On the other hand, when it comes to the issue of tipping markets and monopolizing practices by non-dominant undertakings, the current competition law framework is completely powerless.

The CMA's market investigation tool could in principle be used as a model for the NCT. However, the CMA's experience, while inspiring, must be approached with caution: the Commission here has the unique opportunity to take the best of the foreign system and leave out the features that have proven troublesome. In particular, the Commission ought to be mindful of the difference between the CMA's and the DG COMP's mandates when it comes to consumer protection. Secondly, the use of structural remedies cannot be recommended as part of the NCT.

When it comes to the placement of the NCT within the existing EU competition law framework, it is recommended that large discretion be left to the Commission when it comes to the decision when to initiate the NCT or which competition law tool to choose. To compensate for this open-ended power, it is recommended that the Commission promulgates more concrete enforcement guidelines about what market features may attract the use of the tool. It is precisely on the content of these guidelines and the specification of which harms, precisely, the NCT would sought to prevent or remedy, that further research ought to focus. Especially in view of

concerns submitted as feedback to the Commission's consultations about the NCT, it would be important, before reintroducing this proposal, to ensure clarity in enforcement priorities.

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