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The European Commission eyes the addition of a market investigation tool to its 60-year-old toolbox – but is it a chisel or a sledgehammer?

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On 2 June 2020, the European Commission published its roadmap on the possible introduction of a 'new competition tool' that would allow it to initiate market investigations into perceived structural competition problems, with the ability to impose market-wide remedies on companies. The proposal has obvious parallels to the market investigation tools already in place in the UK. It has the potential to constitute a powerful new weapon in the Commission's enforcement arsenal.

EU market investigation powers

Existing powers

The Commission already has the power to conduct inquiries into particular sectors of the economy, or into particular types of agreements, when it believes that a market is not working as well as it should and considers that breaches of the competition rules might be a contributory factor.[1] The Commission uses the information obtained in an inquiry to understand the functioning of a particular market. If it finds grounds for doing so, the Commission may – at a later stage – assess whether it needs to open specific antitrust investigations targeting specific companies and conduct.

The E-Commerce Sector Inquiry, concluded in 2017, for example, was conducted in the context of the Commission's Digital Markets Strategy, and its findings were part of the impetus for the adoption of the Geo-Blocking Regulation in 2018. Likewise, the 2009 Pharmaceutical Sector Inquiry led to specific enforcement action that resulted in infringement decisions. However, whilst these sector inquiries may lead to policy changes or enforcement action if breaches of the rules are uncovered, the Commission does not have the power to impose any remedies to address any market-wide concerns. In short, this is more of an "advocacy" instrument than an enforcement tool.

Proposed new powers

The Commission is now going far beyond that. It considers that there may be structural competition problems that its existing competition enforcement powers under Article 101 and 102 cannot address.[2] As such, the Commission has published a roadmap towards the possible

adoption of a 'new competition tool' (**NCT**), to be introduced in addition to its existing enforcement powers. This NCT would enable the Commission to initiate market investigations without any prior finding and independent of any infringement of the competition rules. It would also allow the Commission to impose behavioural and structural remedies unilaterally to address any structural competition problems that it uncovered. Whilst the impetus for the NCT has been perceived as a response to issues in digital markets, the new powers will potentially cover all markets.

Under the proposal, the Commission would not make any findings as regards competition law infringements, nor impose any fines, but would be seeking to enable markets with identified structural problems to function more efficiently, if necessary by imposing behavioural and/or structural remedies – notwithstanding the absence of any allegation of wrongdoing by any market participant. The implications for all companies are therefore potentially significant.

The NCT amounts to a paradigm shift in EU competition law. From *ex-post* competition enforcement, we would move to an environment combining *ex-post* and *ex-ante* tools. Such an enforcement mechanism is not totally unheard of: there are a handful of jurisdictions, most notably the UK, Greece, Israel and Mexico, which include a market investigation mechanism in their competition law enforcement systems. It can be described as a sort of "nuclear weapon" of competition law: without any violation of the standard competition rules, the authority intervenes against a certain market structure or a "market failure". This can result in dramatic measures for market participants, such as forced divestitures of assets, structural separation, etc. The concern is that the Commission may use these new powers to drive forward industrial and competition law policy and use it to attack particular sectors and companies in situations where theories of harm under traditional enforcement tools are difficult to articulate or prove.

The precise form that the NCT might take has not been finalised but in the impact assessment, published in tandem with the Commission's roadmap, the Commission has explained that it is considering different forms:

- Under **Option 1**, a market investigation would be focused on unilateral conduct of a specific dominant undertaking (dominance-based), regardless of the industry in which it operates (horizontal scope), and would enable the Commission to order remedies before that undertaking abuses its dominance through rival foreclosure or raising costs;
- **Option 2** would still be dominance-based, but the tool's use would only be limited to specific sectors that are more prone to entrenched dominance and high entry barriers. The Commission expressly mentions digital markets as an example, but leaves the door open to other sectors;
- Rather than dominance-based, **Option 3** would be market structure-based, and would allow the Commission to intervene when a structural problem that cannot be addressed through the enforcement of EU competition rules prevents a market from functioning properly. Like Option 1, Option 3 would have a horizontal scope. The Commission considers that, compared to other options, Option 3 would be the most sweeping.
- Finally, **Option 4** would also be market structure-based, but, just like Option 2, would be limited to specific sectors.

UK experience: lessons to learn?

Of all jurisdictions that include this powerful tool, the UK experience stands out. Indeed, the market investigation option has proven to be a powerful tool in the UK and one that the UK competition authorities have not been shy about utilising – there have been nearly twenty market investigations conducted to date.[3] Under UK law, the competition authorities are empowered to initiate market investigations and impose remedies to address any "adverse effect on competition".[4] Like the NCT proposal, these powers are not contingent on any existing competition law infringement. Indeed, whether remedies are imposed or not, market investigations have a serious impact on affected companies, and significant personnel and data resources typically have to be dedicated to engaging with investigating authorities (with the whole process usually taking over two years).

Scope of the UK power to investigate

The UK test for the conduct of a market investigation requires that a feature (or combination of features) in a relevant market restrict or distort competition. Even though this test may appear to set a high bar, in practice it has become quite malleable. The 'features' that have been investigated previously have included, for example:

- the rail franchise policy that was investigated in the *Rolling stock leasing market investigation*, even though one of the features at issue – the rail franchise system – was derived from government policy; and
- the behaviour of customers in particular markets, such as the customers' general inertia in the *Northern Ireland PCA Banking Market Investigation.*

Neither of these features were within the control of the market participants, of course, but were still sufficient to trigger investigations. It is also noteworthy that in nearly all market investigations cases, some form of remedy has always been imposed. In other cases (so-called market studies, essentially a shorter pre-cursor to a full market investigation), a full investigation has been avoided when companies have agreed to voluntarily change their conduct.[5] In most cases, behavioural remedies have been imposed (e.g., transparency obligations, codes of conduct), but some have resulted in the break-up of companies (e.g., in the airport sector which required, *inter alia*, Heathrow and Gatwick to be under separate ownership).

Safeguards & due process: a necessary counterweight

It is clear the Commission has been at least somewhat inspired by the UK regime, but one feature of the UK regime that is not yet contemplated is the existence of elaborate safeguards and due process. Detailed guidelines apply to the conduct of market investigations in the UK, including precise timescales that envisage site visits, the publication of working papers and annotated issues statements, a series of hearings with concerned parties, and consultation on any recommended remedies, which is a level of engagement and transparency that does not currently apply to the Commission's enforcement powers. Then, there is strong judicial review by the Competition Appeal Tribunal (CAT). Although the EU Courts will certainly review the Commission's actions, the standard of that review is not as high as in the UK.

Yet the existence of appropriate safeguards and due process is indispensable, bearing in mind that companies that have committed no infringement and may be operating perfectly legally, stand to have remedies imposed on them that can go so far as to require forced divestitures.

With power comes responsibility

One might say that the adoption of such a "nuclear weapon" indicates a certain "failure" of a competition system to use appropriately its conventional weapons. Others may see this as a welcome addition to the Commission's toolbox. However, "with great power comes great responsibility": it will be important to ensure that appropriate safeguards are put in place, in particular, a proportionality check, procedural safeguards (as in the UK system), and full judicial review. One major difference between the UK system and the NCT is likely to be the need to walk a tightrope between the interests of Member States, as the tool may be used to investigate markets in which some national champions may be strong across the EU. Therefore, the Commission will have to guard its new tool well and protect it from any political pressure and influence. Otherwise, the Commission's standing as a competition enforcer, as well as the overall EU competition enforcement system, risks suffering potentially irreparable harm.

The Commission is consulting on the roadmap until 30 June 2020 (accessible here) and is expected to launch a public consultation on the NCT in the second quarter of 2020.

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[1] Article 17(1) of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

[2] Inception Impact Assessment: New Competition Tool.

[3] Whereas in Greece there has been only one occasion.

[4] Under section 138(2) of the Enterprise Act 2002.

[5] See, e.g., Office of Fair Trading, *Isle of Wight ferry services*, February 2009.

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