

New Ways to Address Competition Challenges in Digital Markets: Reflections and Enlightenment of the EU's Proposal for a New Competition Tool

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How to cite this paper: Dong, Q. C. (2023). New Ways to Address Competition Challenges in Digital Markets: Reflections and Enlightenment of the EU's Proposal for a New Competition Tool. *Beijing Law Review*, 14, 1372-1393.

<https://doi.org/10.4236/blr.2023.143075>

Received: June 13, 2023

Accepted: September 17, 2023

Published: September 21, 2023

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Abstract

The proposal for the new Competition tool is the EU's positive response to the structural competition challenges of the digital economy. It is an extremely flexible non-sanction competition instrument designed to empower the Commission to intervene in the market by developing binding remedies when there is no violation of competition law. This tool, referring to the UK market study tool, makes a pioneering exploration on the basis of traditional competition law enforcement tools and industry regulation tools. Although it helps to cope with the structural competition challenges in the digital era, it also faces severe legal challenges. The proposal of the new Competition tool does not appear suddenly, but is the result of the trade-off between the modernization of EU competition law and the introduction of economic analysis to highlight the dilemma of enforcement costs, and the abuse of commitment system leading to the stagnation of the development of the theory of competition damage, and the mutual promotion of the two systems evolution processes. The proposal of the new competition tool is an attempt to change the concept path, which is bound to face many doubts and challenges, but it also brings enlightenment for China's competition governance in the digital era. In terms of method, competition status assessment is a beneficial supplement to anti-monopoly law enforcement. It is also necessary to reasonably grasp the status and function of economics in antitrust practice.

Keywords

New Competition Tool, Market Study Tool, Undertaking Commitment Regime

1. Introduction

In June 2020, the European Commission launched a consultation on legislative proposals aimed at strengthening competition law and filling gaps in the implementation of existing rules, with its proposal to introduce a new competition tool (hereinafter, the NCT proposal) aimed at empowering competition authorities to intervene in markets in the absence of anticompetitive conduct or mergers and acquisitions¹. This proposal is a competition tool complemented by the Digital Services Act Package and is one of the Commission's initiatives to ensure that competition policy and rules are appropriate for a modern economy². The proposed new competition tool is a response to recent calls for new competition rules to address the challenges of competition in the digital economy, based on the premise that the existing toolbox of competition law is inadequate to address the issues raised by the "modern economy" (Marsden & Podszun, 2020). It is mainly reflected that traditional competition tools cannot effectively remedy the damage of market competition caused by reasons other than enterprise behavior. It also fails to effectively regulate certain behaviors that have anti-competitive effects. For example, EU competition law does not prohibit implied collusion, and there is no legal barrier to competitors holding minority stakes in each other, although it may promote collusion or restrict competition (Motta & Peitz, 2020). In addition, due to various reasons, the intervention threshold is high or the intervention time is very long, which makes it difficult for traditional competition tools to solve the market competition problem in a timely and effective manner. Moreover, in the digital economy era, market characteristics such as economies of scale or scope, direct or indirect network effects, high switching costs, and consumer behavior biases further highlight the shortcomings of traditional competition tools.

According to a statement by Margrethe Vestager, the new competition tool, which could be called a "market investigation tool," is a complementary tool to the Digital Marketplace Act, between ex ante regulation and ex post antitrust enforcement, and will primarily target the technology giants in the Digital Market Act³. The proposed new competition tool is similar to the UK's Market Investigation Tool, which was implemented in the UK in 2002 and is used not only in the digital market but also in a number of economic sectors, such as energy, retail banking, funerals, investment advisory management services, private motor insurance, private healthcare, etc. (Ahlborn & Leslie, 2021). The NCT is an ambitious solution for the EU in the face of the digital economy, which may not be limited to the digital market but apply broadly to all sectors of the economy, meaning that the EC will have broad and flexible powers of market intervention.

¹For details see Proposals published by the Commission,

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en.

²Id.

³See

<https://www.politico.eu/article/margrethe-vestager-brussels-seeks-to-strengthen-competition-tool-against-big-tech-digital-services-act/>.

Arguably the most important creation since the implementation of the EU Merger Review Regulation, the NCT could have a profound and lasting impact on the EU competition law regime, which has sparked extensive debate and many concerns. Several points should be clear about the NCT: firstly, the NCT will indeed authorize competition authorities to issue injunctive measures regarding structural or behavioural remedies, but not on the basis of a firm's violation of competition law, but on the basis of the competitive characteristics of the market in which the firm is located, which are often structural in nature. Second, the implementation of the NCT will mean that the competition authority's intervention in the market will ignore the efficiency advantages of individual firms, their legitimate market position, and their basic property and business freedom rights. Obligations will be conferred on particular firms primarily from a broad market structure. Finally, while most scholars agree that the existing toolbox of competition law needs to be adapted to the process of economic modernization, the justification of the ends does not automatically justify the means, and the possible implications of the NCT proposal still need to be treated with caution.

Based on the clarification of the objectives of the NCT proposal and its positioning in the EU economic control system, this paper aims to discuss the pros and cons of the new competition tools, the legal risks and challenges faced, and the historical evolution of the development, with a view to shedding light on competition governance in China in the digital era.

2. Objectives, Composition and Characteristics of the NCT Proposal

2.1. Objectives of the NCT Proposal

The specific objectives of the NCT proposal are twofold.

On the one hand, the NCT proposal aims to strengthen the deficiencies of the current EU competition law enforcement. EU competition law consists of two main provisions, Article TFEU101 prohibiting agreements and concerted practices that restrict competition, and Article TFEU102 prohibiting abuse of a dominant market position. Enforcement of these two provisions is ex post enforcement based on a case-by-case analysis. The EC can take antitrust enforcement action only after a suspected violation of competition law has occurred or is assumed to have occurred. Based on past enforcement experience, current competition enforcement deficiencies lie mainly in the structural competition problems that exist in digital or other emerging markets that existing competition law rules and enforcement cannot address or cannot address in the most effective manner. For example, competition problems caused by monopolistic strategies of non-dominant firms with market power, and competition problems caused by the strategic behaviour of firms with market power extending their market position to multiple relevant markets, cannot be effectively addressed. According to the EC, the main reasons for this shortcoming include: 1) the need to prove a violation of existing rules as a basic prerequisite for each initiation of an antitrust investigation; and 2) the need to pass a long period of time to com-

plete formal investigation and fine procedures, yet digital and emerging markets are developing very rapidly. Therefore, the EC needs a new competition tool that will enable it to investigate and prosecute conduct that does not necessarily violate Articles 101 and 102 of the TFEU but does raise competition concerns.

On the other hand, the NCT is proposed to address structural competition issues that are difficult to address under existing competition rules. Structural competition problems involve structural market characteristics that adversely affect competition and may ultimately lead to market inefficiencies such as higher prices, lower quality, reduced choice and less innovation. According to the preliminary impact report of the NCT proposal, while structural competition issues may arise in different contexts, they can generally be divided into two categories depending on whether harm is imminent or has already affected the market. 1) Structural risk of competition. It is a situation where certain market characteristics (e.g., network effects, scale effects, lack of multiple hosts, and lock-in effects) and the behavior of firms in the relevant market pose a threat to competition. It is particularly appropriate for markets where skew effects occur. Competition risk arises from strong market players with entrenched market gatekeeper positions, a situation that can be prevented by early market intervention. 2) Structural absence of competition. It is a situation in which the market does not function well enough to produce competitive outcomes due to market structure (e.g., structural market failure), even if firms do not act anticompetitively. This encompasses two scenarios, one in which the market fails systematically due to certain structural features, including high market concentration, market entry barriers, consumer lock-in, lack of data access or data accumulation, not due to the behavior of a particular firm with market power; and two, in which oligopolistic market structures increase the risk of tacit complicity, including markets with increased transparency due to algorithm-based technology solutions that are becoming more prevalent in the industry.

The overarching goal of the NCT proposal is to ensure fair and undistorted competition in the internal market. Guided by this overall goal, the specific objective is to address structural competition issues that prevent markets from functioning properly and level the playing field in favor of only a few market participants. By restoring distorted competition in these markets, lower prices, higher quality, more choice, and innovation are brought to consumers.

2.2. Composition of the NCT Proposal

2.2.1. Scope of Intervention

According to the initial impact assessment of the NCT issued by the EC, the scope of its interventions, the issues it aims to address are more similar to sectoral regulation, regarding structural market issues, and competition issues that competition law cannot effectively address in a timely manner. This can be summarized in three areas 1) structural competition problems due to market characteristics such as scale effects and network effects; 2) inefficient market outcomes that adversely affect competition and may lead to higher prices, lower quality,

and less choice and innovation; and 3) competition problems that cannot be solved or cannot be solved in the most efficient way by standard competition law tools, i.e., Articles 101 and 102 of the TFEU and the sectoral investigation system provided for in Regulation 1/2003. The former, such as the exclusionary strategies of non-dominant firms with market power, and the latter, such as the use of leverage strategies by firms with a dominant market position to enter multiple neighboring markets.

To address these competition problems, the NCT has designed four alternative scenarios, the main difference being the scope of application and the competition problem it aims to address. The broadest scope of intervention is Option 3, and the narrowest is Option 2 (see **Table 1**, **Table 2**). 1) the scope of application of the NCT: whether the NCT applies horizontally to all sectors of the economy, as competition law applies universally, or whether it is limited to certain specific sectors of the economy, in particular digital or digitized markets; 2) the competition problem intended to be addressed: structural competition problems, or the conduct of anticompetitive strategies by dominant firms, as in the case of Article 102 of the TFEU, but without the need to prove abusive conduct constituting an infringement of the law.

2.2.2. Remedies

A very interesting aspect of the NCT proposal, and a feature that distinguishes it from previous EU industry investigation regimes, is that it empowers the EC to develop and implement binding remedies. These remedies impose certain obligations on companies, which may be structural, non-structural or mixed. Since structural competition problems cannot be attributed to any particular company,

Table 1. Options for the NCT.

Options	Applicable Subject	Scope of application	Competition issues intended to be addressed	Remedies
1	Dominant companies	Universal application to all sectors of the economy	Unilateral conduct that excludes competitors; unilateral conduct that drives up competitors' costs	Behavioral and/or structural remedies
2	Dominant companies	Limited to certain industries, especially digital or digital-enabled markets	Exclusion of unilateral acts of competitors; unilateral acts that drive up competitors' costs	Behavioral and/or structural remedies
3	All companies	Universal application to all sectors of the economy	Structural risks of competition and structural deficiencies of competition that prevent the proper functioning of the internal market	Behavioral and/or structural remedies and legislative actions
4	All companies	Limited to certain industries, especially digital or digital-enabled markets	Structural risks of competition and structural deficiencies of competition that prevent the proper functioning of the internal market	Behavioral and/or structural remedies and legislative action

Source: Initial Impact Assessment Report on the EU Proposal for a New Competition Tool.

Table 2. Classification of NCT options.

	Horizontal (general application)	Vertical (digital sector)
Structure-based (market tipping or oligopolistic market)	Option 3	Option 4
Based on market dominance (no need to prove abuse)	Option 1	Scenario 2

Source: Relevant information compiled.

no finding of a violation is required and no fines are imposed on the company. In addition to remedies, the NCT may lead to outcomes such as 1) a recommendation to the legislature. This outcome is similar to an industry investigation under competition law; 2) recommendations to industry regulators; 3) non-binding recommendations to companies, such as some form of code of conduct; and 4) voluntary commitments made by companies.

2.2.3. Implementation System

At the institutional level, the NCT would be implemented by the EC. One possible setup would be for DG COMP to be responsible for the analysis and for the expert group to review and make decisions. For any Commission decision, the Commission departments and DG would work closely together to prepare the decision through cross-sectoral steering groups and formal intersectoral consultations, and the expert group's decision would be adopted under the principle of cooperation. This means that DGs responsible for specific sectors of the economy and special industry controls will be closely associated with NCT procedures and decisions.

2.3. Features of the NCT Proposal

2.3.1. NCT in between Competition Law and Special Industry Regulation Law

The above comparison shows that the difference between competition law and industry regulation law is significant. The difference between competition law and industry regulation is significant in that competition law protects the good functioning of the competitive process by prohibiting abusive market dominance practices and anti-competitive agreements or concerted practices, while industry regulation aims to pursue broader objectives and seeks to correct market failures. With the exception of merger control, competition law is enforced ex post, while industry regulation is mostly ex ante intervention. Moreover, industry regulation laws take a more proactive stance in promoting competition, not only protecting existing competition, but also aiming to create and design future competition.

The NCT sits somewhere between competition law and sectoral regulation law. It pursues the goals of competition law while focusing not on behavior, but on the characteristics of the market that adversely affect competition. Its analysis is forward-looking and holistic, aimed at identifying the risks to competition or

the root causes of a continuing lack of competition. Its remedies are not designed to effectively end violations, but rather to address structural competition problems to ensure effective competition in the future. The NCT intends to fill gaps in competition law, such as implied conspiracies between firms or other forms of strategic dependence, and will also consider demand-side behavior and will impose remedies that are traditionally considered forms of consumer protection (Fletcher, 2020).

2.3.2. Non-Sanctioned Nature of NCT

NCT does not involve the discovery and sanctioning of violations, nor does it involve fines, except for sanctions imposed for non-compliance with procedural obligations during the investigation process. This is a central feature of the NCT, which focuses on the analysis of the possible adverse effects of market characteristics on the competitive process and its possible remedies. It is important to note that since the NCT process does not involve the investigation and sanctioning of violations, it does not have a punitive or deterrent purpose and does not depend on a finding of guilt and is not subject to punishment, which means that the quasi-criminal procedures provided for in Article 48 of the Charter of Fundamental Rights (CFR), Article 6 of the European Convention on Human Rights (ECHR) do not apply to the NCT (European Court on Human Rights, 2020, Article 6). Ideally, the non-criminal nature of the NCT will facilitate a more participatory and less adversarial interaction between the Commission and the companies involved.

2.3.3. Mandatory Nature of NCT's Prompt Intervention and Remedies

One of the NCT's objectives is to ensure effective and timely intervention when necessary to protect undistorted competition in the internal market. This will require strict timelines and efficient procedural design. It is also worth noting that the design of the NCT's power system gives the EC full discretion in the formulation of remedies and can establish binding remedies based on its findings on the state of competition in the market. In addition, the implementation of NCT remedies is quasi-regulatory in nature, and the implementation and supervision required by the remedies are also in most cases supported by industry regulators⁴. Ideally, it would respond to market features that may impede competition by supplementing or adjusting its rule framework and regulatory regime. This conceptual pathway shift makes NCTs potentially an important addition to the toolbox for protecting competition from distortions in the EU internal market, especially given the digital transformation and its emerging structural challenges to competition.

3. Legal Challenges to the NCT Proposal

Before you begin to format your paper, first write and save the content as a sep-

⁴If an NCT remedy is implemented in a regulated industry, the industry regulatory body may be responsible for monitoring and enforcement. See Larouche/de Streel, *Interplay between the New Competition Tool and Sector-Specific Regulation*, Study for the EU Commission, 2020.

arate text file. Keep your text and graphic files separate until after the text has been formatted and styled. Do not use hard tabs, and limit use of hard returns to only one return at the end of a paragraph. Do not add any kind of pagination anywhere in the paper. Do not number text heads—the template will do that for you.

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3.1. Legal Certainty Is Clearly Compromised

The NCT proposal is modeled after the UK's market investigation system, where market investigation tools complement other enforcement tools and provide great flexibility. However, the vague objectives and assessment criteria will undermine legal certainty. The NCT proposal specifies in its objectives that it will apply to cases of “distortion of competition”, but this expression is quite vague, and even if it further states that it will focus on structural competition issues, it is difficult to delineate a clear outline of the scope of its intervention. The question is, can we expect further interpretation of the NCT's “distortion of competition” standard to dispel concerns about legal certainty? In light of the nearly 18 years of practical experience with the UK market investigation system, this expectation may not be met.

First, even after 18 years of policymaking practice, the UK market investigation system is still described today as “a highly flexible policy tool with unclear substantive boundaries” (Ahlborn & Leslie, 2021). According to the UK market investigation guidelines, a market investigation can examine any competition issue and identify the characteristics that give rise to the problem. Its purpose is simply to observe whether competition is working well or could be improved within the particular market under review, rather than seeking to establish general rules or obligations for companies. In addition to being able to investigate the conduct of firms, the Competition Commission may also investigate other causes that may adversely affect competition, for example, market structure aspects or demand-side behavior (Competition Commission, 2013).

Second, the UK Competition Commission's efforts to seek certainty have been counterproductive. On the one hand, for market analysis, the Competition Commission seeks to quantify the extent of particular effects and the degree of precision, which may vary from case to case (Competition Commission, 2013). It is important to emphasize, however, that the Competition Commission is not asked to take any aspect of market structure or behavior as given, but rather an extremely broad outline to determine any aspect of the market that could be changed to significantly improve competition (Ahlborn and Piccinin, 2010). On the other hand, to determine whether market operations could be improved, the CMA conducted a counterfactual analysis. In identifying certain market characteristics or combinations of characteristics that may adversely affect competition, the CMA must find a benchmark to determine how the market is performing. In the absence of a statutory benchmark, the Competition Commission de-

finer such a benchmark as a “well-functioning market”, i.e., a market that shows favorable aspects of competition but is not ideally perfectly competitive, and the benchmark is usually envisaged as a market that does not have certain characteristics (Competition Commission, 2013). The question of certainty then revolves around the definition of a “well-functioning market”. So far, however, it has been generally accepted that a market is “well-functioning” as long as it is not affected by anti-competitive behavior. Merger review is seen as a complementary strategy to prevent such subsequent conduct, which in turn contradicts the intention of the market investigation tool to avoid a finding of illegality.

Finally, the almost unfettered discretion granted by the NCT proposal would mean a serious erosion of legal certainty. The NCT’s philosophy on market intervention is that it makes sense as long as the competition authority’s intervention makes “things better”. Needless to say, the competitive function of almost every market can be “improved”. Thus, such vague criteria would leave the EC with considerable room for discretion, allowing them to intervene at will and thus expand their power to formulate competition policy (Ahlborn & Piccinin, 2010).⁵ This means that the predictability of intervention ensured under legal formalism is put in jeopardy, and it is also foreseeable that the broad and open toolbox of remedies available to the NCT will undermine legal certainty even more severely through the coercive power of remedies.

3.2. The Principle of Proportionality of Remedies Is Difficult to Ensure

Under the objective of the NCT proposal to change “distorted markets”, the proportionality of the identified competition issues and the design, implementation and monitoring of remedies is an important issue for the NCT, and the only limitation it is subject to, since the principle of proportionality is a fundamental principle of European law. This issue becomes even more difficult when the remedies are applied to a complex multilateral market, such as the current digital market. This is because it is very challenging to understand and take into account all the effects that relief measures may have in the medium or long term at the very moment of their specific formulation. Indeed, it is true that relief measures may reduce competition, negatively affect consumers and even discourage investment in dominant firms, especially structural relief measures, issues that have been pointed out in the CMA’s market investigation practice. Concerns about the proportionality of remedies are particularly evident in the case of structural remedies.

First, the French competition authorities argue that there is no priority between behavioural and structural remedies⁶. This would be in significant conflict with Article 7 of Regulation 1/2003, which states that “structural remedies shall

⁵According to the British Market Survey reference, the Competition Commission has almost unlimited powers to reshape the market to correct any adverse effects on competition that it determines.

⁶ADLC, Les engagements comportementaux (La documentation Française 2019) 11.

only be used if there are no equally effective behavioural remedies, or if any equally effective behavioural remedies are more burdensome for the undertakings concerned than structural remedies”.⁷

Second, the UK experience shows that competition authorities with broad and flexible remedy-making powers are likely to make structural remedies that are disproportionate to the principle of proportionality. The CMA’s competence in remedies in UK market investigations is very broad, with the ability to implement a wide range of legally enforceable remedies after identifying competition issues and their causes, which often focus on making markets more competitive in the future and advising other public bodies on remedial action (*Competition Commission, 2013*). The choice of remedies is also very open, and the CMA has implemented structural remedies through its own capabilities, for example, in the London Airport case, where the CMA ordered BAA to sell several companies in its name (*Competition Commission, 2009*). In the field of antitrust, structural remedies are usually considered disproportionate, so the main focus in individual cases is on the remedy of illegal acts, while in NCT it is doubtful whether it can achieve the principle of proportionality if it does not focus on the determination of illegality of acts and remedy, but instead formulates structural remedies. The EC has already endured similar doubts in its commitment procedures in antitrust enforcement, as there are by no means rare structural commitment decisions in the EC’s commitment decisions. For example, during the period 2004-2014, the Commission made 11 commitment decisions in the energy sector, four of which were structural commitments that were binding on the companies that submitted them.

Finally, judicial review also makes it difficult to ensure the proportionality of NCT remedies. Because it is reasonably foreseeable that NCT-based relief decisions will be cursory on judicial review, reference can be made to judicial review of the principle of proportionality of commitment decisions, where both NCT and commitment decisions have in common that their implementation of relief measures do not require a finding of illegality. The arguments put forward by the European Court of Justice in *Alrosa* case may be applicable to future proportionality reviews of NCT-based remedies. The Court in *Alrosa* case reasoned that because enforcement decisions and commitment decisions have different mechanisms, methods of action, objectives, and underlying concepts, it is legitimate to apply different standards to the review of the proportionality principle for both limited to “clear error by the Commission.”⁸ However, how can there be a clear error when the NCT grants a wide margin of understanding in the assessment criteria? Thus, judicial review is hardly effective in controlling the emergence of disproportionate remedies. Practice also shows that judicial review is difficult to control successfully, and in the period 2010-2020, the CMA success-

⁷Council 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 (L1) 12 (hereafter Regulation no 1/2003).

⁸Case C-441/07 P *Alrosa* [2010] ECR I-05949, paras 37-42.

fully defended most challenges to market investigation remedies before the Competition Court of Appeal (CAT), winning 10 out of 12 appeals, while the two losing cases were based on procedural rather than substantive issues.

3.3. Significant Erosion of the Fundamental Rights of Business

As mentioned above, since the implementation of NCT procedures does not involve sanctions for violations of the law, it is difficult to consider them as (quasi-)criminal proceedings and apply the quasi-criminal procedures provided for in Article 48 of the Charter of Fundamental Rights (CFR) and Article 6 of the European Convention on Human Rights (ECHR) accordingly, it is foreseeable that the protection of fundamental rights such as the right to defense and the presumption of innocence of the enterprise under investigation or taking remedial measures will be significantly weakened. The protection of fundamental rights such as the right to defense and the presumption of innocence of the enterprise under investigation or relief measures is likely to be significantly weakened. This also means that the implementation of the NCT will undermine the achievements of the already progressive improvement of the respect for the fundamental rights of enterprises in antitrust proceedings.

First, the European Court has progressively improved the protection of fundamental rights of businesses in antitrust proceedings. On the one hand, according to the explicit provision of Article 23(5) of EC Regulation No. 1/2003⁹, decisions made by applying the rules of antitrust law do not have a criminal law character. However, on the other hand, the European Court of Human Rights holds a different view, considering that antitrust proceedings can be equated with criminal proceedings, involving fundamental rights in the field of crime, and that the enterprises involved in the proceedings can enjoy the right to a fair trial by applying the provisions of Article 6(1) of the European Convention on Human Rights (ECHR). However, it needs to be made clear that the ECHR case law on the equivalence of antitrust proceedings to criminal charges is only legally binding on the Member States, as the EU is not yet a party to the European Convention on Human Rights and therefore the ECHR does not have the power to directly control the case law provisions of the European Court of Justice (ECJ). However, driven by the conclusions of several Advocates General¹⁰, the ECJ has recognized the benefits of the fundamental guarantees proposed by the ECHR, thus ensuring de facto compatibility between the case law of the ECJ and the ECtHR. As a result, too, the right to defense, the presumption of innocence (*nullum crimen*) and the principle of “*nulla poena sine lege*” favor businesses in antitrust proceedings. Although this protection is far from perfect, it must be acknowledged that the case law of the European Court of Justice has progres-

⁹Article 23, paragraph 5, of Regulation No. 1/2003 provides that decisions taken pursuant to paragraphs 1 and 2 are not of a criminal nature.

¹⁰Case C-17/10 Toshiba, Opinion of AG Kokott, para 48; Case C-272/09 P KME, Opinion of AG Sharpston, para 64; Case C-521/09 P Elf Aquitaine, Opinion of AG Mengozzi, para 31; also Case C-185/95 P Baustahlgewerbe [1998] para 21.

sively improved the respect for fundamental rights.

Second, by analogy with the case law that actions based on Russian industry competition law do not constitute criminal proceedings, the implementation of the NCT may significantly weaken the achievements already made in protecting the fundamental rights of the companies involved in the lawsuit. Under the Engel criteria, the primary criterion used to determine whether a lawsuit constitutes a criminal charge is its oppressive purpose (Delmas-Marty & Teitgen-Colly, 1992). Thus, the European Court of Human Rights has based its determination of whether a lawsuit constitutes a criminal charge primarily on whether it has a punitive objective. But on the question of whether the Russian sectoral competition law (SCL) is applicable to criminal proceedings, the ECtHR held that the criteria for criminal proceedings were not met, based on the fact that 1) it is limited to certain sectors and is not as universally applicable as criminal law; 2) it is designed to prevent distortion of competition rather than to punish violators; and 3) it allows businesses to justify their actions if they have a beneficial effect on the market, but criminal violations cannot be subject to a utilitarian defense. The reasoning of this argument can obviously be applied to NCT as well. Despite the fact that the Russian industry competition law provides for violations and penalties including restitution of proceeds, the European Court of Human Rights still does not consider that proceedings based on this law constitute criminal proceedings. It can be deduced, then, that the ECtHR would not consider an action based on the NCT to constitute a criminal proceeding without establishing any violation of the law and without any sanctioning nature, and whose underlying purpose is not repressive NCT proposals. Therefore, it can be argued that the guarantee of the fundamental rights of businesses regarding criminal proceedings will probably not be possessed despite the fact that the remedies under the NCT proposal will have a significant impact on the interests of the businesses concerned.

Finally, as mentioned before, and as difficult as judicial review of the principle of proportionality is to guarantee, it remains to be seen whether a cursory judicial review will be effective in protecting fundamental rights, including the right to a defence, even if it is stipulated that the NCT's decision should respect the principle of a fair trial under Article 6 of the European Convention on Human Rights and that businesses have the right to appeal the NCT's decision to the European Court of Justice.

4. Historical Reasons for the Emergence of the NCT Proposal

4.1. Modernization of EU Competition Law: The Introduction of Economic Analysis Highlights the Dilemma of Enforcement Costs

The modernization process of EU competition law with economic analysis as the core element has transformed the objectives, values, analytical methods and regulatory framework of competition law, and has had a profound impact on the

institutional system and enforcement system of EU competition law as a whole. Among them, the enforcement cost dilemma arising from the administrative enforcement center's implementation system has created the realistic motivation for the NCT proposal.

First, the procedural law reform with decentralized enforcement powers at its core has led to the problem of inconsistent enforcement standards, paving the way for the introduction of economic effects analysis. The modernization movement of EU competition law started in the mid- to late 1990s and early 2000s, when the number of member states increased with the collapse of the Soviet Union and the expansion of the EU to the east, which made the EU's competition law enforcement efforts face the realistic pressure of a surge in workload and insufficient resources (Claus-Dieter, 1996). In response, procedural law reforms centered on the decentralization of enforcement powers were first carried out, with the enforcement powers of EU competition law being shared between the EC and the NCA, and private litigation of competition law was encouraged to promote judicial enforcement of competition law in order to achieve decentralization of enforcement powers and simplification of enforcement procedures (Gerber, 2007). The decentralization of enforcement authority has led to the plurality of enforcement subjects, and there are different standards of competition law enforcement between the EC and NCA, with problems such as excessive market intervention and occurrence of false positive errors. In order to ensure uniform enforcement standards and avoid excessive intervention, substantive law reform with the main content of reshaping competition law enforcement analysis methods was launched.

Second, the substantive law reform has placed economic analysis at the core, achieving a reshaping of EU competition from conceptual objectives to analytical methods. The substantive law reform of the EU competition law is guided by neoliberal economics and takes the analysis of economic effects of conduct as the basic method, and reshapes the determination and judgment of the illegality of conduct through the "economics-based analysis" or "effects-based analysis". The economic analysis is not the first time to appear in the EU. Economic analysis is not the first time to appear in EU competition law enforcement, but the modernization reforms have made this previously non-mainstream approach play a central and crucial role in enforcement, and have allowed modern economic theories, methods, value objectives and discourse to redefine the objectives and analytical methods of EU competition law (Hildebrand, 2002). This means that through the reform of the "effects-based analysis" approach, the core value objectives of competition law have shifted and the status of the unified internal market has started to decline, with consumer welfare and efficiency becoming the core objectives of competition law (Röller & Stehmann, 2006). In addition, the specific methods have been updated. For example, in analyzing the anti-competitive nature of abusive conduct, the abuse guidelines introduced the "As-efficient competition test" (AEC test), i.e., any competitor that provides consumers with The EC will intervene through enforcement only if its conduct pre-

vents competitors who are deemed to be equally efficient as those with a dominant market position from competing (Kadar, 2019).

Finally, the “effects-based analysis approach” creates an institutional dilemma in which the cost of economic analysis enforcement remains high. The administrative enforcement-centric enforcement regime adopted by EU competition law is the institutional context for one of the dilemmas. In the U.S., the common law enforcement approach of judicial centrism has solved the problem of enforcement costs, and the high costs of economic analysis are reasonably shared through the well-developed system of private antitrust litigation, triple damages, and litigation costs borne by the losing party. In contrast, under the EU’s administrative enforcement-centric implementation path, the high enforcement costs of economic analysis and limited administrative budgets form an institutional dilemma, especially in the digital economy and in the face of economic analysis in increasingly complex markets. This is evidenced, for example, by the proliferation of the length of the Commission’s enforcement decision instruments in the post-reform period, which averaged less than 100 paragraphs in the 1979-1991 period and more than 500 paragraphs in the 2005-2017 period. To address this dilemma, it is necessary to find alternative institutional solutions to the high enforcement cost dilemma of complex economic analysis.

4.2. Widely Use of Commitment Procedures: Paving the Way for NCT’s Market Shaping Experiments

The commitment procedure under Article 9 of EC Regulation No. 1/2003 on the implementation of competition rules is a powerful and readily available tool to address this cost dilemma¹¹. In reality, however, the progressive development of the commitment procedure as the default preferred antitrust enforcement tool and its widespread use has severely blocked the development of a theory of competitive harm that is crucial to the adjustment of antitrust rules. This has also made the EC’s enforcement stretched and costly in the face of complex new cases in the digital economy, which partly explains why the NCT was proposed to fill the gap in competition enforcement. The proposed NCT will complete this development and may eventually replace the commitment procedure, further reducing antitrust litigation and becoming another tool for the EC to expand its discretionary powers.

First, it is important to note that there is an inherent contradiction in the implementation of the commitment procedure itself, making it more likely to be applied in new and complex cases where it should not be applied. This procedure eliminates the need for competition enforcement agencies to conduct in-depth investigations to complete a finding of illegality of conduct, envisaging

¹¹Article 9, paragraph 1, of Regulation 1/2003 provides that: If the Commission intends to adopt a decision calling for an end to the infringement and the undertakings concerned undertake to meet the concerns expressed by the Commission about them in its initial assessment, the Commission may, by decision, make these undertakings binding on those undertakings. Such a decision may be adopted within a specified period of time and shall conclude that the Committee no longer has grounds for action.

that cases already covered by established case law can be dealt with more effectively accordingly, and that competition authorities do not have to take into account the fines imposed in these cases. Thus, the original design goal of the commitment process was to optimize the allocation of enforcement resources to more complex and novel cases, and to simplify the determination of illegality in common enforcement cases where case law exists through the commitment process. Among the incentives for respondent companies is the mitigation or waiver of fines. In practical implementation, however, it is precisely new and complex cases that impose nominal fines, while common cases tend to impose fines. This goes against the spirit of the original design and makes it more likely that the commitment procedure will be applied in new and complex cases. What inevitably happened next was that the EC took full advantage of its power to initiate commitment proceedings to negotiate a quick commitment decision with the companies involved in the case (Mardsen, 2013). This is because these companies fear being involved in lengthy and costly antitrust litigation, mainly in complex or novel cases where there is uncertainty as to their illegality. However, as a matter of course in complex and novel cases it is necessary to develop a sound theory of damages to provide a strong legal argument for a finding of wrongdoing and to leave it to judicial control.

Second, this tendency has continued to evolve into a general trend that has brought the development of antitrust law rules and competition damage doctrine to a near halt, making it difficult to respond flexibly and effectively to complex and novel cases. With the entry into force of Regulation No. 1/2003, commitment decisions have become the default antitrust enforcement tool in the era of competition law modernization and are still becoming more frequent today (Gerard, 2016) (Wils, 2015). This indicates that the EC is more eager to use the commitment procedure to conclude antitrust investigations quickly and efficiently. It also means that, on the one hand, instead of promoting a more balanced and rational enforcement of antitrust rules, the modernization reforms have paradoxically led to a decrease in the number of cases based on Article 7 enforcement procedures, including equally the most complex cases. On the other hand, this soft and “efficient” policymaking practice has halted something crucial: the development of case law. The progressive adaptation of antitrust rules, flexible enough to respond to new cases, has been sacrificed for the sake of short-term efficiency policies. Thus, the current antitrust rules seem inadequate to deal with new competition problems, in part because the massive use of commitment procedures has stalled the development of sound antitrust jurisprudence. Indeed, had the Commission dealt with complex cases more regularly, they could have developed a solid theory of harm on new competition issues and helped improve the determination of the illegality of monopolistic conduct, particularly the abuse of dominant market position common in digital markets. This would have ultimately led to a reduced burden of proof for competition enforcement agencies and thus to more efficient enforcement.

Ultimately, the introduction of the NCT will put an end to this trend and is a

choice made by the EC in a trade-off between different competition tools, a choice rooted in an excessive trust in economic “science” and a dilution of respect for the rule of law. On the one hand, the side effects of the large-scale application of the commitment procedure to address competition concerns are clear: 1) it undermines the deterrent effect of antitrust rules on business conduct; 2) it deprives victims of anticompetitive conduct of the possibility of private litigation without having to prove infringement; and 3) it deprives a significant proportion of Commission decisions of the opportunity for rigorous judicial review, including most of the problematic ones. This reduces the role of justice and reinforces the discretionary powers of competition authorities. On the other hand, several pending antitrust proceedings brought by the EC against GAFA in the last few years have made it possible to doubt the ability of the ECJ to be consistent and have the expertise it needs in responding to complex cases. Therefore, the proposed NCT as another way to deal with the tech giants will open up the development of market shaping trials. The criteria for the NCT are still very vague, but the EC, which will be given full discretion, is planning an ambitious market-shaping experiment. This plan is based on an excessive (blind) trust in economic “science”, while ignoring the rationality and necessity of the rule of law and fair judicial review of competition in a market economy.

5. Enlightenment of the NCT Proposal for Competition Governance in the Digital Age

5.1. Methodology Level: Assessment of Market Competition Status Is a Useful Supplement to Antitrust Enforcement

From one side, the NCT proposal shows the importance of the overall assessment of the competition situation through market investigation in addressing the challenges of the digital economy today. A specialized assessment of the competitive situation in a market allows a broader perspective to be taken and analyzed on a wide range of competition issues. This helps competition governance policymaking bodies, including antitrust enforcement agencies, to go beyond the examination of market conduct and better integrate extra-behavioral factors such as market structure, regulatory barriers, structural impediments, consumer bias, and privacy protection for a holistic competition analysis. It provides more objective and comprehensive analytical materials and factual support for enforcement decisions and competition policy implementation. It also helps antitrust agencies to gain a deeper understanding of the actual operation and competition situation of new business models and modes in the digital industry. According to ICN’s Market Research Project Report, the factors that are usually included in the assessment of market competition are: firm behavior; market structure; information failures; consumer behavior; public sector intervention in the market (either through policy or regulation, or through direct intervention in the day-to-day operations of the supply and demand sides of the market); and other factors that may harm consumers ([International Competition Network](#)

Advocacy Working Group, 2009).

Article 9 of China's Anti-Monopoly Law also stipulates that the Anti-Monopoly Commission of the State Council has the duty to "organize investigations, assess the overall competition situation in the market and issue assessment reports". Since the enactment of the Anti-Monopoly Law, the Anti-Monopoly Commission has conducted assessments of the competition situation in a number of key industries or fields. This "has played an active role in helping antitrust enforcement agencies and relevant industry authorities to grasp and understand the state of China's market structure, competition operation and industrial development, strengthen and improve antitrust enforcement, provide basic data support for strengthening competition policy implementation, effectively improve the relevance, scientificity and effectiveness of antitrust legislation and enforcement, and promote the implementation of antitrust law and competition policy to better match the operation of the market economy and high-quality development" (*Antitrust Bureau of the State Administration of Market Supervision and Administration, 2020*). It is particularly important to assess the competition situation of the platform economy, which is an emerging digital economy, involving a wide range of industries, strong technology and rapid changes in new business models, and thus a holistic competition assessment is particularly important. It is important to track, evaluate and study the competition situation of the platform economy in general and its internal sub-sectors from the perspectives of economic positioning, industry development, enterprise behavior and consumer or social welfare in the context of the national digital economy development strategy.

In conclusion, the legal challenges of the NCT proposal in terms of power allocation and implementation do not affect its value in the assessment of the competitive situation in the market as a method. Market research-based assessment of competitive conditions is an important part of the competition toolbox, and there are outstanding advantages that distinguish it from enforcement tools and other competition tools. At least it can be a useful supplement to antitrust enforcement in improving the quality of enforcement, enhancing the effectiveness of enforcement, and implementing competition policy.

5.2. Institutional Level: Alert to the Risk of Abuse of the Operator Commitment System and Strengthen Procedural Control

The proposal of NCT completes the evolution of the development of the operator commitment system and is a trade-off choice under the stagnant development of the competition damage theory under the illegal determination. The historical tracing of NCT, although the operator commitment system has alleviated the dilemma of enforcement costs brought about by the introduction of economic analysis, it has also exposed many abuses under the abuse of the operator commitment system. Therefore, it is important to have a clearer understanding of the undertaking system, which is a typical co-existence of risk and value, mainly for the sake of administrative efficiency and administrative cost

saving (Choné et al., 2012). While its role as an important alternative enforcement tool can improve enforcement efficiency, save enforcement resources, and address competition issues flexibly and effectively. However, operator undertakings are a form of administrative settlement procedure that bypasses formal enforcement procedures, and the decision to undertake depends to a large extent on private negotiations between the parties, which gives more discretionary power to enforcement agencies, as has been the practice in the EU for more than a decade with the undertaking system, which, while leading to abuse of enforcement power, also reduces the number of formal enforcement cases implemented under the enforcement procedure and stagnates the antitrust analysis. The development of the most important theory of competitive harm in antitrust analysis. In terms of the mechanism of action of the commitment system, this informality brings advantages such as efficiency and convenience, but also brings problems such as abuse of enforcement discretion, which ultimately leads to the opposite of the purpose of the system. In the era of digital economy, when facing new and more complicated competition problems, the harmful effects of abusing the operator's commitment system are even more significant, which reduces the effect of antitrust deterrence and makes the EC go further and further down the road of "market shaping experiment".

Therefore, it is necessary to impose reasonable legal procedural controls on the operator commitment process so that it can be used to advantage while minimizing risk and harm. The goal of procedural control is to find a balance between the flexibility and legitimacy of the commitment system and to achieve the organic unity of "freedom" and "do no harm". The basic way of procedural control is, first, to restrain the expanding discretion of law enforcement agencies through procedures to prevent law enforcement agencies from generalizing the use of the commitment system for the simple pursuit of convenience in law enforcement, and to strictly regulate the conditions for the initiation of the commitment process, and on the other hand, to ensure a substantial balance between the positions of the two parties in the application of the system based on the nature of administrative reconciliation, and to prevent it from becoming an excuse for public coercion. Second, the transparency of the application of the commitment system should be enhanced through procedures so that the decision to commit based on the consent of both parties does not become a shortcut to the detriment of third parties and the public interest. It is important to have both legal formal restrictions and to place the whole process of commitment decisions under the window of social scrutiny, since competition issues have typical externalities. Finally, it is necessary to ensure through procedures the "rational expectations" of operators in the application of the commitment system. That is, institutional arrangements should be made to convince operators that the commitment decision is the optimal action for both parties, both at the time of its establishment and throughout the process of its implementation.

The operator commitment system is also provided in our Antimonopoly Law, which follows the current general trend of international antitrust enforcement.

However, we should also learn from the lessons learned since the implementation of the EU commitment system, be alert to the risk of abuse caused by excessive discretionary power, and strengthen the procedural control of the operator commitment system. This will enable the system to properly play its role in optimizing the allocation of resources for antitrust enforcement and promote the development of competition damage theory in China's enforcement.

5.3. Conceptual Level: The Status and Role of Economics Should Be Reasonably Grasped in Antitrust Practice

It can be found that in the NCT program, the “scales” of rule of law and economics are seriously tilted in the direction of economics, which makes the core values of legality and fair judicial protection under the principle of rule of law seriously damaged. We have to think again about the position of economics in antitrust. This in turn raises the closely related question of whether economic efficiency should be the only goal of antitrust? Or should it be the goal of antitrust along with other values.

First, antitrust naturally requires economics. While the role of economics as a problem-solving approach is easily exaggerated. But to establish stable antitrust policy and eliminate arbitrariness, there must be a consistent economic model. Without such a model, it would be too susceptible to the politics of constantly fluctuating interest groups. Worse, antitrust rules also do not do a good job of achieving their stated goals. This is because antitrust law, as a product of a certain stage of market economy development, is a path choice and institutional tool used by modern market economies to maintain market competition and promote economic development, which naturally implies respect for and application of economic knowledge and theory. Therefore, we need to recognize soberly that in antitrust practice, the use of economic analysis is the key to legislation, law enforcement and justice, and is the theoretical basis for effective understanding of the monopoly phenomenon and intervention in the market. As Posner said, “The economic theory of monopoly provides the only correct basis for antitrust policy” (Posner, 2003). It can be seen that economics is the intellectual foundation and value basis of antitrust, and the application of economics shapes the logical framework and analytical path of antitrust.

Second, what kind of antitrust economics do we need in the face of the inconsistency and complexity of economics? To answer this question, it should be recognized that the primary value of economics as a realistic tool for our understanding of monopoly issues is rhetorical and requires that antitrust legislators and enforcers clearly understand the nature and principles of monopoly, and that the “story” should be told logically and coherently. Thus, the best economics for antitrust is generally the uncontroversial and accepted theories found in economic writings. More sophisticated theories are certainly relevant to policy and could become the orthodoxy of economics in the future (Hovenkamp, 2009). But before that, it needs to undergo the constant test of academic discussion and enforcement practice.

Finally, the reasonable limits of economic analysis should be grasped in antitrust, and the normative role of the rule of law must not be ignored. Although antitrust needs economic theory, antitrust economics is not antitrust itself. The effective implementation of antitrust cannot be separated from its legal basis, the antitrust law, and the rule of law framework and normative analysis of antitrust is the “ballast” to ensure effective market competition and economic development. Neglecting the role of the rule of law will not only bring about the abandonment of basic values such as freedom, equality and justice, but also make it difficult to meet the requirements of efficiency, since compliance with the substantive and procedural controls of the rule of law is an important source of economic efficiency¹². Therefore, in antitrust practice, it is necessary to learn the lessons of NCT and reasonably grasp the relationship between the rule of law and economic analysis. The basis for effective promotion of antitrust is the rule of law, and the operation of the antitrust rule of law cannot be separated from the guarantee and support of economics. In the analysis of antitrust illegality, we should adhere to the idea that normative analysis is the “body” and economic analysis is the “use”, incorporate economic analysis into the framework of normative analysis, meet the requirements of certainty for the rule of law, and realize the unity of substantive and formal rationality.

6. Conclusion

The complexity of competition issues in the digital era, the emergence of new industries, new models and new technologies, our antitrust regulation is required to keep up with the development of the digital platform economy in a timely manner, and to reserve space for the innovation of business models and the iterative upgrading of technological achievements of enterprises in the design of rule-making, analytical framework and remedies. But dynamic efficiency is not the “eternal justice” that overrides all other value goals, and we still need to pursue efficiency goals on the road of respecting the rule of law, which is also one of the roots of efficiency. This means that the innovation of our regulatory system should not only focus on short-term interests, but should also adhere to long-termism, optimize the interpretation system of antitrust law under the framework of antitrust rule of law, and promote the continuous development of competition damage theory. The effective completion of any major reform requires great patience and determination. The nature of scientific regulation is cumulative, and any innovation should be based on tradition, as well as on the innovative path of antitrust regulation, where we cannot ignore the traditional values of the market economy, which are the rule of law and freedom. As Walter

¹²A warning issued by the European Economic and Social Committee (EESC) in 2020 shows that this trend is troublesome in the EU, where the rule of law has recently come under pressure, because it may mean that other fundamental rights are not respected. Its cross-country studies analyzing the impact of compliance with the rule of law on economic growth show that, on average, countries with more compliance with the rule of law grow faster than those with less compliance. See: EESC, ‘The rule of law and its impact on economic growth’ [2020] ECO/511, para 2.3. its impact on economic growth’ [2020] ECO/511, para 6.1.

Pate put it in the 19th century, “The Wound of Experience”, “In order to explore something new, you must know the past, otherwise you may just be repeating the results of your predecessors, going round and round in circles with great care” (Watson, 2019).

Acknowledgements

I would like to express my sincere gratitude to all the people who have supported me throughout the process of writing this paper. First and foremost, I would like to thank my advisor for his invaluable guidance, patience, and encouragement. Without his support, this paper would not have been possible.

I would also like to thank my family and friends for their unwavering support and understanding during this challenging time. Their love and encouragement have kept me motivated and inspired me to keep going.

Furthermore, I would like to acknowledge the contributions of my colleagues and classmates who have provided me with valuable insights and feedback. Their constructive criticism has helped me to refine my ideas and improve the quality of my work.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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