

United Kingdom's Market Investigation Powers Under the Enterprise Act 2002 in the Context of EU's New Competition Tool Proposal*

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In this article, the author is aiming to look at the United Kingdom's system of market investigations, which involves quite extensive procedural safeguards, and is trying to see whether there are any lessons which could be learned and later used in developing the New Competition Tool or a similar market investigation tool on the European Union level.

Keywords: enforcement, market investigation, procedural safeguards, New Competition Tool.

Rinkos tyrimo įgaliojimai pagal Jungtinės Karalystės 2002 m. Įmonių akta naujo Europos Sąjungos konkurencijos priemonės pasiūlymo kontekste

Šiame straipsnyje autorius siekia pažvelgti į Jungtinės Karalystės rinkos tyrimų sistemą, kuri apima gana plačias procedūrinės garantijas, ir išsiaiškinti, ar yra kokių nors pamokų, kurias būtų galima išmokti ir vėliau panaudoti kuriant naują konkurencijos įrankį ar panašią rinkos tyrimo priemonę Europos Sąjungos lygmeniu.

Pagrindiniai žodžiai: vykdymas, rinkos tyrimas, procedūrinės apsaugos priemonės, nauja konkurencijos priemonė.

Introduction

In 2019 the European Commission began consultations with the view of harnessing stakeholders' opinions on whether a 'New Competition Tool' (hereinafter: the 'NCT') could be used to address structural competition problems arising on markets that are not covered or not effectively covered by Articles 101 and 102 TFEU (EC). This initiative was part of a broader piece of work that was leading, apart from the adoption of the proposed Digital Services Act, to the establishment of a system of ex-ante regulation of digital platforms, including additional requirements for those that play a gatekeeper role.

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After receiving feedback from 73 entities, including market players, consultancies, NGOs and governmental bodies, the Commission decided against introducing a horizontal tool for ex-ante market interventions, choosing instead to focus on the digital markets as one of its current enforcement priorities.

The 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) will be a part of a broader package of legislative reforms in the digital sector, including mainly the Digital Services Act (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) and the P2B regulation (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). However, the concerns raised by the Commission in the Initial Impact Assessment have not disappeared and are likely to be brought up again, thus causing the Commission to reconsider its choice and possibly initiate the introduction of a horizontal NCT (EC, 2020, p. 3).

The NCT belongs to a category of competition enforcement tools often referred to as ‘market investigation tools’. It would allow the Commission’s Directorate-General for Competition (DG COMP) to impose structural and/or behavioral remedies to overcome any structural harms to competition in the investigated market. This would be possible without the establishment of a finding of an infringement of Article 101 and/or 102 TFEU by the undertakings under investigation, which would make it a very powerful tool.

One of the main concerns regarding the use of such a tool would be procedural safeguards that would have to balance the substantive power the NCT would have. There are several jurisdictions where competition authorities already have similar market investigation powers. They include the United Kingdom, Italy, Iceland, Greece, Mexico, and Romania (Whish, 2020, pp. 37–48).

Overview of UK competition legislation

First, I would like to provide an overview of the UK competition legislation. The two main competition law statutes in the UK are the Competition Act 1998 and the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013 (the ‘ERRA 2013’).

The Competition Act 1998 contains two principal ‘antitrust’ provisions. The ‘Chapter I prohibition’ – the counterpart of Article 101(1) TFEU – prohibits agreements that may affect trade within the UK and that have as their object or effect the prevention, restriction or distortion of competition. The ‘Chapter II prohibition’ – the counterpart of Article 102 TFEU – prohibits the abuse of a dominant position if it may affect trade within the UK.

Both of those prohibitions are enforced by the Competition and Markets Authority (the ‘CMA’) and, to an extent, by nine sectoral regulators, including the Office of Communications (‘Ofcom’) and the Office of Gas and Electricity Markets (‘Ofgem’)¹.

The Enterprise Act 2002 establishes a system of market investigations, allowing the CMA and the aforementioned sectoral regulators to carry out a market investigation in order to check whether any features of such a market prevent, restrict, or distort competition.

Part 4 of the Enterprise Act lays foundations to the market investigation system, in which the CMA and the sectoral regulators can make a market investigation reference in order to discover whether any features of a market prevent, restrict, or distort competition.

¹ This is the so-called ‘*concurrency regime*’, in which the CMA and the sectoral regulators have concurrent jurisdiction to apply competition law. See: CMA 2014a.

The CMA (and previously the Office of Fair Trading (the 'OFT')) has also issued guidelines with the aim to further clarify the market investigations regime. These guidelines are not binding, and the CMA can adapt its procedures according to the needs of a particular case, providing that it respects the procedural provisions stated in the primary legislation. The most important publications are the *Guidance on making references*⁹, *Market investigation guidelines*¹⁰, and the *Supplemental guidance on the CMA's approach*¹¹.

Procedural aspects of Market Investigations in the UK

There are many publicly available sources that provide a detailed and thorough analysis of the market investigation procedure (Whish, 2022; CMA 2014b). In this article, I will provide a short overview of the most significant procedural aspects, with focus on safeguards and other measures that balance the substantial power of this tool.

The market investigation is carried out by a group of members of the CMA Panel, usually consisting of three to five people. The CMA and the sectoral regulators may make an 'ordinary reference' when there are 'reasonable grounds for suspecting' that one or more 'features' of a market prevent, restrict, or distort competition in the supply or acquisition of goods or services in the UK. Those features include:

- (a) the structure of the market concerned or any aspect of that structure;
- (b) any conduct (whether in the market concerned) of one or more than one person(s) who supply or acquire goods or services in the market concerned; or
- (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services (Enterprise Act 2002, s 131(2) and s 131(3)).

This conduct can be intentional or not (Enterprise Act 2002, s 131(3)). Later in the process, when the CMA group finds that some features of a market have an adverse effect on competition, it must then consider how those adverse effects and any harm to customers could be remedied, and then it must implement the appropriate (effective and proportionate) remedies. The CMA has broad powers to remedy any market feature that has an adverse effect on competition or any harm resulting therefrom, including the power to order the divestiture of assets.

It is worth noting that a finding in a market investigation that some features of a market have an adverse effect on competition does not mean that the investigated undertakings are guilty of any misconduct. There are no administrative fines being imposed on the responsible undertakings, or no damages are being awarded to anyone harmed by the conduct. As the Competition Commission once stated in Paragraph 21 of the *Market Research Guidelines*, the market research system is investigative and inquisitorial: it is not accusatorial (CC, 2013).

Safeguards of Market Investigations in the UK

The UK's market investigation tool has a wide range of procedural safeguards. The process is transparent, includes stakeholder engagement, has clear milestones and statutory time limits. It begins with the initiation procedure, which starts with a vote of the board of the CMA. The Board consists of the Chair and at least five Board Members, at least one of whom must also be a member of the CMA Panel².

Section 169 of the Enterprise Act requires the CMA or sectoral regulator to conduct consultation before making a market investigation reference. Section 172 requires it to give reasons for the decision

² See more at the CMA's "Our governance" webpage: <https://www.gov.uk/government/organisations/competition-and-markets-authority/about/our-governance>.

to propose the reference. The consultation can be public or not, the form and extent of the consultation process are not strictly regulated.

The investigation is conducted by a market reference group which consists of at least three members of the CMA Panel (CMA, 2104c). CMA Panel members are not CMA staff, and they are all highly experienced, non-political, and bring a diversity of expertise and viewpoints (Fletcher, 2020, p. 47). It reduces the risk of confirmation bias, as Panel members might be less likely than CMA enforcement officials to have gotten used to seeing the targets of investigations as adversaries. The market reference group decides whether there is an AEC in the market(s) referred, and, if so, whether and what remedial action is appropriate. In order to make a valid finding of an AEC that can be subject to remedial action, a decision must be taken by at least a two-thirds majority of the market reference group (CMA, 2104c, p. 8).

As Fletcher (2020, p. 50) notices, the overall procedure is prominently transparent. CMA publishes an initial issues statement, working papers and an annotated issues statement, provisional findings and a possible remedies notice (if relevant), provisional decision on remedies (if relevant), and a final report. Anyone can comment on the intermediate documents. There are also hearings held with parties at key stages, attended by the full decision-making Group.

Section 169 of the Enterprise Act requires the CMA to consult any person before making any decision in a market investigation case that may have a substantial impact on the interests of that person. The fairness of the CMA's procedures has been clarified in the judicial review of the CMA's investigation into Private healthcare. In its judgment in *BMI Healthcare v Competition Commission*, the CAT cited *R v Home Secretary, ex parte Doody*:

“Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer”.

CAT furthermore recognized that what constitutes the ‘gist’ of the case is context-sensitive:

“Finally, whilst Lord Mustill’s sixth proposition refers to a person affected by a decision being informed of the ‘gist’ of the case which he has to answer, what constitutes the ‘gist’ of a case is acutely context-sensitive. Indeed, ‘gist’ is a peculiarly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obvious, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the ‘gist’ of the Commission’s reasoning will often involve a high level of specificity. Indeed, this can be seen in the Commission’s practice, described in paragraph 7.1 of the CC7 Guidance, of disclosing its provisional findings as part of its consultation process” (§39(7)).

The timelines of the market investigations are also very clear. Early in the investigation, the CMA drafts an anticipated timeline and sends it to the main parties for comment. It updates the timeline as the investigation proceeds, and has to release the final report within 18 months of initiating the investigation (CMA, 2014c, pp. 26–27).

After the final report’s release, parties may appeal in the Competition Appeal Tribunal (CAT). While Competition Act 1998 cases receive a Full Merits review, market investigations can be appealed on a Judicial Review (JR) basis only. The appeal process can continue up to the Court of Appeals and the Supreme Court.

Section 179 of the Enterprise Act regulates the review of decisions under Part 4 of the Act. Section 179(1) of the Act states that any person “aggrieved by a decision” of the CMA may apply to the CAT

for a review of that decision within two months. Judicial Review basis means that the decision can be challenged on the grounds of illegality, irrationality and procedural impropriety. Further guidance can be found in the CAT's judgment in *BAA Ltd v Competition Commission* (§20).

"It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] *EWCA Civ. 142 per Carnwarth LJ* at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008]; *Barclays Bank plc v Competition Commission* [2009]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in 'second guessing' the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC ...".

Market Investigations in UK's practice

The transparency of the procedure, the participative nature of the investigation and the independence secured by the split of decision making between the decision to refer a market for investigation and the final Market Investigation decision make Market Investigations a tool with a wide range of effective procedural safeguards. What are the benefits of having market investigations in the UK's competition arsenal and why might the European Commission want to implement a similar tool?

First of all, in contrast to other competition law instruments, market investigations play a proactive role in promoting competition. One good example of that is the Open Banking measures which arose from the UK Retail Banking Market Investigation. They were designed to open up the potential for disruptive and innovative competition from new technologies and business models (Fletcher, 2020, p. 48).

Standard competition law focuses primarily on the conduct of undertakings, while market research is designed more broadly to solve any 'functions' of markets that have been identified as having a negative effect on competition³. As Fletcher (2020, p. 49) rightly notices, those could include subtle complexities in the nature of strategic interdependence between firms, including the potential for tacit coordination⁴. That could also include potential tacit algorithmic collusion scenarios, because the focus of Market Investigations is on anticompetitive effects, not human interactions.

Another example illustrating how useful this tool can be is the Airports investigation (CC, 2009, §14–16). The investigation lasted two years, and its subject was the ownership of British airports by the British Airports Authority ('BAA'). The Competition Commission concluded that an adverse effect on competition ('AEC') resulting from the common ownership by BAA of multiple airports can be remedied only by the divestiture of both Gatwick and Stansted and either Edinburgh or Glasgow to different purchasers. It seems very unlikely that weak investment and poor user-responsiveness, resulting from high market shares and barriers to entry alongside inadequacies in the regulatory system could constitute abuse under Article 102. Even though there was no abuse of dominance, however, the tool has been applied because a lack of competition was harming consumers. In 2015/2016, the CMA evaluated the remedies imposed. It has found downward pressure in price and an improvement in customer service. The post-divestment traffic increased more in divested airports than in other UK airports, which was seen as evidence that consumers benefited from the structural remedies in the form of improved connectivity and choice (CMA (2016)).

³ Conduct, however, can also be investigated by the CMA.

⁴ See, for example, 2014 Aggregates, Cement and Ready-mix Concrete Market Investigation (gov.uk 2016), in which the Competition Commission found a combination of structural and conduct features that were leading to higher prices. It required a divestiture by Lafarge Tarmac to facilitate the entry of a new producer; it also accepted an undertaking by Hanson to divest itself of a blast furnace slag facility.

Final remarks

Even though, for now, the Commission has abandoned its original plan to introduce an ex-ante enforcement instrument, nothing excludes the possibility of reexamining that plan in the future. To avoid any confusion, it is worth noting that there is a similar market study tool in the EU law: 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 the Member States, the rigidity of prices or other circumstances suggest that competition might be restricted or distorted within the common market. The Commission may request undertakings to provide information, but it cannot impose any remedies. Once the inquiry has finished, the Commission can proceed with an investigation of specific undertakings, but only with regards to Article 101 or 102 TFEU infringements rather than any structural concerns.

The current market study tool cannot therefore compare to the powers the Commission would have with the NCT. One thing is certain, the implementation of the NCT or a similar tool would require a careful design of its governance structure to safeguard appropriate checks and balances. To start with, it would have to specify who has the initiative of opening the case and who decides whether the case should go forward. As DG COMP has no experience in using internal separation of decision-making, it could consider modeling such internal checks on the UK's system. Creating a second-tier to the already existing market inquiry system in 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 (OJ 2003 L 1/1) could be one way of doing that. When it comes to judicial review, the UK market investigations can be appealed on a Judicial Review (JR) basis only, but it is unclear whether the same would suffice at the EU level. It seems like the ability to impose structural remedies, which in certain situations can cause irreversible harm, would have to be balanced by the access to a legal review of NCT decisions, including the factual foundations of the case.

All in all, market investigation tools can provide numerous benefits to the competition law system by filling some of its gaps. Taking into account all of the new anticompetitive harms that could possibly evade the current competition laws, focusing on the structure of the market seems to be one of the viable solutions for that. But, in order to balance such substantive power, adequate procedural due process and certain legal basis would have to be a starting point. Perhaps it would even require the EU to create new independent decision-making bodies or new types of specialized courts.

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S u m m a r y

The European Commission has been considering the possibility of proposing a 'New Competition Tool' that could address structural competition problems arising in markets that are not covered, or not covered effectively, by Articles 101 and 102 TFEU. The NCT belongs to a category of competition enforcement tools often referred to as 'market investigation tools'. This article provides an overview of a similar market investigation tool existing in the arsenal of the UK's Competition and Markets Authority which is regulated in the UK Enterprise Act of 2002. It enables the CMA to investigate markets and to determine whether any 'features' of a market prevent, restrict, or distort competition. If the CMA discovers an 'adverse effect on competition', it can impose a broad range of remedies. This article describes the UK market investigation procedure with a strong emphasis on procedural safeguards. The benefits of using such a tool along with the recent UK's practice are covered. Finally, some comments are made regarding the possible introduction of a similar tool in the EU law.

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S a n t r a u k a

Europos Komisija svarstė galimybę pasiūlyti „naują konkurencijos priemonę“, kuri padėtų spręsti struktūrinės konkurencijos problemas, kylančias rinkose, kurioms SESV 101 ir 102 straipsniai netaikomi arba nėra veiksmingi. Nauja konkurencijos priemonė priklauso konkurencijos įgyvendinimo priemonių kategorijai, dažnai įvardijamai kaip „rinkos tyrimo priemonės“. Šiame straipsnyje analizuojama panaši Jungtinės Karalystės konkurencijos ir rinkų institucijos arsenale esanti rinkos tyrimo priemonė, kurią reglamentuoja Jungtinės Karalystės 2002 m. Įmonių aktas. Ji leidžia konkurencijos ir rinkų institucijai tirti rinkas ir nustatyti, ar kokios nors rinkos „ypatybės“ trukdo, riboja ar iškraipo konkurenciją. Jei konkurencijos ir rinkų

institucija nustato „neigiamą poveikį konkurencijai“, ji gali taikyti platų teisių gynimo priemonių spektrą. Šiame straipsnyje analizuojama JK rinkos tyrimo procedūra, daug dėmesio skiriama procedūrinėms apsaugos priemonėms. Apžvelgiami tokios priemonės naudojimo pranašumai ir naujausia Jungtinės Karalystės praktika. Galiausiai pateikiama pastabų dėl galimo panašios priemonės įtraukimo į ES teisę.

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