

THE PROLIFERATION OF NATIONAL “NEW COMPETITION TOOLS” WITHIN THE EU: A NEW CHALLENGE FOR CROSS-BORDER BUSINESS?

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Abstract: More than a third of EU Member States already have, or at least are seeking to have, a so-called new competition tool (NCT). Their autonomous standard-setting in this field is not yet subject to direct harmonisation by the EU, so one may wonder whether the future use of the NCT in practice in some member states will not be to the detriment of the coherence of the regulatory environment of the EU single market. Against the background of the historically oldest UK model, the paper therefore compares NCTs newly enacted or proposed in Germany, Czechia, Denmark, and Greece, with a view to identifying differences that could pose a new difficulty for cross-border business within the EU single market. Despite the structural similarities of NCTs in all the member states mentioned, the competences, procedures and the capacities of national competition authorities regarding the use of NCTs differ. The text therefore concludes with a mention of proposals for an EU NCT as a tool in the hands of the European Commission that could prevent emerging of troublesome regulatory differences in the shaping of some markets important for the whole EU.

Resumé: Více než třetina členských států EU již má nebo alespoň usiluje o zavedení tzv. nového soutěžního nástroje (NCT – z ang. New Competition Tool). Jejich autonomní normotvorba v této oblasti zatím nepodléhá přímé harmonizaci ze strany EU, takže je možné se ptát, zda budoucí využívání NCT v praxi některých členských států nebude na úkor soudržnosti regulačního prostředí jednotného trhu EU. Na pozadí historicky nejstaršího britského modelu NCT proto článek porovnává nově přijaté nebo navrhované NCT v Německu, Česku, Dánsku a Řecku s cílem identifikovat rozdíly, které by mohly představovat nové obtíže pro přeshraniční podnikání v rámci jednotného trhu EU. Navzdory strukturálním podobnostem NCT ve všech zmíněných členských státech se kompetence, postupy a kapacity vnitrostátních orgánů pro hospodářskou soutěž, pokud jde o používání NCT, liší. V závěru textu jsou proto zmíněny návrhy na vytvoření NCT na úrovni EU jako nástroje v rukou Evropské komise, který by mohl zabránit vzniku obtěžujících rozdílů v regulaci některých trhů důležitých pro celou EU.

Key words: competition law; new competition tool; EU’s internal market; market investigation; structural remedies; commitments

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Introduction

The notion of a New Competition Tool (NCT) is not entirely new, as the European Commission organised a public debate on a ‘new complementary tool to strengthen competition enforcement’ in 2020.¹ Then, although this ambitious goal was replaced by an initiative leading to the adoption of a sector-specific Digital Markets Act (Regulation (EU) 2022/1925 of the European Parliament and of the Council), the baton in the search for a *new complementary tool* was taken up by individual member states.

At present, some form of a new competition tool is approved or under discussion within the European Economic Area in Ireland, Italy, Iceland, Luxembourg, Hungary, Germany, the Netherlands, Norway, Greece, Sweden, and, from 2024, in Czechia as an amendment to the Competition Protection Act (No. 143/2001 Sb.)² was approved by the government, but with very little time left before the parliamentary elections in autumn 2025 for its final adoption. A return to the idea of an EU NCT was called for by the European Parliament in January 2024 and proposed by the well-known Draghi Report on the Future of European Competitiveness in the autumn of the same year.³

All the changes in the powers and instruments of competition authorities, covered by the NCT label, are based on the urgent need, perceived on several sides, to give competition authorities more scope for action than the ex-post sanctioning of wrongful conduct of specific undertakings can provide. In particular, the NCT is intended to allow preventive intervention in markets where competition is not working, but where its dysfunction is not caused by cartels or abuse of dominance, i.e., where problems stem more from a lack of genuine rivalry or from a less dynamic market structure.⁴

Typically, these are phenomena known as tacit collusion, price leadership, supplier lock-in, market tipping, etc., which are not uncommon in many new as well as traditional

¹ EUROPEAN COMMISSION, Single Market – new complementary tool to strengthen competition enforcement, available online at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en; MOTTA, M., PEITZ, M., SCHWEITZER, H. (Eds.), *Market Investigations: A New Competition Tool for Europe?* Cambridge: Cambridge University Press, 2022.

² NERUDA, R. et al. Nový soutěžní nástroj à la tchèque? (New Competition Tool à la tchèque?) *Právní prostor* 6.12.2024, available online at: <https://www.pravniprostor.cz/clanky/obchodni-pravo/novy-soutezni-nastroj-la-tcheque>; PETR, M., Czech Competition Authority Looking for New Powers. *European Competition and Regulatory Law Review*, Vol. 8 (2024), Issue 4, pp. 255–259, available online at: <https://core.lexxion.eu/article/CORE/2024/4/7>; NEJEZCHLEB, K. Novela soutěžního zákona – evoluce či revoluce? (Amendment to the Competition Act – Evolution or Revolution?) *Antitrust* n. 3/2024, pp. 70–71; draft amendment to the Czech Competition Act is available (in Czech), available online at: <https://www.odok.cz/portal/services/download/attachment/ALBSDAXC5LP0/>.

³ DRAGHI REPORT, Part B, Section 2, Chapter 4 Revamping Competition, para 9, pp. 303–304. The Federal Government, Modernising EU competition law German proposals for the 2024-2029 term of the European Commission, available online at: https://www.bmwk.de/Redaktion/EN/Downloads/M-O/modernising-eu-competition-law-german-proposals.pdf?__blob=publicationFile&cv=2; BORONAT, A. The New Competition Tool: a market design tool for pro-competitive industrial policies in Europe? *Journal of European Competition Law & Practice*, 2025, pp. 1–11.

⁴ See in KUIPERS, P., VAN ROOSMALEN, J. The new competition tool: what is it and why do national regulators want it? *Bird & Bird Competition & EU law insights*, 18.9.2024, available online at: <https://competitionlawinsights.twobirds.com/post/102jj79/the-new-competition-tool-what-is-it-and-why-do-national-regulators-want-it>.

sectors today. The second area of newly allowed intervention should be the control of mergers and takeovers, specifically those that would otherwise be considered undersized in relation to the applicable turnover criteria allowing control of concentrations of larger firms. In short, the NCT’s role is to enable pro-competitive public-law intervention in the functioning of the market where empirical data has shown that, even in the absence of detected anti-competitive agreements, without anti-competitive behaviour by dominant firms and without significant anti-competitive takeovers, the market is being concentrated and market conditions stabilised, with increasing margins for the prevailing oligopoly, but all to the detriment of buyers and start-ups.⁵

Since an active transition to NCT could bring about a mental and paradigmatic shift in competition protection from prohibitions to remedies, from the prosecution of individual infringements to extensive market-shaping, in other words: from competition law to competition policy, this burgeoning novelty is receiving the attention of a number of analysts and commentators, for whom the competition authorities also organise thematic international conferences.⁶ Much of the discussion is devoted to the specific form of the adopted or proposed legislation and the resulting changes, or focuses on criticism of the increase in the power of competition authorities, the possible arbitrariness of their interventions in the functioning of markets, the reduction of predictability and legal certainty for businesses, etc.⁷

The following analysis is therefore directed elsewhere. Since, so far, ‘nationally, the landscape is different’⁸ with regard to NCT in the EU, the research question is: What will the proliferation of national NCTs do to the single market as an area of open competition, especially from the perspective of firms engaged in business in multiple national markets?

The core of the following text is a comparison of the NCT provisions added in 2023 to the German Competition Act (the so-called GWB - *Gesetz gegen Wettbewerbsbeschränkungen*)⁹ and the currently proposed provisions of the amendment to Act No. 143/2001 Sb. on the

⁵ SNOEP, M. Small mergers, big problems. *Blog of Martin Snoep, Chairman of the ACM*, 6.11.2023, available online at: <https://www.acm.nl/en/publications/blog-martijn-snoep-small-mergers-big-problems>.

⁶ Swedish Competition Authority Conference in May 2024 “The Pros and Cons of New Tools”, available online at: <https://www.konkurrensverket.se/en/knowledge-and-research/the-pros-and-cons/the-pros-and-cons-of-new-tools/>; one of the panels of the St. Martin’s Day 2024 Conference of the ÚOHS was dedicated to the new competition tool, available online at: <https://uohs.gov.cz/cs/informacni-centrum/konference-a-seminare/uskutecnene-akce/svatomartinska-konference-2024/predstaveni-prednasejicich.html>.

⁷ See e.g., in ARNAUDO, L. New competition regulatory tools: Towards a structure-behavior-performance framework. *Conurrences* n. 3/2024, pp. 58–70; BETHAN, J. Ex-CMA official cautions on adoption of new competition tool. *Global Competition Review*, 10.10.2024, available online at: <https://globalcompetitionreview.com/article/ex-cma-official-cautions-adoption-of-new-competition-tool/>; COLANGELO, G., Trendy Antitrust for Digital Markets: Are Market Investigations the New Black? *Journal of European Competition Law & Practice*, Vol. 15, issue 5, 2024; QUICHAO, D. 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*, Vol. 14 No. 3, September 2023, available online at: <https://www.scirp.org/journal/paperinformation?paperid=127831>.

⁸ HOUTHOF, *Competition Outlook 2025*, p. 3, available online at: <https://www.houthoff.com/nl-nl/actueel/news/houthoff-competition-outlook-2025>.

⁹ For the full text of the GWB after the 2023 amendment, see Competition Act in the version published on 26.5.2013, *Bundesgesetzblatt (Federal Law Gazette)* I, 2013, p. 1750, as last amended by Article 1 of the Act of 25.10.2023, *Federal Law Gazette* I, p. 294, available online at: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0822.

Protection of Competition (ZOHS) in Czechia.¹⁰ Given the high interconnectedness of the two neighbouring markets, the importance of such a comparison is self-evident. The German-Czech example is then confronted with the NCT in the competition laws of Greece¹¹ and Denmark,¹² two countries that differ not only in their geographical location but also in their legal and regulatory tradition from the Central European region. In the background of all these EU examples is the non-EU *benchmark* of all NCTs, the UK's Enterprise and Regulatory Reform Act, 2013.¹³ The author's ambition is to see, using this small sample, whether the proliferation of NCTs across the EU can be expected to substantially widen the differences in competition regulation between EU Member States.

Although the NCT usually also includes changes to the merger control rules, for the purposes of the following analysis they represent only a minor innovation that will not be considered further. In all four member states under review, the NCAs have already acquired or are seeking to acquire greater control over mergers and takeovers (by reducing the turnover criteria that are decisive for compulsory notification, introducing a call-in model for certain sectors). These new measures and the differences between them are of course worthy of corporate attention, but as inequalities of the EU single market they are not unusual. National rules applicable to mergers that do not fall within the competence of the European Commission have historically differed not only in the criteria governing the obligation to notify mergers, but also in procedural law, and have traditionally required merging firms to adapt to the conditions of local rules. Therefore, the introduced novelties do not represent a qualitative revolution or leap in quality, although they will lead to more mergers being checked.

The British model

The main model for all European supporters of the need to introduce a national NCT are competencies of the British Competition and Market Authority (CMA). The latter has been given the power in Part 4 of the Enterprise Act (2002), amended in 2013 to become the Enterprise and Regulatory Reform Act,¹⁴ in its Chapter 2 entitled "Markets", to actively conduct (after initial information gathering) sector inquiries (Phase 1), and to follow up on the suspicions identified therefrom with an in-depth investigation (Phase 2). Both

¹⁰ Bill amending Act No. 143/2001 Sb., on the Protection of Competition, and Act No. 40/2009 Sb., the Criminal Code, available online at: <https://www.zakonyprolidi.cz/monitor/7892814.htm>.

¹¹ Greek Law 3959/2011 on the Protection of Free Competition, available online at: <https://www.epant.gr/en/legislation/protection-of-free-competition.html>.

¹² Details on the content of the amendment to the Danish Competition Act: BERGQVIST, C., GALL, M. Significant Amendments to the Danish Competition Act. *Kluwer Competition Law Blog*, 5. 6. 2024, available online at: <https://competitionlawblog.kluwercompetitionlaw.com/2024/06/05/significant-amendments-to-the-danish-competition-act/>; BORUM, J., BARRY, D. Amendments to the Competition Act adopted. *Plesner Legal News* 3.6.2024, available online at: <https://plesner.com/en/insights/artikler/2024/06/amendments-to-the-competition-act-adopted>; the DCCA website does not yet contain an English translation of the law after the 2024 amendment, see online at: <https://en.kfst.dk/competition/legislation>.

¹³ Enterprise and Regulatory Reform Act 2013, available online at: <https://www.legislation.gov.uk/ukpga/2013/24/> contents. However, this law also had its predecessors in the UK and it can even be argued that the history of regulatory enforcement following an in-depth market investigation in the UK is three quarters of a century long (since 1948). See in KUIPERS, P., VAN ROOSMALEN, J. op. cit. ref. 4.

¹⁴ Specifically for digital markets, the Digital Markets, Competition and Consumers Act 2024 (in Chapter 4 of that Act) gives CMA similar powers.

phases must be properly notified by the CMA and their findings published. The primary objective is not to uncover individual distortions of competition in the form of cartels or abuses of dominance, but to identify industry-wide practices and constellations that restrict competition.

Phase 1 may already be followed by negotiation with undertakings and acceptance of commitments by them, but further intervention in the competitive situation, which is not an infringement proceeding with an individual infringer, requires the implementation of Phase 2. This should be concluded within 18 months, exceptionally within two years. The CMA can then, after extensive public consultation on its findings, not only begin to accept commitments from individual undertakings in competitively problematic sectors but can also enforce changes in the competitive situation against them through behavioural and structural orders.¹⁵

The British example is often mentioned at the beginning of various reviews of the proliferating NCTs, as the model of A) sector inquiry/in-depth investigation/negotiation and B) negotiated or imposed corrective measures or remedies, is often copied by EU Member States in the implementation of their own NCTs, as will be seen below. The emphasis on the sequencing of all the steps is not accidental, because the NCT is about imposing orders on undertakings that have not committed any specific competition infringement by their conduct, but thanks to Phase A they should discover and understand in time what will be required of them and why.

Moreover, the importance of the British example for this analysis lies, not least, in the frequency of its use (which is considerable)¹⁶ and its estimated results. According to data from 2024, the CMA has conducted a total of 111 sectoral surveys since gaining authority, followed by 21 in-depth investigations. For example, in 2024, the CMA conducted two surveys and two investigations.¹⁷ However, only two of the surveys conducted to date have resulted in structural measures in the form of compulsory divestments of airports or cement works.¹⁸ More common, naturally, are behavioural remedies consisting of changes in the communication, business or cooperation strategies of the companies concerned. The CMA itself has estimated the consumer benefits of this specific tool over £1.7 billion per annum between in average 2021/22 and 2023/24.¹⁹

From the number of investigations, they're not inconsiderable financial benefits with a very small number of drastic measures, it can be concluded that the impact of the UK NCT on the markets is due to the very activity of the applying authority, mainly reflected in the

¹⁵ CMA, *CMA market investigations: a summary*, available online at: https://assets.publishing.service.gov.uk/media/5a81c7b8e5274a2e8ab55c91/market_investigations_summary.pdf.

¹⁶ BONNÉ, G., BERG, W. et al. Germany's New Tools to Strengthen Competition: A Comparison with the UK's Markets Regime. *European Competition Law Review*, Issue 4/2024, p. 132.

¹⁷ CARTER, R. The CMA's current focus: a closer look at the investigations and market studies opened in 2024. *Macfarlanes*, 23.5.2024, available online at: <https://www.macfarlanes.com/what-we-think/102eli5/the-cma-s-current-focus-a-closer-look-at-the-investigations-and-market-studies-opened-in-2024-102j8cq/>.

¹⁸ See ARNAUDO, L., op. cit. ref. 7; BONNÉ, G., BERG, W. op. cit. ref. 16; COLEMAN, M. *Market investigations: 75 years of UK experience*. A keynote speech to the Swedish Competition Authority's Pros and Cons Conference. 20.5.2024, available online at: <https://www.gov.uk/government/speeches/market-investigations-75-years-of-uk-experience>.

¹⁹ CMA, *CMA Impact Assessment 2023 to 2024*, Crown Copyright 2024, p. 15, available online at: https://assets.publishing.service.gov.uk/media/66a89fd5fc8e12ac3edb069f/CMA_Impact_Assessment_2023_to_2024.pdf.

number and extent of sector inquiries undertaken and the imposed or negotiated changes in the behaviour of firms. The sharpness of the NCT thus rests in particular on the ability of the authority to carry out its exploratory and investigative part more frequently and, within this, to monitor not only obvious market failures but also imperfections in the structure, openness, practices, and standards of markets arising from deeper causes.²⁰ Businesses operating in a market that is far from perfectly competitive thus need not worry so much that the authority will try to break them up at any moment. But they have to reckon with the fact that supplying information and negotiating with the authority becomes a routine part of their operations.

German NCT

In the German GWB, as of 2023, the NCT is included into Sections 32e (Investigations into Individual Sectors of the Economy and Individual Types of Agreements) and 32f (Measures following a sector inquiry). The Federal Competition Authority (Bundeskartellamt - BKA) may (possibly in cooperation with the authorities of the Länder and also at the initiative of the German Monopolies Commission)²¹ carry out sectoral or cross-sectoral investigations if it considers that competition is not functioning or that the interests of a large number of consumers are being harmed. The GWB typically lists the characteristics of markets in which such undesirable conditions or situations are likely to arise: (i) markets with unilateral supply or buyer power, (ii) with restrictions on market entry, market exit, the capacities of undertakings, or on switching to another supplier or buyer, (iii) with uniform or coordinated conduct, and (iv) with foreclosure of access to input factors or customers through vertical relations.

The duration of the investigations of these markets should not exceed 18 months and should result in a report published by the BKA. A competition deficiency can then be established by a decision of the BKA if it has persisted or recurred for more than three years preceding the decision on the deficiency. Such a decision may be issued by the BKA if there are no indicators that the deficiency is more likely to disappear in the following two years. This decision may be followed by recommendations by the BKA to the state for changes in laws or policies but also by the imposition of corrective measures in relation to the addressee undertakings in a further separate decision. These are behavioural but also structural measures imposed on undertakings in a sector where competition is not functioning properly.

The BKA can only make decisions on measures against undertakings if the application of traditional prohibitions (against agreements and abuses of dominance) proves inappropriate. The measures concern only those undertakings whose behaviour and importance for the structure of the market contribute significantly to the distortion of competition. Thus, although the beneficial effect should be felt by the entire market, its smaller players should only be the beneficiaries of the changes that the BKA will impose on its largest players or members of a dominant oligopoly. These undertakings must be given the opportunity to be heard before remedies are imposed, they may appeal against decisions on behavioural and

²⁰ The importance of the different scope and targeting of NCTs, or their market-investigation components, is highlighted by BORONAT, A. op. cit. ref. 3.

²¹ The German Monopolies Commission is a permanent, independent committee of experts - an advisory body to the German government.

structural measures, and such appeals have suspensive effect. Remedies may also be imposed by way of commitments negotiated with the undertakings concerned.

The types of possible measures are illustratively listed directly in the law (Sec 32f(4)):

- the granting of access to data, interfaces, networks, or other facilities,
- requirements for the business relations between undertakings in the markets examined and at different market levels,
- the obligation for undertakings to establish transparent, non-discriminatory, and open norms and standards,
- requirements for certain types of agreements or contractual arrangements, including contractual provisions regarding the disclosure of information,
- the prohibition to unilaterally disclose information which facilitates parallel conduct by undertakings, or
- the accounting or organisational separation of parts of undertakings or business divisions.

Dominant undertakings and undertakings of primary importance for competition in markets may be required to divest shares or assets of undertakings where such a measure can be expected to eliminate or significantly reduce a substantial and lasting impediment to the functioning of competition. The divesting undertaking may not then recover the divested assets within a period of five years unless it can demonstrate that market conditions have changed and that the substantial and lasting impediment to the functioning of the market has disappeared.

These divestment measures are subject to a number of conditions in the law, given the importance of the impact on businesses:

- Such measures may only be imposed if the above behavioural measures are not possible, or are not as effective, or are even more burdensome for the undertaking concerned.
- The German Monopolies Commission and the highest authorities of the Länder in whose territory the undertakings concerned are established must be notified of the BKA's divestment decision and given the opportunity to comment. The decision must be published in the Federal Law Gazette.
- The need to achieve at least 50% of the divestment yield in relation to the value of the divested assets as determined by the auditor, or to provide additional financial compensation to the divesting company if this is not achieved.

In sectors where there is a sectoral regulator in Germany (railways, postal services, telecommunications, electricity, and gas supply), the BKA needs the approval of the relevant federal agency to impose behavioural and structural measures.

Proposed Czech NCT

The amendment to the Act on the Protection of Competition (ZOHS) approved by the Government intends to add among its provisions Section 13a giving the Czech Competition Authority (ÚOHS) call-in powers in merger control and then the new powers examined in this Article in Section 20(2) and especially in Sections 20b – 20d. The proposed content of this part of the NCT is very similar to the German example described above. It all starts

with a notified sector inquiry by the ÚOHS, the resulting report of which is then to be publicly discussed for at least two months before becoming a final report which may contain recommendations for other national authorities. Measures addressed to undertakings may then be imposed by the ÚOHS on the basis of a ‘measure of a general nature’²² which it adopts in the light of the findings of a sector inquiry report that found significant distortions of competition²³ in the relevant market under examination. The distortion of competition must last continuously for at least three years and is unlikely to disappear within a further two years, nor can it be addressed by traditional competition law instruments.

The characteristics of the markets where competition is significantly distorted are listed in more detail in the proposed Czech amendment than in the German law, which contains the above features (i) to (iv). The Czech amendment specifically emphasises in its list, over and above the German law, the following: a narrowly oligopolistic market structure, a distance in the market shares of the leading undertakings from the rest of the competition, significant information asymmetry between competitors, their suppliers or customers, or consumers. In both cases, however, this is only a demonstrative list, and the characteristics listed in the Czech amendment can be deduced by an extensive interpretation of the list contained in the German law. Nevertheless, it can be argued that the Czech amendment would be more didactic for undertakings and would better signal to them whether their particular market may be worthy of increased attention by the ÚOHS.

The key step to intervene in such relevant markets is the issuance of a measure of general nature, which the ÚOHS will be authorised to issue for a period of three years with the possibility of extension for a further three years. In the relevant market concerned by such a measure, the ÚOHS may impose both an obligation to notify any merger and, in particular, it may, by subsequent decisions, impose individual behavioural (but not structural) remedies on undertakings operating in the relevant market whose ‘conduct, importance and market power in the relevant market significantly contribute to the continued substantial distortion of competition’ (Section 20c(1)). The type of behavioural remedies listed are broadly the same as those listed by the German GWB (see above). Beyond the German ones, there is an obligation to disclose information that reduces information asymmetry, and, conversely, there is no accounting or organisational separation of parts of undertakings or business divisions. It should not be forgotten, however, that these lists in both laws are merely demonstrative.

The ÚOHS may not impose these measures in sectors regulated by the Energy Regulatory Authority, the Czech Telecommunications Authority, or the Czech National Bank. The measures imposed will expire at the same time as the validity of the measure(s) of a general

²² A measure of a general nature is a specific-abstract administrative act with a specifically defined subject matter and a generally defined range of addressees, which stands on the borderline between a legal regulation and an individual decision. This concept was introduced into the Czech legal order by Administrative Code No. 500/2004 Sb. with effect from 1 January 2006 (see Sections 171–174 of Czech Administrative Code).

²³ The proposed text of the Czech NCT [see Section 20c(1)] uses the phrase “distortion of competition” (narušení soutěže), as is the case in the application of the traditional prohibitions on cartels and abuse of dominance. The laws of the other countries included in this analysis tend to use the terms insufficiency, dysfunction, etc. of competition, which are more appropriate for cases of a market situation where it is not possible to detect the infringer and the distortion of competition attributable to him because of his conduct that the law expressly prohibits. Thus, the terminology chosen either narrows the scope of the proposed NCT or rather devalues the very notion of distortion of competition by extending it to cases where competition is not demonstrably distorted by anyone but is simply absent or not sufficiently developed for systemic reasons.

nature on the basis of which they were issued. There is nothing in the proposed amendment or in the explanatory memorandum to the amendment about the possibility to change the conduct of undertakings by negotiated commitments.

NCTs in Germany and Czechia – differences and correspondences

The first significant difference between the current German and the proposed Czech version of the NCT is the fact that the BKA acquires new powers by publishing a sector inquiry report and by issuing a decision on the basis of a report on the lack of competition in a particular market. This decision is already addressed to the relevant undertakings in the market in question, which are then subject to specific remedies in subsequent decisions. In contrast, the amendment to the Czech Act contains a separate and important formal intermediate step, which is the issuance of a measure of a general nature by the ÚOHS, i.e., an administrative act with a specifically defined subject matter but generally identified addressees. In it, the ÚOHS is supposed to identify the relevant markets with distorted competition, not the individual undertakings on which it wishes to impose a measure. It is only in a subsequent follow-up step that the ÚOHS can then, by its decision, impose specific remedial measures on important undertakings in the relevant market identified in the measure of general nature.

The Czech route to the use of the NCT powers is therefore more complex and it is not entirely clear to what extent individual undertakings will be able to object to the draft of a measure of a general nature and, after its adoption, whether undertakings that are active in the identified measure will be able to submit formal proposals for its repeal.²⁴ If it is not the type of measure whereby the ÚOHS imposes an obligation on all undertakings in the relevant market to notify all their mergers, then undertakings will only find from the measure of general nature that they are active in a market with distorted competition, which traditional competition law tools are not sufficient to remedy, and the ÚOHS will very likely therefore resort to NCT. However, the measure of general nature will not impose anything specific on any of them, and they will hardly be able to show that they have already been deprived of their rights by the measure as such.²⁵ Moreover, if the courts were to allow such a defence for undertakings on the market affected by the measure of general nature issued by the ÚOHS, the Czech route to the use of the NCT would be much more complicated than the German one.

The second significant difference is the ability of the German BKA to impose far-reaching structural (i.e., divestiture) measures on companies, whereas the Czech ÚOHS will not gain such authority under the proposed amendment. The Chairman of the BKA, A. Mundt, stated at the time of the relevant amendment of the GWB in 2023 that the new powers of his office are subject to very strict conditions and that he sees the forced divestiture of companies' assets only as a last resort.²⁶ The future will show to what extent this strong power of the BKA will remain a kind of Damocles sword.

²⁴ The possibility of challenging a measure of a general nature is supported by e.g., NERUDA, R. et al. op. cit. ref 2.

²⁵ The ÚOHS claims that by adopting a measure of a general nature it will declare that there is a continuing significant distortion of competition in a particular market and set out specific criteria for the obligation to notify a merger of competitors. See in *ÚOHS Annual Report for 2024*, p. 6, available online at: <https://uohs.gov.cz/cs/informacni-centrum/vyrocní-zpravy.html>.

²⁶ BAUERMEISTER, T. New Provisions in German Competition Law: New Competition Tool, Provisions

The third significant difference lies in the fact that the Czech amendment to the Competition Act does not mention anything about the possibility of negotiation and acceptance of commitments by undertakings in markets with distorted competition. The current text of ZOHS provides for the possibility of separate commitment proceedings for individual competition infringements, including, since the last amendment, proceedings for competition infringements by public authorities. Although the absence of commitments in the proposed NCT does not preclude competition advocacy by the ÚOHS even in the application of the NCT, commitments will only be available (unless the proposed amendment is supplemented) after the initiation of standard sanction proceedings against a particular undertaking - the infringer of traditional prohibitions on cartel agreements, abuse of dominance, and also against parties to merger proceedings.

The BKA, apart from what has already been mentioned, is not squeezed out of sectors with sector-specific regulators, as is the case with the Czech ÚOHS. Otherwise, there is an overwhelming consensus between the two national NCTs. The use of NCTs in both countries is conditional on a publicly announced and negotiated sector inquiry (although neither country has a clearly separated exploratory and in-depth investigation phase as in the UK), in which potentially affected undertakings will participate and the resulting reports from the competition authorities should not come as a surprise to them. Both laws contain an identical list of observable market parameters (number, size and market shares of the main undertakings, prices, choice, quality of the products offered, etc.) against which the lack of genuine competition is to be measured. In both countries, the authorities' measures will be addressed only to the decisive undertakings in the relevant markets with dysfunctional competition - the selection of which, however, has no more precise criteria set out in either law.

Therefore, the frequency and vigour of the use of NCTs, i.e., the capacity and activity of one or the other competition authority, will be the main determinant of whether firms will fear significantly different effects of NCTs when moving between the German and Czech markets. Although in both countries the imposition of measures on undertakings is intended to be subsidiary to traditional competition protection and to intervene only where traditional prohibitions on cartels and abuse of dominance prove ineffective or inapplicable, it cannot be ruled out that in one country there will be several sectoral investigations (with possible follow-up measures) each year and in the other there will substantially fewer. Current figures show that the Czech ÚOHS has carried out two sector inquiries in the period 2022–2023 and initiated two new ones in 2024,²⁷ while the German BKA has carried out six for 2022, 2023, and the first half of 2024.²⁸ Thus, the intensity of the use of NCTs may not only be due to different market conditions, but also to the capacity of the competition authority to carry out their demanding market investigation.

Accompanying the DMA and a Presumption of Benefits. *Kluwer Competition Law Blog* 15.11.2023, available online at: <https://competitionlawblog.kluwercompetitionlaw.com/2023/11/15/new-provisions-in-german-competition-law-new-competition-tool-provisions-accompanying-the-dma-and-a-presumption-of-benefits/>.

²⁷ ÚOHS, *Annual Reports*, available online at: <https://uohs.gov.cz/cs/informacni-centrum/vyrocnizpravy.html>.

²⁸ BUNDEKARTELLAMT, *Annual Reports*, available online at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2023-2024.html.

Greek and Danish NCTs

The Greek Protection of Free Competition Act No 3959/2011, as codified in January 2022, and the Danish Competition Act No 360 of March 2021, as codified in July 2024, both rely on market investigations to identify markets where competition is weak. In both countries, the competition authorities (HCC in Greece, DCCA in Denmark) cooperate with other authorities to do so: in Greece, it is the Minister of Economy, Competitiveness, and Shipping who can request the HCC to carry out a sector inquiry or to reconsider its conclusions; in Denmark, the DCCA can only act after the Competition Council²⁹ has agreed and after a public consultation on the intention of the inquiry has been carried out. It is only after the investigations have been carried out and reports finding that there are competition deficiencies in the sector under investigation have been published, that the two competition authorities can take further action. In both countries, these measures are seen as necessary only if the standard competition remedies are not sufficient.

In Greece, the adoption of a measure by the Competition Authority must be preceded by a public consultation in which the appropriateness and proportionality of the steps the Authority intends to take are discussed for at least 30 days. If this consultation-warning is not sufficient to change the behaviour of undertakings in a market with dysfunctional competition, the Competition Authority may start imposing behavioural and structural measures on undertakings in the market in question. The structural measures are only applicable under the law if the behavioural measures prove inappropriate or ineffective. Otherwise, Article 11 of the Greek Law establishing the NCT does not contain any enumeration of the characteristics of dysfunctional competition, nor does it contain any examples of the measures to be imposed, nor does it limit them to undertakings with a significant impact on market conditions. Nor does the Greek Competition Authority have competence in the telecommunications and postal sectors, which are subject to specific regulation.

The Danish Competition Authority may, after publication of the sector inquiry report and further consultation with the undertakings public institutions concerned, impose only behavioural measures on undertakings in the relevant market and negotiate other remedies in the form of commitments. The law illustratively lists the types of behavioural orders for undertakings: termination of a contract, fixing prices and margins, easier access to information, limited public announcement of certain information, facilitating consumer switching, and reducing barriers to entry for new competitors. Otherwise, even according to commentators, the amended section of the law regarding NCT is brief and leaves many questions for future practice to answer.³⁰

Thus, Greece and Denmark also follow in their NCTs the model of A) extensive investigation and discussion and B) measures imposed on companies. However, their legislation is not as detailed and didactic towards businesses as the current German and proposed Czech legislation. The difference in the authorities' ability to impose (in Greece) and not impose (in Denmark) structural measures on enterprises is evident. The Danish model emphasises bargaining with enterprises on commitments, which brings its NCT closest to the British

²⁹ A seven-member panel of Commissioners appointed by the Minister for Industry to independently decide cases referred to it by the DCCA. For more details see the DCCA website at: <https://en.kfst.dk/about-us/organisation/the-competition-council>.

³⁰ BERGQVIST, C., GALL, M., *op. cit.* ref. 12.

CMA, which also, in the spirit of the so-called participatory anti-trust, equally emphasises the possibility to agree with enterprises as well as to decide unilaterally against them. The Greek law is silent on commitments in the section on NCT (in this respect it is similar to the proposed amendment in Czechia) and does not mention them either in Article 11 (NCT) or in Article 25, which is devoted to the use of commitments. Thus, participatory antitrust in Greece, and in Czechia, is likely to remain narrowed down to competition advocacy in the application of the NCT, which could limit the reach of this instrument in terms of its real impact. Formally agreed commitments with the main market players may result in a new and permanent market design, whereas a mere informal understanding with them is more likely to address only some of the excesses causing temporary market failures.

Conclusions and perspectives

The comparison made above has revealed that the various national NCTs, while differing in many details of their statutory implementations, exhibit substantive commonalities. These are undoubtedly driven by the same need to find a tool to operate in markets where competition is not working, but at the same time a clear infringer cannot be convicted by the traditional prohibitions on restrictive agreements and abuse of dominance. Alongside this, of course, is the spontaneous harmonisation brought about by knowledge of influential national models (British, German), the European Commission's 2000 proposals, and the sharing of inspiration in the rapidly communicating European Competition Network (ECN) and the competition lawyers' community.

Nevertheless, among the four competition authorities, we find some can intervene with more vigour or more easily (Germany, Greece) than other authorities (Czechia, Denmark). Although possible structural remedies will only be used exceptionally in Germany and Greece, they are weapons of maximum effect that undertakings that are not convicted infringers of competition law prohibitions would prefer not to see in the hands of a competition authority. Fortunately for them, in all the jurisdictions surveyed, the imposition of any measure must be preceded by a series of steps in which undertakings have the opportunity to actively communicate, persuade, and negotiate with the competition authorities (in Germany and Denmark also about commitments). Any measure imposed on them should therefore not come as a sudden surprise. In all countries, undertakings are guaranteed both a hearing and subsequent judicial defence against decisions issued as well as against sanctions for non-compliance.³¹ The following table summarises the main similarities and differences.

	Sector investigations and hearings	Behavioural remedies	Structural remedies	Negotiated commitments
Germany	+	+	+	+
Czechia	+	+	-	-
Greece	+	+	+	-
Danmark	+	+	-	+

³¹ See e.g., comparison of judicial protection options in the presentation by SERDAREVIĆ, G. *New Competition Tool With great power comes great responsibility!* St. Martin's Day 2024 Conference of the ÚOHS, 6.11.2024, op. cit. ref. 6.

It remains to mention the prospect of an EU NCT. If the EU follows the path recommended by Draghi's Report, the basic NCT model as described in this text will reach the EU level in some time. Indeed, this report also proposes a market investigation first, followed by negotiations with businesses on corrective measures. It identifies cases of dysfunctional competition in a particular market more or less in line with what is contained in the German GWB and the proposed amendment to the ZOHS.³² Last but not least, it is significant that the report emphasises what has also emerged from this analysis: it is not only about new powers, but also about the capacity of authorities to carry out large and frequent sector inquiries and to model effective remedies. This is why the Report recommends that the already large apparatus of the European Commission's DG Competition, should be given, together with an NCT, even greater resources and capacities to apply it.³³

From a broader perspective, this is another signal that the EU Digital Market Act, as a by-product of the original EU NCT project (back in 2020), is not an exhaustive solution, nor is it formally speaking a competition protection instrument.³⁴ It addresses the exclusionary or unfair practices of only the largest online platforms – selected internet gatekeepers – whereas an EU NCT would address insufficiently competitive conditions across markets and impact on the conduct of firms that may be neither dominants nor gatekeepers. Given the principle of priority application of EU law, regulation through an EU NCT would preclude identical parallel national regulation in the same markets. In the most interconnected sectors of the EU internal market, this would remove the potential risks arising from the differences in instruments, capacities and potentially uncoordinated actions of the different national competition authorities. An argument in favour of an EU NCT could also be its impact on the EU's emerging new industrial policy. It could ensure in a unified way that it is not selected European champions but above all the functioning competitive environment of the EU internal market that generates the competitiveness, strategic autonomy and resilience of the European Union.³⁵

³² Draghi's report mentions four main cases in which the EU NCT should be used: markets with tacit collusion, markets needing enhanced consumer protection, markets with weak economic resilience, and markets where past remedies have failed to foster competition.

³³ However, the EU NCT as a priority is absent from the European Council's Strategic Agenda 2024–2029 document, which was approved at its meeting in Brussels on 27 June 2024, document available online at: https://www.consilium.europa.eu/media/yxrc05pz/sn02167en24_web.pdf.

³⁴ The legal basis of the DMA is Article 114 TFEU (EU internal market harmonisation measures), and its stated aim is to ensure fair and contestable digital markets, not to address distortions of competition in them.

³⁵ The background to the future EU NCT is explored in more detail in e.g., BORONAT, A. op. cit. ref. 3.