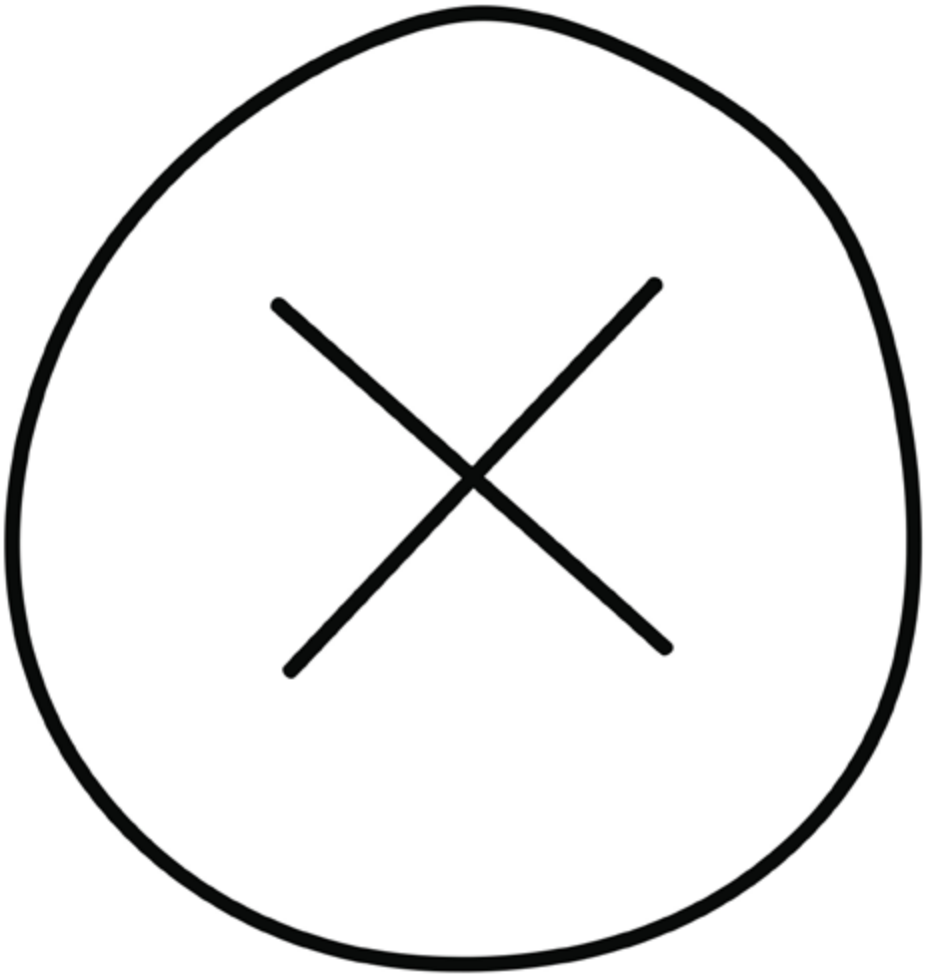
THE CONSTITUTIONAL INVALIDITY OF THE NEW COMPETITION TOOL… EVEN IN GEOPOLITICAL TIMES



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By Edith Loozen

This article discusses Mario Draghi's suggestion to battle increasingly uncompetitive markets in the EU by way of a so-called New Competition Tool (NCT). The NCT is a flexible tool that would extend the standard competition regime by allowing the Commission to investigate whether certain market features would cause markets to deliver less competitive outcomes than in the counterfactual without any such features and, if so, impose remedies without having to prove anticompetitive firm conduct. This article posits that a possible European NCT would be constitutionally invalid because not democratically legitimate. To protect legitimacy, the EU's principle of parliamentary primacy makes a hard cut between legislative, political rulemaking and administrative, apolitical rulemaking. Based thereupon, the correction of inefficient market outcomes is organized differently for regulatory or exchange inefficiencies. Regulatory inefficiencies fall within the legislative realm because they result from ill-defined market regulation and therefor require political decision-making to be corrected. Exchange inefficiencies fall within the competition enforcement realm because they result from anticompetitive firm conduct which does not need political decision-making to be corrected. Leaving the exchange efficiency realm, the NCT would politicize antitrust and, in so doing, fail the democratic legitimacy test.

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I. INTRODUCTION

In September 2024, Mario Draghi presented his report on the future of Europe's competitiveness.[2] His message was straightforward. If the European Union wanted to keep its promise of "democracy, freedom, peace, equity and prosperity in a sustainable environment" in a world in which "world trade is slowing, geopolitics is fracturing and technological change is accelerating," it should face reality and restore its competitive strength.[3] One of his suggestions was to complement the competition toolbox with a New Competition Tool ("NCT") – "a market investigation instrument" that gives the Commission "the power to design together with firms […] effective remedies to tackle systematic failures of competition and impose their application."[4]

A few years earlier, the Commission had discussed a proposal to introduce a European NCT. In the preparatory process, economic experts listed two types of structural competition problems ("SCPs") that the new instrument would help to solve.[5] SCPs that result from "market features that may hinder markets from working properly." These include scale economies, network effects, switching costs, asymmetric information, and behavioral biases of consumers. And SCPs that result from "firm behavior that current competition rules do not adequately address." These concern common and cross-ownership, tacit collusion, contracting and business practices by non-dominant companies as well as dominant firms' practices that which may be difficult to address under Article 102 TFEU.

The Commission abandoned the proposal, however. Not only because of fierce industry opposition but allegedly also because adoption would require unanimous Member State consent.[6] Today, unanimity might no longer pose a problem since the NCT has advanced steadily through EU Member States' ranks ever since. Invented in the UK, multiple EU Member States have adopted a national version, while others are contemplating to follow suit.[7] Divergences in the application of national NCTs might be another reason to enact a European NCT.[8]

A pressing matter however is whether the EU legislature is authorized to enact NCT regulation in the first place. In this article, I argue that it isn't. NCT regulation will lack democratic legitimacy because it would politicize antitrust. The first part of the article reproduces the state of the discussion. Here I will highlight the essentials of the UK and German market investigation tools to concretize what a European NCT might look like and outline the legitimacy justifications put forward by legal experts (Sections II and III). The second part reflects on this discussion. I first map out the institutional facts that determine the democratic legitimacy of EU legislation. Next, I motivate why an NCT regulation would fail the legitimacy test (Sections IV and V).

II. WHAT MIGHT A EUROPEAN NCT LOOK LIKE?

To concretize what a European NCT might look like, I resort to the market investigation tools employed by the UK Competition and Markets Authority ("CMA") and the German Bundeskartellamt ("BKartA"). The UK market investigation tool is referred to because it inspired the earlier EU attempt to introduce an NCT.[9] The German market investigation tool is used because it was not only inspired by the UK model but also started from the same premise as the Commission, which is that the current competition regime no longer suffices to ensure competitive markets.[10]

2 Mario Draghi, The Future of European competitiveness (Part A: A competitiveness strategy for Europe; Part B: In-depth analysis and recommendations), 9 September 2024.

3 Mario Draghi, Address European Parliament on the Presentation of the report on the Future of European competitiveness, 17 September 2024.

4 Draghi, *supra* note 2, Part B, p. 304.

5 Massimo Motta & Martin Peitz, Intervention triggers and underlying theories of harm, Expert Advice at the request of the Commission in the context of the 2020 Impact Assessment New Competition Tool, 16 December 2020.

6 Massimo Motta, Martin Peitz & Heike Schweitzer, Market Investigations in the EU. A Road Map, in: Market Investigations: A New Competition Tool for Europe?, eds Motta M., Peitz M., & Schweitzer, H., Cambridge University Press, 2022, 1-15, p.5.

7 To name a few: Iceland, Greece, Italy, Germany, Denmark, Belgium, Bulgaria, Austria, Romania, Lithuania, Finland, Czech Republic, Norway, Sweden, the Netherlands.

8 Jasper van den Boom, Inge Graef, Giorgio Monti, Cédric Argenton & Eric van Damme, Towards Market Investigations Tools in Competition Law: The Case of the Netherlands, JECL&P 2023: 553-564, p. 564; Martijn Snoep (Chairman Netherlands Authority for Consumers & Markets, Working Group on Competition Policy of the Committee on Economic and Monetary Affairs of the European Parliament, 4 March 2026, www.acm.nl/publicaties/bijdrage-martijn-snoep-aan-werkgroep-europees-parlement-over-europees-mededingingsbeleid.

9 Richard Whish, New Competition Tool: Legal Comparative Study of existing competition tools aimed at addressing structural competition problems. With a particular focus on the UK's market investigation tool, Expert study at the request of the European Commission in the context of the 2020 Impact Assessment New Competition Tool, 16 December 2020. See also: Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?*, JECL&P 2021:44-55.

10 Deutscher Bundestag, Drucksache 20/6824, 16 May 2023, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze,

A. The UK Market Investigation Tool

The NCT hype started in the UK, which introduced a markets regime as a fourth pillar of its competition regime in the Enterprise Act 2002 ("EA02").[11] Market investigations are meant to provide the CMA with a flexible tool "to assess markets holistically to see if they are delivering competitive outcomes […] and if not, the best way of remedying them."[12] The EA02 therefor authorizes the CMA to investigate whether "any relevant feature of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK."[13] If that proves to be the case, this constitutes an "adverse effect on competition" ("AEC").[14] The finding of an AEC authorizes the CMA to impose remedies that take away the AEC and any detrimental effects on customers resulting therefrom in the form of higher prices, lower quality and less choice or innovation.[15]

"Market features" may be of a structural nature, relate to firm conduct or customer conduct.[16] "Structural market features" include high levels of market concentration, high entry barriers, common ownership of competing assets, buyer power as well as government policy and regulation. "Market features that follow from firm conduct" occur when sellers strategize to foreclose rivals, coordinate behavior to limit competition or impose high switching costs on customers. "Market features that follow from customer behavior" concern unwillingness to shop around or inability to fully assess all competitive parameters of a good or service.[17] Since the burden of proof no longer asks the CMA to establish that the anticompetitive effects are caused by firm conduct, theories of harm use a well-functioning market counterfactual as a benchmark (which is not a statutory test but an analytical tool).[18]

Remedies are potentially far-reaching and may include structural remedies (e.g. divestiture), behavioral remedies (enabling measures like market opening measures and information remedies as well as controlling measures like price control) and hybrid measures (e.g. intellectual property remedies).[19] They may be imposed by "undertakings" or "orders."[20] The CMA Rules of Procedure ensure that firms are informed (launch and issues statement, state of play update after evidence has been gathered and analyzed; interim report) and heard (hearings after state of play update and response hearings after interim report).[21] Other stakeholders and experts may be engaged in the proceedings too.[22] Judicial review is organized with the Competition Appeal Tribunal and, subsequently, the Court of Appeal.[23]

B. The German Market Investigation Tool

Germany followed suit in 2023. Up until then, the BKartA had been authorized to conduct sector inquiries to investigate competitiveness problems but only to be followed up upon by competition infringement proceedings or competition policy recommendations to the Federal Government.[24] The 11th Amendment to the German Competition Act added that if the results of the sector inquiry lead the BKartA (i) to then find "a significant and continuing malfunctioning of competition" ("MOC"), it may (ii) impose remedies on the firms "whose conduct and relevance for the market structure contributes significantly" to the MOC established.[25]

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11 UK Enterprise Act 2002, as amended by the Enterprise and Regulatory Act 2013, Part 4.

12 Guidance on CMA market reviews, market studies, market investigations and the monitoring and review of market remedies (CMA3), 3 February 2026, p. 7.

13 Section 134(1) EA 02.

14 Section 134(2) EA02); Markets regime Guidance [CMA3], *supra* note 12, para 8.3.

15 Section 138(2) EA02.

16 Section 131(2) EA02.

17 Markets regime Guidance [CMA3], *supra* note 12, para 8.6.

18 *Id.*, para 1.6.

19 *Id.*, Fig. 8-1, p. 83.

20 Section 138(2) in conjunction with 159 and 161 EA02.

21 Markets regime Guidance [CMA3], *supra* note 12, para 8.12.

22 *Id.*, para 8.23 and 4.74.

23 Sections 179(1), 178(6) and (7) EA02.

24 Section 32e German Competition Act (GCA; Gesetz gegen Wettbewerbsbeschränkungen).

25 Section 32(f)(3)-(8) GCA.

MOCs concern situations of "low intensity of competition" which is reflected by high prices, limited product choice or less quality, less innovation and inefficient resource allocation.[26] They may exist particularly in cases of (i) supplier or buyer power, (ii) restrictions on market entry/exit, the capacities of undertakings or switching to another supplier of buyer, (iii) uniform or coordinated conduct; (iv) foreclosure of access to input factors or customers through vertical relations.[27] To be "significant" a malfunctioning of competition must have more than slightly anticompetitive effects on at least one market that is national in scope, in several individual markets or across markets.[28] To qualify as "continuing," it must have existed over a period of three years without indications that it will cease to exist within the next two years.[29]

Remedies may be behavioral or structural, and may include (i) the granting of access to data, interfaces, networks or other facilities, (ii) requirements for the business relations between undertakings in the markets examined and at different market levels, (iii) the obligation for undertakings to establish transparent, non-discriminatory and open norms and standards, (iv) requirements for certain types of agreements or contractual arrangements, including contractual provisions regarding the disclosure of information, (v) the prohibition to unilaterally disclose information which facilitates parallel conduct by undertakings, (vi) the accounting or organizational separation of parts of undertakings or business divisions.[30]

In principle, the German market investigation tool applies only insofar standard competition rules "appear unlikely to be sufficient to eliminate the malfunctioning of competition effectively and permanently."[31] The BKartA must organize a public hearing that allows an open exchange of views on the presence of a MOC and necessary remedies, while representatives of sectors affected by potential remedies should be given the opportunity to express their views.[32] The finding of a MOC and the determination of remedies can be challenged separately in court.[33]

There are three takeaway points for a possible European NCT. First, the legal test of market investigation tools differs substantially from the standard test. Whilst Articles 101 and 102 as well as the EU Merger Regulation ("EUMR")[34] ask that a restriction of competition, an abuse of dominance or a significant impediment of effective competition is the result of firm conduct, market investigation tools ask that certain market features produce worse competitive outcomes than compared to a counterfactual without these features. Second, absent the need to prove anticompetitive firm conduct, the adversarial infringement procedure is replaced by a broader accessible compliance procedure. Third, remedies may be market-wide and intrusive.

III. LEGITIMACY JUSTIFICATIONS

However, a preliminary question is whether the EU Treaties empower the EU legislature to enact an NCT regulation, at all.

The common opinion under legal scholars seems to be that they do. Though "legislative rulemaking enjoys a higher degree of democratic legitimacy [than administrative rulemaking],"[35] the general gist is that the NCT can "be easily integrated in the existing body of EU economic regulation."[36] Since "its general goal would be to undergird the protection of undistorted competition in the internal market," it can be added

26 Deutscher Bundestag, *supra* note 10, p. 15.

27 Section 32f(5) GCA; Deutscher Bundestag, *supra* note 10, 32-34.

28 Deutscher Bundestag, *supra* note 10, p. 28.

29 Section 32(f)5 GCA.

30 Section 32f(3) GCA.

31 *Id.*

32 Jens-Uwe Franck & Martin Peitz, *Germany's new competition tool: sector inquiry with remedies*, JECL&P 2024: 515-525, p. 520.

33 *Id.*, p. 517.

34 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ 1989 L 395/1; replaced by Council Regulation (EC) No 139 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24/1.

35 Franck & Peitz, *supra* note 32, p. 516. See also: Jens-Uwe Franck, *Competition enforcement versus regulation as market-opening tools: an application to banking and payment systems*, JAE 2024: 148-188.

36 Pierre Larouche & Alexandre de Streel, Interplay between the New Competition Tool and Sector-Specific Regulation in the EU, Expert study at the request of the Commission in the context of the Impact Assessment for a possible New Competition Tool, 16 December 2020, p. 3.

as a "new pillar" to "the competition law system."[37] Such an additional pillar would comply with the fundamental right of "freedom to conduct a business" laid down in Article 16 of the Charter of Fundamental Rights of the European Union ("CFR") as long as it would "not become a regime of boundless discretionary intervention into markets."[38] For "nothing suggests that the boundaries of intervention meant to protect a system of undistorted competition are conclusively defined by Articles 101 and 102."[39] To the contrary. The introduction of the EUMR and other sectoral regulations would show that the EU legislature "enjoys a broad margin of appreciation" when considering "which rules and interventions into markets and individual economic rights are needed to ensure the well-functioning of competition."[40] Also, the EU legislature would be authorized, "within certain limits," to delegate legislative powers to the Commission' (to account for "market-wide measures" that "at times" may "resemble legislation") and would have "already done so in the field of competition law" (Council Regulation 1/2003 on the implementation of Article 101 and 102).[41]

I think that this line of reasoning is incomplete. Basically, because it overlooks how the core EU values of democracy and freedom play out institutionally.

IV. INSTITUTIONAL FACTS

In constitutional democracies like the EU, legislatures do not act in a void when considering whether to extend their competition regime.[42] Truly democratic government asks that political decisions, that is those where "we pass from the individual to the collective […] to arrive at a single decision for the entire group,"[43] are self-determined by the people. Bridging the gap between individual and collective action, constitutions therefor set constraints on how to determine collective action. Key is the principle of parliamentary primacy that governs political rulemaking and, as such, the organization of the competition regime.

The principle of parliamentary primacy is laid down in Articles 289 and 290 TFEU. Article 289 TFEU defines "legislative acts" as legal acts adopted by legislative procedure, while "legislative procedure" is defined as a procedure in which the European Parliament and the Council exercise their legislative functions jointly. Article 290 TFEU adds that, when delegating rulemaking power to the Commission, the legislature must define the essential elements of an area in the legislative act and may solely delegate the power to adopt non-legislative elements of general application. Considering that transfers of individual decision-making power to the collective epitomize the essence of collective action in a democracy, it is fair to conclude that political decisions fall in the exclusive realm of the EU legislature.

The hard cut between legislative, political rulemaking and administrative, apolitical rulemaking implies that the EU organizes the correction of market failures differently dependent on whether they are market-induced or firm-induced.[44] Market-induced failures concern problems of regulatory inefficiency: because the regulatory setting within which voluntary exchange processes between producers and consumers take place is ill-defined, decentralized decision-making fails to produce most efficient outcomes. Since different or further limitation of individual choice-making requires political decision-making, correction of market-induced failures fall exclusively within the legislative domain. Market-induced failures cover so-called nonexistent markets, which include externalities, asymmetric information, public goods as well as market-induced market power. Firm-induced market failures concern problems of exchange inefficiency: competition does not produce efficient outcomes because firms frustrate voluntary exchange by restricting the choice-making power that consumers derive from the market regulation in place. Correction of firm-induced market power does not require political decision-making power. It is sufficient to prohibit firms to engage in anticompetitive conduct.

37 Heike Schweitzer, The New Competition Tool. Its institutional set-up and procedural design, Expert report at the request of the Commission in the context of the Impact Assessment of the New Competition Tool, 16 December 2020, p. 4 and 10.

38 *Id.*, p. 9.

39 *Id.*

40 *Id.*

41 *Id.*, p. 39.

42 For a more elaborate and documented account of the findings in this section, see: Edith Loozen, *The Democracy Manual to Antitrust. Time to Revisit the More Economic Approach*, Amsterdam Center for Law & Economics Working Paper No 2025-09, https://ssrn.com/abstract=6117546.

43 Bruno Leoni, *The Meaning of 'Political'*, in Political Decisions, Political Studies, 1957-5, Vol. 22(1), p. 3-26.

44 Motta & Peitz refer to market-induced market failures as 'exogenous market failures […] that are not determined by firms' decisions, *supra* note 5, p. 37.

The organization of the competition function concurs with the principle of parliamentary primacy including the hard cut the latter provides between legislative, political rulemaking and administrative, apolitical rulemaking. First, the constitutional lawmaker enacted apolitical rules targeting cartelization and abuse of dominance (Art. 101 and 102 TFEU). Second, other than suggested, Article 103 TFEU does not authorize the Council to delegate legislative, political rulemaking powers to the Commission. For constituting only half of the EU legislature, the Council cannot produce legislative acts when enacting regulations that give effect to the competition principles laid down in Articles 101 and 102. The summary of potential Council regulations listed in Article 103(2) confirms this point: all topics are of an administrative, apolitical nature. Promoting effective supervision and administrative efficiency, Council Regulation 1/2003 concurs with its apolitical legal base (Art. 83(2) sub b EC; now Art. 103(2) sub b TFEU). Consequently, any power that Regulation 1/2003 bestows upon the Commission is (or should be) of an administrative, apolitical nature too. Third, Article 105(1) bestows solely administrative enforcement power upon the Commission.[45]

This means that the Commission's interpretation of the competition principles laid down in Articles 101 and 102 must follow logically from the objective that competition law aims to achieve (protect against firm-induced market power) without trespassing on the market regulation in place (since redefining market regulation is the legislature's prerogative). The EUMR pursues the same objective by targeting exchange inefficiency in terms of firm-induced market power. The institutional expectation is that its application does not trespass on the political decision-making power of the legislature.

The fundamental right to freedom to conduct a business protects the freedom to exercise an economic activity, to contract and to compete in accordance with Union law.[46] This right is not absolute; the legislature may impose restrictions on the manner in which firms exercise their freedom provided they are necessary and genuinely meet the objectives of general interest recognized by the Union.[47] This has led to "a broad range of interventions" limiting the freedom to conduct a business, which might indicate indeed that the legislature enjoys a broad margin of appreciation.[48] Other than suggested, that broad discretion only regards the EU legislature which, by way of market regulation, limits the way firms may exercise their freedom. Since all markets must be regulated for competition to produce good outcomes. The broad discretion does not regard the EU legislature when enacting the EUMR (or a possible European NCT for that matter). For, if competition is understood in terms of voluntary exchange, the freedom to conduct a business and EU competition law are two sides of the same coin: the latter protects the very right that the former asserts. This means that the discretion the EU legislature disposes of when complementing the competition regime is limited to protecting against exchange inefficiency resulting from anticompetitive firm conduct.

The conclusion is that the legitimacy justifications put forward fail the above institutional framework on which the EU operates. There is no such thing as gradual legitimacy since the principle of parliamentary primacy makes a hard cut between legislative, political and administrative, apolitical rulemaking. Not delegating political decision-making power to the Council, the competition function does not delegate political decision-making power to the Commission either. The broad discretionary margin that the EU legislature disposes of when limiting the freedom to conduct a business does not regard its power to extend the competition regime.

V. LEGITIMACY UP CLOSE

Protocol 27 to the EU Treaties authorizes the EU legislature to adopt a new competition instrument if necessary to ensure undistorted competition in the internal market. No problem there. But to lawfully integrate the NCT into the existing competition regime it needs to pursue the same objective and therefore not delegate political rulemaking power to the Commission.

I see two obstacles. NCT regulation would extend competition enforcement to cover regulatory inefficiency. This regards the first group of SCPs identified by economic experts - market features that may hinder markets from working properly or because of which competition is at risk. Obstacle two relates to the fact that a NCT would lower evidentiary standards for matters of exchange inefficiency. This concerns the second group of SCPs identified by economic experts - firm behavior that current competition rules do not adequately address.

45 The power to adopt so-called block exemptions (Art. 105(3) TFEU) is of an administrative, apolitical nature too because they follow from the Council's power laid down in Article 103(2)(b) TFEU.

46 Explanation on Article 16 Freedom to conduct a business (Explanations relating to the Charter of Fundamental Rights, which, Article 52(7) CFR stipulates, should be given due regard by the courts of the EU and of the Member States).

47 Article 52(1) CFR.

48 Case C-283/11 *Sky Österreich*, ECLI:EU:C:2013:28, at [46].

A. The First Group of SCPs: Incontestable Markets

Scale economies, network effects, switching costs, asymmetric and limited information, and behavioral biases of consumers that favor incumbents lead to so-called incontestable markets. Basically, because the self-correction mechanism of market power does not work.[49] In competitive markets, market power self-corrects in that the markups that go with market power signal potential entrants to enter the market, which, if they do, leads to competition and, consequently, lower prices. In incontestable markets, this mechanism does not work. In case of scale economies, for example, high entry costs and fixed costs frustrate competitive processes. In case of network effects, incumbents become immune for competition once they have established a sufficiently large customer base. As such, incontestable markets do concern a problem of market power but one that is market-induced, not firm-induced. (Though further anticompetitive firm conduct may be present, such conduct aggravates incontestability rather than originally cause it.) Correction of a market-induced market failure requires political and therefore legislative decision-making. This point is well illustrated by the regulation of digital platform services where a combination of "extreme scale economies" and "very strong network effects" had enabled incumbents to use "serious imbalances in bargaining power" to "leverage their advantages" to the "detriment of prices, quality, fair competition, choice and innovation in the digital sector."[50] To steer markets in a more competitive direction, it was necessary to rein in the manner in which incumbents used the market power they had amassed. The EU legislature therefor enacted a legislative act, the Digital Markets Act ("DMA"), that limits the decision-making freedom of "gatekeepers," that is providers of "a designated core platform service" who "enjoy an entrenched and durable position," by submitting them to a long list of obligations they have to live up to. Interesting detail: in the DMA recitals, the EU legislature observes that, considering that the DMA aims to ensure that "markets where gatekeepers are present […] remain contestable and fair," the DMA's objective is "complementary to but different from that of protecting undistorted competition on any given market."[51]

The upshot is that by delegating political decision power to the Commission, NCT regulation would pursue a different objective than the competition regime.

B. The Second Group of SCPs: Problematic But Nonregulated Firm Behavior

This time the malfunctioning of competition does result from firm conduct but either the standard competition rules would not apply (contracting and business practices by non-dominant firms) or the NCT procedure would be better suited to tackle the problem (horizontal shareholding, tacit collusion, dominant firms' practices which may be difficult to address under Article 102). The enforcement advantages strived for are clear. On the one hand, the NCT frees the Commission from the burden of having to prove firm-induced market power.[52] On the other, it offers the Commission a wide-ranging toolkit to tackle the competitiveness problem. These advantages pose major problems in terms of legitimacy, however.

Standard competition law enforcement relies on the adversarial, infringement procedure to stay away from correcting regulatory inefficiencies. Considering that firms will not want to be held accountable for anticompetitive effects caused by inefficient market regulation, the burden of proving anticompetitive firm conduct forces the Commission to stay within the exchange efficiency realm. The market investigation test is too weak to keep competition enforcement within that realm. In fact, its whole purpose is to bypass the exchange efficiency realm. Operating an "anticompetitive effect only" test, market investigation tools blur the line between regulatory and exchange inefficiencies. In so doing, NCT regulation would delegate political decision-making power to the Commission. Instead of prohibiting firms to not eliminate the individual decision-making power that consumers derive from the market regulation in place, it proceeds to limiting the individual decision-making power firms derive from that same market regulation.

NCT proponents argue that market investigation remedies are justified, nonetheless. Key is that "where the formation of a rule is […] more technocratic and less politicized," this would affect "the way a procompetitive intervention is received and in fact accepted by its addressees and stakeholders." [53] The remedies would then profit from a "functional dimension of legitimacy" where "the public accept[s] a measure without having to be coerced."[54] That argument does not fly.

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49 Motta & Peitz, *supra* note 5, p. 8.

50 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022, L 265/1, recitals 2-4.

51 *Id.*, recital 11.

52 Larouche & De Streel, *supra* note 36, p. 3, who locate the advantages of NCT regulation in competition enforcement no longer being "straitjacketed within specific competition law methodology" but based on "more discretion for the Commission and more reliance on economic methodology."

53 Franck, *supra* note 35, p. 162.

54 *Id.*

For one because market investigation remedies cannot escape their coercive nature: once *imposed*, firms will have to comply. There is no pulling out other than a judicial review in their favor. But also, because a "more collaborative and participatory style of procedure" cannot repair a flawed legal basis.[55] As noted above, the principle of parliamentary democracy precludes legislative procedure from being replaced by administrative procedure. The reason is that it is the legislative process that democratizes political decision-making. A Commission-led administrative proceeding, even though broader accessible, open and transparent, moves away from democratic decision-making.

So, whilst a lower burden of proof takes market investigations outside the exchange efficiency realm, the political decision-making resulting therefrom cannot be massaged away by broader accessible enforcement proceedings.

VI. CONCLUDING REMARKS

European NCT regulation is not in the books. Simply because antitrust is governed by its apolitical nature, even in geopolitical times. Operating a hard cut between legislative, political rulemaking and administrative, apolitical rulemaking, the EU constitutional lawmaker did not allow the introduction of some hybrid mechanism that in fact combines two bads. On the one hand, the Commission would no longer be committed to a burden of proof that ensures apolitical antitrust. On the other, the Commission would, by regulating markets, take over the legislature's job by regulating markets. Meanwhile, tightening up standard competition enforcement might work miracles. The current interpretation of the consumer welfare standard seems to offer opportunities for ensuring more competitive markets. Finally, given that the principle of parliamentary primacy governs political decision-making in all constitutional democracies, all national NCTs are invalid for the same reasons.

55 Franck & Peitz, *supra* note 32, p. 517.

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