



# Interplay between the New Competition Tool and Sector-Specific Regulation in the EU

Expert study

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## Summary

This paper analyses the relationship among competition law and the various sectoral regulatory regimes making up the EU body of economic regulation, at the systemic, substantive and institutional level. In the light thereof and of experience with comparable tools in other jurisdictions, we make recommendations regarding the interplay between the envisaged New Competition Tool (NCT) and sector-specific regulation. In our opinion, the proposed NCT could easily be integrated in the existing body of EU economic regulation. At the systemic level, the NCT should have a horizontal scope and hence be applicable to regulated sectors, since the NCT could usefully close eventual regulatory gaps. At the substantive level, the NCT should rest on economic knowledge and methodology, in line with existing EU economic regulation, yet without being straitjacketed within specific competition law analysis. At the institutional level, a close transversal cooperation between the Commission (or any authority implementing the NCT) and the relevant NRA(s) is needed at every stage of NCT implementation, if and when the NCT is applied in regulated sectors.

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## Executive Summary

This paper sets out our recommendations on the interplay between the envisaged New Competition Tool (NCT) and existing EU sector-specific regulation.

Our recommendations are based on an analysis of current EU economic regulation. We show that **the different components of EU economic regulation (competition law and sectoral regulatory regimes) often overlap. They stand in a complementary relationship to each other.** They all are meant to pursue the overall objectives of the EU Treaties but with different means, each of them focusing on its particular strengths. At the substantive level, competition law and sectoral regulation share a common theoretical basis and typically follow a public interest approach. They also share a common methodology, based on economic analysis and the application of the principles of subsidiarity and proportionality. At the institutional level, both competition law and sectoral regulatory regimes are implemented and enforced by a complex set of EU and national institutions: the European Commission, National Competition Authorities (NCAs), National Regulatory Authorities (NRAs), EU-level networks, with national and European courts playing a role as well. Coordination mechanisms are in place to cover horizontal (between national authorities), vertical (between the European and national levels) and transversal (across regulatory regimes) relationships. The success of the overall system depends mostly on a smooth coordination between the different institutions.

On the basis of our analysis and the experiences of other jurisdictions already having an NCT equivalent, we conclude that the **proposed NCT could easily be integrated in the existing body of EU economic regulation.** At the systemic level, we think that the **NCT should have a horizontal scope and apply across the board to the whole economy, including regulated sectors,** as the NCT could usefully close eventual **regulatory gaps.** Such gaps could arise because a Structural Competition Problem (SCP) occurs so infrequently that regulatory intervention has been deemed too costly for the benefits it would bring, or because, as a matter of regulatory dynamics, the SCP in question is a new occurrence that has not yet been acknowledged and identified by sector-specific regulation.

At the substantive level, we recommend that the **NCT should rest on the same theoretical basis and methodology as existing EU economic regulation.** However, the NCT should not be straitjacketed within specific competition law methodology (including relevant market definition and assessment of the relevant market in the light of the provision at stake), as long as solid economics underpin its implementation, including a theory of harm in individual cases. This does necessarily imply an increase in the discretion of the authority in charge of the NCT, but rather reliance on an economic methodology which is better adapted to the SCPs that the NCT is aimed to address. We also recommend that the NCT should be formulated in technology-neutral terms, i.e. using economic or functional concepts. Finally, we think that the fundamental elements of the NCT should be set out in legislation, and the role of soft-law – if any – should be limited to developing or elaborating on these fundamentals.

At the institutional level, we suggest that NCT implementation and enforcement be embedded within the institutional framework for coordination under Regulation 1/2003, to ensure proper coordination with competition authorities. Furthermore, if



and when the NCT is applied in regulated sectors, we recommend a **close transversal cooperation between the Commission (or any institution in charge of the NCT) and the relevant NRA(s) (or other regulatory authority) at every stage of the NCT implementation.** (i) At the *initiation* stage, NRAs should be able to make an NCT reference when they cannot deal with a SCP in their sector because of the existence of a regulatory gap, as defined above. (ii) At the *information gathering* stage, the Commission and NRAs should be able to exchange confidential information provided, confidentiality is respected at both ends of the exchange. (iii) At the *SCP identification and remedy design* stages, the NRAs (and relevant EU-level networks) should be able to issue an opinion on draft Commission decisions, and the Commission should be bound to take the utmost account of such opinion. (iv) At the *remedy implementation* phase, the Commission should be able to impose remedies when the NRAs cannot act. However, if the NRAs are able to act (hence the NCT investigation shows that there is no regulatory gap in the end), then the Commission should make recommendations for action, of which the NRAs should take utmost account. (v) Finally, at the *remedy monitoring* stage, the Commission may delegate to the NRAs the compliance monitoring as well as the evaluation of the remedy.

Given these coordination mechanisms, the potential for divergence between the NCT and sectoral regulation is minimized. In any event, **we would recommend that the NCT and sectoral regulation apply concurrently**, except in the rare case where a firm would be put in a position where it could not comply with one without breaching the other, in which case an EU-level remedy under the NCT should prevail over a national sectoral remedy.

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## 1. Scope and aim of the paper

This paper, which has been written for the European Commission, aims to analyse and make recommendations on the interplay between the envisaged New Competition Tool (NCT) and existing sector-specific regulation originating from the EU and aiming to address structural market failures. To do so, the paper is structured as follows. After this introduction, Section 2 deals with the characteristics of the main legal tools composing EU economic regulation, i.e. standard competition law and sectoral regulation, together with the proposed NCT. Then Section 3 deals with the existing relationships and interface between standard competition law and sectoral regulation at the systemic, substantive and institutional levels. Such analysis then leads us, in Section 4, to make concrete policy recommendations to ensure an effective complementarity between the proposed NCT and existing sectoral regulation.

## 2. Characteristics of the main legal tools of EU economic regulation

Next to competition law, EU economic regulation includes a number of more specific regulatory regimes, which are briefly reviewed below, in order to be able to situate the New Competition Tool.

### 2.1. Competition law

#### *(a) Systemic and substantive issues: scope, trigger for intervention and remedies*

The regime of competition law in the European Union is well known; we will briefly survey its main relevant features for the purposes of this paper. For the sake of brevity, this section remains general and does not go into every detail.

While discussion remains open on this issue, it is safe to say that the objectives of competition law include consumer welfare and the protection of the competitive process. EU competition law, as it applies to firms, comprises **three main components**: (i) a prohibition against restrictive agreements and concerted practices, at Article 101(1) TFEU, coupled with an exemption clause at 101(3) TFEU; (ii) a prohibition against abuses of dominant position, at Article 102 TFEU; (iii) prior review of concentrations (mergers and acquisitions) having an EU dimension, pursuant to Regulation 139/2004 (commonly known as the EU Merger Control Regulation or EMCR).<sup>1</sup>

These three components are all couched in fairly general legislative provisions, which are applied in individual cases following a largely **common methodology**. First, relevant markets are defined, followed by market assessment (in the light of the specifics of each component) and the imposition of appropriate remedies, if necessary. The **remedial** arsenal of competition law includes fines, damages, nullity of agreements in breach of Article 101 TFEU, prohibition of mergers that run afoul of the EMCR, as well as a wide range of behavioural or even structural obligations to remove or prevent infringements of the law or to restore competition.

#### *(b) Institutional issues*

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<sup>1</sup> Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. [2004] L 25/1.

The enforcement of Articles 101 and 102 TFEU is detailed in Regulation 1/2003.<sup>2</sup> **Enforcement powers are shared** between the European Commission and the respective National Competition Authority (NCA) of each Member State. In addition, the respective competent court(s) in each Member State are competent to apply those provisions as original jurisdictions; they are also in charge of judicial review of NCA decisions (with the possibility of reference to the CJEU), whereas European courts entertain appeals from Commission decisions. The EMCR is enforced by the European Commission alone, with appeal to European courts.

Member States also have **national competition laws** along broadly convergent lines to EU competition law, which are enforced by the NCA and national courts. Regulation 1/2003 contains a number of rules on the interplay between EU and national competition laws (reconciliation rules and rules on applicable law). It also includes coordination mechanisms between the categories of authorities involved in EU competition law enforcement, including consultation, coordination, case allocation and the creation of a European Competition Network (ECN) of authorities.<sup>3</sup> The scope and need for coordination under the MCR are less, given the mutually exclusive scope of EU and national laws. Mechanisms are in place for the transfer of cases from the EU to the national level, and vice versa. Under Regulation 1/2003 as well as under the MCR, Member States are involved in Commission decision-making through advisory committees (Advisory Committee on Restrictive Practices and Dominant Positions, Advisory Committee on Concentrations).

## 2.2. Sectoral regulation

### *(a) Systemic and substantive issues: scope, trigger for intervention and remedies*

Next to competition law, EU economic regulation features a number of more specific regimes, usually dealing with a single economic sector. While more specific in scope, these regimes often cover a broader range of concerns than the three components of competition law listed above. Dunne (2015:40) defines economic regulation as: ‘any State-imposed, positive, coercive alteration of – or derogation from – the operation of the free market in a sector, typically undertaken in order to correct market defects of an economic nature, and to be distinguished from regulation that pursues a predominantly social aim’.

**Specific regulation is usually adopted and tailored to correct perceived market failures in part of the economy.**<sup>4</sup> Market failures can have different causes, and economic literature on this point is constantly evolving. The main ones are market power, externalities, asymmetry of information and coordination issues.<sup>5</sup> Whereas competition law is mostly concerned with market failures on the supply side (coordination of competitive behaviour, dominance), specific regulation often extends to both supply-side and demand-side failures. In addition, one could argue for an even broader definition of EU economic regulation, which would also include general

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<sup>2</sup> Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. [2003] L 1/1, as amended.

<sup>3</sup> For constitutional reasons, coordination mechanisms as between the Commission and NCAs are better developed and stronger than between the Commission and national courts.

<sup>4</sup> This paper will not venture into the fundamental issue of the normative benchmark for market failure, which can be either a “purely economic” concept such as efficiency or welfare, or a more political benchmark established by reference to public policy objectives.

<sup>5</sup> Baldwin, Cave and Lodge (2012); Viscusi, Harrington and Shappington (2018).

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regimes dealing with demand-side failures, i.e. consumer protection rules. As will be seen below, there is no theoretical incompatibility in so doing. In terms of methodology, remedies and institutions, these general demand-side regimes tend to resemble sector-specific regulation rather than competition law.

Specific regulation tends to be **formulated in more detailed provisions** than competition law, and accordingly implementation and enforcement is often more focused on narrow issues. In so doing, authorities typically rely on economic knowledge and analysis in applying provisions that result from the economic assessment made by the legislative authority.

Amongst sector-specific regulation, **EU electronic communications regulation stands out** though its regime of asymmetric regulation for providers with Significant Market Power (SMP). The SMP regime features a more developed methodology, which leans more clearly on competition law. This regime aims to regulate providers that hold SMP (interpreted as equivalent to dominance) on selected relevant markets, defined according to competition law methods. Relevant markets are selected if they meet the so-called “three-criteria test”:<sup>6</sup>

- (i) high and non-transitory structural, legal or regulatory barriers to entry are present,
- (ii) there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry,
- (iii) competition law alone is insufficient to adequately address the identified market failure(s). This third criterion has been clarified by the Commission in the following way: ‘Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable. Thus, *ex ante* regulation should be considered an appropriate complement to competition law when competition law alone would not adequately address persistent market failure(s) identified’.<sup>7</sup>

Most other EU economic regulation regimes are not based on competition law methodology, since they respond to market failures – and may pursue economic policy objectives – that are different from those of competition law. This is the case for the other elements of EU electronic communications regulation, such as the symmetric obligations which can be imposed to all electronic communications providers independently of their market power or the universal service provisions.

The **remedial** arsenal of specific regulatory regimes, in comparison to competition law, tends not to rely on fines, but rather on the imposition of (mostly) behavioural obligations, on wholesale or retail markets. Wholesale obligations range from non-discrimination to price regulation, and include all forms of separation/unbundling as

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<sup>6</sup> Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [hereinafter EECC], OJ [2018] L 321/36, Article 67(1).

<sup>7</sup> Commission Recommendation 2014/710 of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, OJ [2014] L 295/79, recital 16.

well as wholesale access and service provision. Retail obligations include prudential obligations, consumer protection requirements or universal service obligations.

*(b) Institutional issues*

While, next to NCAs, the Commission can directly enforce EU competition law (which is exceptional in the broader context of EU law), **EU economic regulation is usually enforced by Member States**. Most regimes require Member States to set up a dedicated National Regulatory Authority (NRA) for implementation and enforcement. Given the importance of applying economic regulation effectively and in a non-discriminatory manner across the internal market, EU law generally sets strict requirements for those NRAs – in particular in terms of independence, accountability, expertise, procedural safeguards and remedial powers<sup>8</sup> – compliance with which is strictly enforced by the Court of Justice.<sup>9</sup>

In order to guarantee the consistent application of EU law and some measure of **coordination between NRAs**, EU sectoral regulation regimes often establish an EU-level forum for NRAs, in the form of a network, an agency or other.<sup>10</sup> In general, the Commission plays a very active role in those networks. Moreover, in some cases, NRA decision are subject to review or even veto at the European level by the Commission or the EU-level forum.

Exceptionally, EU economic regulation can be enforced directly by EU-level agencies or bodies. This is the case in particular for the financial supervision of the systemic banks, which are supervised by the Single Supervisory Mechanism at the ECB.<sup>11</sup> In other sectors, the EU agency comprising the network of NRAs may also have direct, but limited, enforcement powers on matters having cross-border dimensions,<sup>12</sup> cross-border externalities or a strong internal market dimension.<sup>13</sup>

### 2.3. Proposals for a New Competition Tool

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<sup>8</sup> EEC, Art. 6-9; Directive 2019/944 on common rules for the internal market for electricity [2019] OJ [2019] L 158/125, Art. 57. It should be noted that the same requirements apply to NCAs as well: see Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, O.J. [2019] L 11/3.

<sup>9</sup> E.g. Case C-424/15 Ormaetxea Garai et al. v Administración del Estado ECLI:EU:C:2016:780.

<sup>10</sup> For instance: Regulation 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of the European Regulators for Electronic Communications, OJ [2018] L 321/1; Regulation 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing an European Agency for the Cooperation of Energy Regulators, OJ [2019] L 158/22; Regulation 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), O.J. [2010] L 331/84, as amended.

<sup>11</sup> Council Regulation 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. [2013] L 287/63 setting the criteria for the systemic banks being supervised by the SSM: (i) the size - total value of its assets exceeds € 30 billion; (ii) the economic importance for the specific Member State or the EU economy as a whole; (iii) the size of the cross-border activities - the total value of its assets exceeds €5 billion and the ratio of its cross-border assets/liabilities in more than one other participating Member State to its total assets/liabilities is above 20%; or (iv) the direct public financial assistance when the bank has requested or received funding from the European Stability Mechanism or the European Financial Stability Facility.

<sup>12</sup> See the powers conferred upon ACER throughout Regulation 2019/943 on the internal market for electricity.

<sup>13</sup> See in particular the power of ESMA to supervise and fine credit rating agencies. Article 28 of Regulation 236/2012 which regulates short selling and certain aspects of credit default swaps gives the ESMA the power to intervene through legally binding acts in the financial markets of Member States if there is a 'threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union'. This power has been validated by the Court of Justice in Case C-270/12 United Kingdom v. European Parliament and Council, ECLI:EU:C:2014:18.

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(a) *Systemic and substantive issues: scope, trigger for intervention and remedies*

According to the Inception Impact Assessment of the Commission services,<sup>14</sup> the NCT will address:

- (i) certain **Structural Competition Problems (SCP)** due to problematic market features;
- (ii) that have *adverse consequences on competition* and may ultimately result in inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation;
- (iii) and that *standard competition law tools* – i.e. Articles 101 and 102 TFEU and the related sector enquiry mechanism under Regulation 1/2003<sup>15</sup> – *cannot tackle or cannot address in the most effective manner*. Examples of the former are exclusionary strategies by non-dominant firms with market power. Examples of the latter are parallel leveraging strategies by dominant firms into multiple adjacent markets.

The Inception Impact Assessment groups those SCP into two categories depending on whether harm is about to affect or has already affected the market.<sup>16</sup>

First, **structural risks for competition** occur where certain market features – such as network and scale effects, lack of multi-homing and lock-in effects – and the conduct of the firms operating in the markets concerned create a threat for competition. This applies to: (i) *tipping markets*, where risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, which could have been prevented by early intervention; and (ii) *unilateral strategies* by non-dominant firms to monopolise a market through anti-competitive means.

Second, a **structural lack of competition** happens when a market is not working well and not delivering competitive outcomes due to its structure (i.e. a structural market failure). These include: (i) markets displaying *systemic failures* – going beyond the conduct of a particular firm with market power – due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation; and (ii) *Oligopolistic market structures* with an increased *risk for tacit collusion*, including markets featuring increased transparency due to algorithm-based technological solutions.

To tackle those SCP and the related market features, the Inception Impact Assessment envisages **four different options** depending on:

- the scope of the NCT: whether the NCT would apply horizontally to all sectors of the economy, as it is the case for standard competition rules, or be limited to certain sectors, in particular the digital or digitally-enabled markets;
- the basis of intervention: whether the NCT would apply to all cases of SCP (and potentially to all firms in those markets) or be limited to dominant firms as it is the case under Article 102 TFEU (but without having to prove abuse).

The different options are presented in the Table 1 below, the broadest option being option 3 while the narrowest is option 2.

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<sup>14</sup> <https://ec.europa.eu/info/law/better-rulation/have-your-say/initiatives/12416-New-competition-tool>

<sup>15</sup> Regulation 1/2003, Art. 17.

<sup>16</sup> See Motta and Peitz (2020) for some proposals on triggers and theories of harm for the NCT.

**Table 1: The different options for the NCT**

	<b>Horizontal</b>	<b>Sectoral</b> (e.g. digital)
<b>Structure-based</b> (e.g. tipping or oligopolistic markets)	Option 3	Option 4
<b>Dominance-based</b> (but without requirement to show abuse)	Option 1	Option 2

All policy options of the Inception Impact Assessment would empower the Commission to impose different **types of remedies**. They may consist in imposing on firms certain obligations which may be structural, non-structural or hybrid. Since the issues underlying SCP are not imputable to any particular firm, there is no finding of infringement, nor are fines imposed on firms.

Beyond those remedies, the NCT could also lead to: (i) recommendations to legislatures, which could bring the NCT close to the existing sector enquiry under competition law, as these sector enquiries are often followed by legislative proposals from the Commission to the EU legislative bodies;<sup>17</sup> (ii) recommendations to sectoral regulators; (iii) non-binding recommendations to firms, for instance in form of code of conducts; (iv) voluntary commitments made by firms.

*(b) Institutional issues*

At the institutional level, the NCT would be **enforced by the Commission**. A possible setting would be that DG COMP does the analysis and the College of Commissioners adopts the decision.<sup>18</sup> As for any Commission decision, the Commission services and DGs would closely cooperate in preparing the decision through an inter-service steering group and a formal Inter-Service Consultation and the College decisions are adopted under the principle of collegiality.<sup>19</sup> This implies that any DG in charge of a specific economic sector and the accompanying sector-specific regulation would be closely associated in any NCT proceedings and decisions.

#### **2.4. Comparison between the main legal tools of EU economic regulation**

Table 2 below compares the main general characteristics of current EU competition law, a possible New Competition Tool as explained in the Inception Impact Assessment and sector-specific regulation.<sup>20</sup>

<sup>17</sup> Report from the Commission of 10 May 2017, *E-Commerce Sector Inquiry*, COM(2017) 229 and Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on consumers' nationality, place of residence or place of establishment within the internal market OJ [2018] L 60I/1.

<sup>18</sup> As suggested by Schweitzer (2020).

<sup>19</sup> Commission Decision 2010/138 of 24 February 2010 amending its Rules of Procedure, arts. 1 and 23.

<sup>20</sup> For a detailed comparison of the features of competition law and sectoral economic regulation see Carlton and Picker (2007); Dunne (2015).



**Table 2: Comparison between EU economic regulation legal tools**

	<b>Competition Law (101-102 TFEU, EMCR)</b>	<b>New Competition Tool</b>	<b>Specific Economic Regulation (Competition- based)</b>
<b>Objectives</b>	Consumer welfare Competitive process	Consumer welfare Competitive process	More specific economic objectives (with trade- offs) <sup>21</sup>
<b>Intervention trigger</b>	Market power Firm conduct / Merger	Market failures/ Market features	Market failures / Market features
<b>Legislation</b>	Open-ended provisions applied to individual cases	TBD	More specific provisions
<b>Analytical method</b>	Specific competition law method: market definition, market assessment, remedies	TBD	General economic analysis <sup>22</sup>
<b>Remedies</b>	- Nullity (101 TFEU) - Incompatibility (EMCR) - Prohibitions: Behavioural and structural - Fines - Private damages	- Obligations: Behavioural and structural - Recommendations to others	- Obligations: Behavioural and structural
<b>Enforcement</b>	- 101 and 102 TFEU shared between: Commission, NCA, National courts - MCR: Commission alone	TBD	NRAs Exceptionally, EU-level authorities
<b>Coordination</b>	- Consultation, case allocation, rules on applicable law - European Competition Network	TBD	- Consultation, review (even veto) of NRA draft decisions - EU-level forum (network, agency)

Such comparison shows that the NCT is likely to share many features with the rest of EU competition law, and other features with sectoral regulation.

### **3. Existing interplay between competition law and sector specific regulation**

An NCT along the lines of the features described above will therefore be introduced into a well-populated landscape of legal regimes of economic governance in the EU.

<sup>21</sup> For instance, the EECC, Art. 3(2), indicated four objectives (connectivity to very high capacity networks, effective competition, internal market and citizens interests) that should be balanced by the NRAs.

<sup>22</sup> Except for the SMP regime in electronic communications, which tracks competition law methods more closely.



Accordingly, its relationship with the existing legal regimes must be carefully considered. Indeed, in its response to the public consultation, BEREC points to the risks that: “a conflict between Electronic Communications Services regulation and the NCT could result in inconsistent application of ex-ante regulation, forum shopping by market actors and potential regulatory uncertainty on whom, how and under which circumstances a market actor is subject to regulation. This legal uncertainty could have serious implications for investment in a dynamic and competitive sector”.<sup>23</sup>

In order to structure the analysis of the relationship between the NCT and existing EU economic regulation, we will distinguish between three aspects thereof:

- The *systemic* relationship between the NCT as an instrument and other existing clusters or units of economic governance – including consumer protection law – i.e. boundary and hierarchy issues as between these regimes;
- The *substantive* relationship, as concerns the respective substance and methodology of these regimes;
- The *institutional* relationship, as between the institutions who are in charge of implementing, interpreting and enforcing these regimes.

In this section, we provide a survey of the state of the law and of existing options regarding the three aspects of the relationship between various regimes of economic regulation, by way of background to our analysis of how the NCT would fit into that landscape that will be developed in the next section.

### **3.1. Systemic relationship: Complementarity between economic regulation regimes**

In the wake of the substantial expansion of sector-specific regulation at EU level from the mid-1980s onward, as a result of harmonization and liberalization efforts to achieve the Single Market, the systemic relationship between these regulatory clusters came to the fore, and in particular the relationship between competition law and sectoral regulation. Practitioners and academics alike sometimes conceive of competition law and sector-specific regulation as substitutes or alternatives: each of them would have its domain, exclusive of the other.<sup>24</sup> Under this view, the main challenge would then be to properly classify concrete issues and disputes as pertaining to one or the other. Quite conceivably, this view is influenced by US law, where regulation has been seen as a substitute to antitrust law, and where leading case-law tends to consider antitrust and regulation as exclusive of one another.<sup>25</sup>

Yet both a theoretical analysis of EU law and the weight of practice and case-law point to the opposite direction: **in the EU, competition law and sectoral regulation should be seen as complements which pursue similar objectives but with**

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<sup>23</sup> BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR(20) 138, p.37.

<sup>24</sup> This was a prominent feature in the discussions around the future of sectoral regulation, and it linked with the sometimes excessive use of the ex ante vs ex post distinction, especially by economists: see for instance Bourreau and Dogan (2001) or Newbery (2004). On the legal side, see Breyer (1982) at 156-161.

<sup>25</sup> Shelanski (2011) chronicles and criticizes the two leading US cases on point, *Verizon Communications v. Trinko* 540 US 398 (2004) and *Credit Suisse v. Billing* 551 US 264 (2007). See also OECD (2011). Note that a nuanced reading of *Trinko* reveals that, in order to conclude that the application of antitrust law is excluded, the US Supreme Court is careful to point out that the prior regulatory process “fulfilled the antitrust function”.

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**different means, each of the two focusing on its particular strength.**<sup>26</sup> To the extent it is at all useful to try to delineate their respective domains, these domains overlap. Hence cases will arise where both are applicable, and coordination mechanisms will be necessary.

The theoretical analysis is based on the architecture of EU law. Ultimately, all instruments of EU law are meant to pursue the overall objectives listed at Article 3 TEU (and Protocol 27), including, for the legal instruments concerned by the present paper, the establishment of an internal market where competition is not distorted. These objectives inform the main provisions of primary EU law, such as Articles 101 or 102 TFEU (which establish the competition rules) or Articles 34, 45, 49, 56, 63 (which establish the four freedoms of movement) as well as the corresponding legal bases used to enact secondary law (regulations, directives), including Articles 103, 114 or 352 TFEU which have been used for competition law and internal market law. Secondary law based on these legal bases is meant to contribute to the realisation of those overarching objectives. In other words, the architecture of EU law connects all these regimes and subsumes them under common objectives. It is accordingly not only possible, but even preferable to conceive of them as components of a coherent whole, i.e. an EU body of economic regulation.

Hence, over the years, it has become customary to refer to competition law as a general, across-the-board component of that body of economic regulation, next to which a number of specific regulatory regimes are concerned with specific sectors or issues.<sup>27</sup> General competition law and specific regulation then go hand in hand as complements (and not substitutes or alternatives). Specific regulation contributes to achieving the overall objectives of EU economic regulation by dealing with questions that either lie outside the purview of general competition law because competition law was not conceived to deal with them, or are recurrent systemic issues for which competition law is not the most effective instrument. Overlaps between competition law and specific regulation are therefore unavoidable.

The **practice of the last decades bears witness to these overlaps and to the complementarity between economic regulation regimes.** Electronic communications regulation offers many instances. The 1998 Access Notice already detailed the interplay between competition law and sector-specific regulation in the emerging competition practice of the 1990s.<sup>28</sup> In the 2000s, a string of high-profile refusal to deal and margin squeeze cases<sup>29</sup> further highlighted the relationship between competition law and sector-specific regulation. Examples come from other sectors as well. In the postal sector, the liberalization of cross-border mail services came through the application of Postal Services Directive and competition law.<sup>30</sup> In the energy sector, enforcement of Article 102 TFEU against the major network operators

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<sup>26</sup> See also Dunne (2015) and Hellwig (2005). This is also the view of some US authors like Carlton and Picker (2007) noting that: "Antitrust and regulation can also be viewed as complements in which regulation and antitrust assign control of competition to courts and regulatory agencies based on their relative strengths. Antitrust also can act as a constraint on what regulators can do".

<sup>27</sup> Larouche (2000).

<sup>28</sup> Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, O.J. [1998] C 265/2.

<sup>29</sup> Case C-280/08P *Deutsche Telekom v. Commission*, ECLI:EU:C:2010:603; Case C-52/9 *Konkurrensverket v. TeliaSonera* ECLI:EU:C:2011:83; Case C-295/12P *Telefonica v. Commission*, ECLI:EU:C:2014:2062.

<sup>30</sup> Directive 97/67 of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ [1997] L 15/14, as amended; Geradin (2006).

gave a decisive impetus to the unbundling of networks (transmission and distribution) from production, as provided in the sectoral directives.<sup>31</sup> In the financial sector as well, the realisation of the internal market in insurance was a result of the interaction between competition law and sectoral directives.<sup>32</sup> In all of these examples, the existence of an overlap between competition law and sectoral regulation was acknowledged and accepted. That overlap is the very foundation for the complementary interplay between these regimes that led to successful outcomes (from the point of view of the overarching EU objectives).

For the purposes of this paper, this EU body of economic regulation can be deemed to include demand-side regulation as well, dealing with consumer protection or data protection (in particular the GDPR).<sup>33</sup> Indeed consumer protection is primarily dealt with through secondary legislation based on Article 114 and 169 TFEU, thereby linking with the general objectives of Article 3 TEU as they relate to the functioning of the economy. Furthermore, a number of the sector-specific regulatory regimes, such as those in network industries, the financial sector, the audio-visual sector and e-commerce, span both supply- and demand-side regulation.

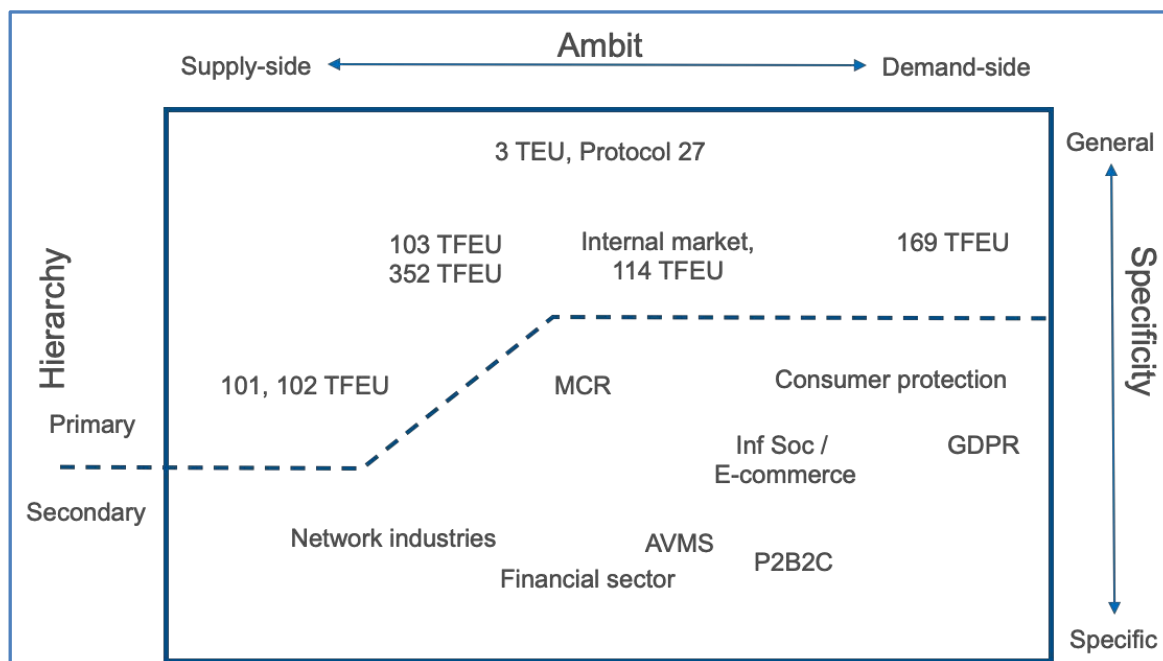
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<sup>31</sup> Now: Directive 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity OJ [2019] L 158/125. See Hancher and Larouche (2011).

<sup>32</sup> As best exemplified in the role played by the sectoral block exemption, lately Regulation 267/2010, OJ [2010] L 83/1 (now expired), in charting a balance between the liberalization of the sector and the need for insurance firms to cooperate on certain aspects of their operations.

<sup>33</sup> On the interplay between competition law and consumer protection, see Cseres (2009).

**Figure 1 – The EU body of economic regulation**



### 3.2. Substantive relationship

If the various regimes of EU economic regulation are complements within a larger body of law, with some overlap between them, their respective substantive rules should be compatible, if not aligned.

Indeed the **starting point is that all of these regimes share a common theoretical basis and methodology**. With respect to theory, EU economic regulation typically follows a public interest approach: public authorities stand at some distance from markets and society, they observe the operation of markets and act in the public interest in order to remedy or correct market failures. Compared to the USA, public choice theory plays a less important role. Government failure is of more limited concern: it is assumed that the EU multi-level institutional setting is less vulnerable to capture and other government failures.<sup>34</sup> EU economic regulation is content with traditional safeguards such as judicial review, reporting obligations, or periodical assessments and reviews.

This theoretical basis is reflected in the methodology used to develop and review regulation, which is derived from the principles of proportionality and subsidiarity.<sup>35</sup> That methodology is set out in the Better Regulation Guidelines, especially in the chapter on Impact Assessment.<sup>36</sup> In the case of EU economic regulation, the methodology incorporates the use of economic analysis, in the development of regulation and, to the extent necessary, in its implementation and enforcement as

<sup>34</sup> On the different positive and normative explanations of regulation, including public interest and public choice theories, see Baldwin, Cave and Lodge (2012); Viscusi, Harrington and Shappington (2018).

<sup>35</sup> TUE, Art. 5 and Protocol No. 2.

<sup>36</sup> European Commission Staff Working Document of 7 July 2017, Better Regulation Guidelines SWD(2017)350, Chapter III.

well. In other words, economic regulation relies on recognized economic knowledge, from fields such as industrial organization, institutional economics, political economy, game theory or behavioural economics, to name but the main ones.

In principle, the substance of the NCT, as a general regime of economic regulation, should fit within the theoretical basis and methodology set out above. No significant difficulties should arise. Nonetheless, it is worth mentioning a few substantive lessons arising from the experience with other economic regulation regimes, that could be useful in the elaboration of the NCT.

First of all, there is **limited value in methodological convergence going beyond the general commitment to rely on recognised economic knowledge**, as set out just above. As mentioned earlier in this paper, in the course of developing the current regulatory framework for electronic communications in the early 2000s, EU institutions decided to rely on competition law methodology for a core element of the framework, the SMP regime. It was hoped that this would ensure coherency between electronic communications and competition law and boost the ease-of-use and legitimacy of sector-specific regulation. Market definition and market analysis (in order to ascertain if a player held SMP) were built into the regulatory process, ostensibly to reproduce competition law analysis. A good argument can be made that both market definition and SMP analysis never were done quite along the same lines as under competition law.<sup>37</sup>

In any event, starting at the latest with the second Recommendation on relevant markets, in 2007,<sup>38</sup> the exercise became mostly one of market selection, with the famous “three-criteria test” (explained above) becoming the main focus of discussion. The market selection made in the Commission Recommendation was so influential that the “competition law” analysis carried out by NRAs to define markets and then identify SMP operators on those markets receded in the background. The experience of electronic communications regulation with the introduction of competition law methodology is therefore at best inconclusive.<sup>39</sup> On a more general note, Hellwig (2009) explains how the use of market definition (within the meaning of competition law) in sectoral regulation unduly prevents regulation from taking a more systemic view of the market failures and theories of harm.

Secondly, the commitment to rely on recognised economic knowledge does however have some concrete implications for regulatory design. Here as well, electronic communications regulation provides a good illustration. The current regulatory framework rests on the principle of **technological neutrality**,<sup>40</sup> which implies that the law must be framed so as to be sustainable in the face of technological change and evolution, and that it must avoid picking technological winners inadvertently.<sup>41</sup> As a consequence, most of the central concepts of electronic communications law have been formulated in economic or functional terms, eschewing technological

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<sup>37</sup> Hellwig (2009); Larouche (2002); de Streel (2008).

<sup>38</sup> Recommendation 2007/879 of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation [2007] OJ L 344/65.

<sup>39</sup> If the reliance on competition law methodologies proved inconclusive at the substantive level, such reliance serves an institutional purpose, namely to justify the Commission veto over NRAs draft decisions regarding market definition and SMP designation.

<sup>40</sup> EECC, art. 4(c).

<sup>41</sup> Hancker and Larouche (2011), Van der Haar (2008).

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categories.<sup>42</sup> This choice has stood the test of time. In comparison, regulatory frameworks that enshrine technological categories or models – such as the successive electricity directives – have proven more difficult to manage over time, with each round of legislative review leading to more regulation and increased complexity.

Thirdly, since the early 2000s, with the reform of competition law and the electronic communications regulatory framework, the Commission relied mostly on **soft-law instruments as the preferred vehicle to achieve coordination, whether substantive or procedural**. These soft-law instruments include recommendations (within the meaning of Article 288 TFEU) as well as less official forms such as communications, notices and guidelines. The Commission chose soft-law instruments because of their informality and flexibility, given that they were meant for fellow regulatory or competition law authorities. In practice, these soft-law instruments were largely followed, but their formal legal force was questioned and tested by litigants in a number of court cases. Unfortunately, European courts weakened the approach of the Commission by emphasizing the lack of binding effect of soft-law instruments upon courts and other authorities than the Commission itself.<sup>43</sup>

Amongst these soft-law instruments, only recommendations have been given some effect, in that courts are bound “to take them into account in order to decide disputes submitted to them, in particular where they cast light on the interpretation on national measures adopted in order to implement them or where they are designed to supplement binding Community provisions”.<sup>44</sup> It took years for the Court to finally accept, in 2016, that soft-law – in this case a recommendation - could impose some constraints on NRAs and reviewing courts, when the NRA was expressly required to “take utmost account” of it. For the NRA, “taking utmost account” implies following the recommendation, unless it finds that this is not appropriate, in which case the NRA must give reasons for its position.<sup>45</sup> Upon review, a national court may depart from a recommendation only for reasons having to do with factual circumstances.<sup>46</sup>

### 3.3. Institutional relationship

#### (a) Overall picture

When it comes to institutions, the **relationship between regulatory regimes is multi-dimensional**.<sup>47</sup> Within each regime, there is typically a *horizontal* relationship

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<sup>42</sup> Although the European Electronic Communications Code reintroduces some technology-based concepts with the notion of ‘very high capacity network’ at EECC, Art. 2(2).

<sup>43</sup> This can be observed in particular with respect to competition law, where the CJEU insisted upon the non-binding nature of the *De minimis* notice (now at [2014] OJ C 291/1) (Case C-226/11 *Expedia* ECLI:EU:C:2012:795 at para. 4), the Notices on cooperation within the ECN [2004] OJ C101/43 and on leniency [2006] C 298/17 (Case C-360/09 *Pfleiderer* ECLI:EU:C:2011:389 at para.21), the Guidance paper on Article 102 TFEU [2009] OJ C45/7 (CJEU, 6 October 2015, Case C-23/14 *Post Danmark I* ECLI:EU:C:2015:651 at para. 52), the instruments produced by the ECN, especially the Model Leniency Programme (Case C-428/14, *DHL Express (Italy)* ECLI:EU:C:2016:27 at para. 41-44). The General Court also denied any binding nature to Commission comments issued under Art. 7(3) of Directive 2002/21 [now Art. 33(3) EECC]: Case T-109/96 *Vodafone España* ECLI:EU:T:2007:384 at para. 93.

<sup>44</sup> Case C-322/88 *Salvatore Grimaldi* ECLI:EU:C:1989:646 at para. 18, reconfirmed in the context of economic regulation in Case C-55/06, *Arcor v Bundesrepublik Deutschland* ECLI:EU:C:2008:244 at para. 94 and Case C-28/15 *KPN v. ACM* ECLI:EU:C:2016:692 at para. 41.

<sup>45</sup> Case C-28/15 *KPN v. ACM*, at para. 38. This ruling is confirmed in Case C-277/16 *Polkomtel v. UKE*, ECLI:EU:C:2017:989 at para. 37. The CJEU gives more effect to “utmost account” than the Gen Ct had previously done in Case T-109/96 *Vodafone España*, at para. 93.

<sup>46</sup> Case C-28/15 *KPN v. ACM* at para. 42-43, expanding upon existing case-law, as mentioned at para. 41.

<sup>47</sup> See *Larouche* (2004), *Monti* (2020).

between the regulatory authorities of each Member State – in charge of implementing EU secondary law, as a default rule – as well as a *vertical* relationship between the Member State authorities and the European-level authority, usually the Commission. In addition, as between regimes, the respective authorities find themselves in a *transversal* relationship.

The overall picture is quite complex:

- At the apex of the pyramid, the *European Commission* plays a role in every EU economic regulation regime. In EU competition law, it holds direct implementation powers, shared with NCAs. Where national authorities are (also) in charge of implementation, the Commission is empowered – depending on the regime – to enact implementing or delegated legislation, to issue non-binding coordination documents (recommendations, guidelines, etc.) or to review, veto or take over the work of national authorities. In addition, the Commission is always a member or observer in the European-level institutions regrouping national authorities;
- At the bottom of the pyramid, each Member State created a *national competition authority (NCA)* as well as a number of *national regulatory authorities (NRAs)* to handle the implementation and enforcement tasks arising from EU economic regulation.
- Within each Member State, one or more *courts* are responsible for the judicial review of NRA and NCA decisions (or a similar mechanism of judicial control), and courts also hold original jurisdiction for the application of competition law.
- Between the European Commission and the national authorities and courts, for each regime, the NCAs or NRAs, as the case may be, are regrouped in a *European-level forum* wherein they can – depending on the regime – exchange information, coordinate or allocate enforcement activity, develop best practice or issue recommendations or other soft-law instruments or in some cases even issue decisions. These European fora take various legal forms, and their size and powers vary. They include the European Competition Network (ECN), the Body of European Regulators for Electronic Communications (BEREC), the Agency for the Cooperation of Energy Regulators (ACER) or the European Supervisory Authorities (ESAs) in the financial sector.

*(b) Horizontal and vertical coordination*

In each EU economic regulation regime, EU law typically provides for means of **horizontal and vertical coordination between the relevant authorities concerned with that regime**.<sup>48</sup> It is beyond the scope of this paper to describe them in great detail. One prominent example is found at Regulation 1/2003, as regards Articles 101 and 102 TFEU. At Article 11, Regulation 1/2003 sets out a mechanism for cooperation between the Commission and the NCAs: they notify each other when proceedings are initiated and before they are closed, with a view of coordinating their action. Such coordination takes place within the European Competition Network

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<sup>48</sup> On the need and types of institutional cooperation in shared regulatory spaces, see Freeman and Rossi (2012) and Monti (2020). On the practical form of inter-agencies cooperation, the International Competition Network and the OECD did interesting surveys in ICN (2004 and 2005) and OECD (1999 and 2005).

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(ECN).<sup>49</sup> Ultimately, the Commission retains the power of taking cases away from an NCA (Article 11(6)), but that power has not been used so far, in view of the proper functioning of cooperation within the ECN.

Another model is found in electronic communications, under the SMP regime:<sup>50</sup> there NRAs communicate their draft SMP measures to one another and to the Commission, for consultation. Coordination takes place within BEREC, which can also comment on NRA draft measures. Ultimately, the Commission retains the power to object to a draft measure, and even veto it if it concerns market definition or SMP assessment. A small but non-insignificant number of veto decisions have been issued over the years.<sup>51</sup>

The mechanisms described above are too detailed and probably too prescriptive to be applied to transversal relationships as between two different economic regulation regimes, if only because such regimes are contained in separate legal instruments. Indeed **no comparable mechanisms exist as between two different regimes in EU law at the moment. Nonetheless, two features of these mechanisms could be useful** in the design of what would be a more limited transversal coordination regime involving the NCT.

First of all, the **duty to consult is designed to be as effective as possible**. Consultation takes place early in the process, for competition law, on the basis of a notice of intent to open an investigation, in order to avoid wasteful duplication of enforcement efforts.<sup>52</sup> A second, more extensive round of consultation takes place towards the end of the proceedings, when the authority has reached the point in its work where it can table a draft decision or measure. The Commission and other authorities have all the information in hand to be able to give meaningful comments to the authority that tabled the draft, and that authority has time to take these comments into account.

Secondly, one of the most interesting features of the SMP regime under the electronic communications framework is the **obligation to “take utmost account”**, which figures throughout Articles 32 and 33 EECC.<sup>53</sup> NRAs must take utmost account of the objectives of the EECC.<sup>54</sup> They must equally take utmost account of (i) comments received from other NRAs, BEREC or the Commission regarding a draft measure,<sup>55</sup> (ii) a Commission notification that it entertains serious doubts regarding a draft measure.<sup>56</sup> In return, the Commission is also bound to take utmost account of BEREC’s opinion before issuing a veto or a recommendation to an NRA.<sup>57</sup> Similarly, NRAs must also take utmost account of Commission recommendations aiming to harmonize EECC implementation<sup>58</sup>. As mentioned above, in *KPN v. ACM*, the CJEU

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<sup>49</sup> *Save for consultations on draft Commission decisions, which take place through the Advisory Committee on Restrictive Practices and Dominant Positions : Regulation 1/2003, Art. 14(1).*

<sup>50</sup> EECC, Art. 32-33.

<sup>51</sup> See <https://ec.europa.eu/digital-single-market/en/consultation-procedures-telecom>

<sup>52</sup> *Such a round of early consultation would be pointless under the EECC, since the NRAs are well aware of their respective enforcement agenda (being coordinated via the Commission Recommendation on relevant markets) and the risk of overlap is minimal.*

<sup>53</sup> *The notion of “taking utmost account” figures in many other places in the EECC, and indeed throughout EU law. However, it is in the context of Articles 32 and 33 EECC that it has received the most attention in practice and in academic work.*

<sup>54</sup> EECC, art.32(1)

<sup>55</sup> EECC, art.32(8) and 33(1).

<sup>56</sup> EECC, art.33(4a).

<sup>57</sup> EECC, art.32(6) and 33(5).

<sup>58</sup> EECC, art.38(2).



elaborated for the first time on the meaning of “taking utmost account”.<sup>59</sup> It held that, in order to take utmost account of a Commission recommendation, an NRA is expected as a rule to follow the recommendation. The NRA can depart from the recommendation only if it finds the recommendation inappropriate in the circumstances of a given situation, and then the NRA must give reasons for its conclusion. In other words, “taking utmost account” would correspond to a **strong “comply or explain” obligation**. Even though the CJEU in *KPN v. ACM* formulated its reasoning in general terms, it remains to be seen whether “taking utmost account” will be interpreted similarly in other contexts.

*(c) Transversal coordination*

As mentioned above, as regards transversal relationships between authorities across regimes, EU law is much less developed. At a minimum, **all authorities at EU and national level, in their capacity as actors in the implementation and enforcement of EU law, are under a duty of loyalty** (sincere cooperation) towards one another, pursuant to Article 4 TEU. Such duty translates in an obligation to consult other authorities – usually between an NRA and the NCA – as explicitly stated in some EU regimes.<sup>60</sup> But effective coordination often requires more than consultations.

At the **European level, some transversal coordination effort takes place internally, given that the Commission plays a role in every EU economic regulation regime**. Such coordination is a matter for the internal rules and procedures of the Commission. In principle, internal coordination within a single institution – the European Commission – should happen without too much friction. The joint work of DG COMP and DG CNECT in the early years of the SMP regime provide a successful example of intra-Commission coordination. Coordination between the European-level regulatory fora is uneven: whereas in network industries the respective fora are perhaps too diverse to be able to coordinate effectively, the three financial-sector European Supervisory Authorities appear to be in closer contact, given their greater symmetry and their common design.

If anything, the most interesting developments regarding transversal coordination occurred at **Member State level. A number of innovative formulae have been deployed**. By way of example, Italy and the UK have created NRAs spanning multiple regimes in the converging ICT sector (electronic communications and audiovisual media services), in order to regulate more effectively. Given commonalities and also out of efficiency concerns, Germany has bundled all network-industry NRAs into one (Bundesnetzagentur or BNetzA), as well as all financial sector NRAs into one (Bundesanstalt für Finanzdienstleistungsaufsicht or BaFin).<sup>61</sup> In order to avoid frictions and forum shopping between competition law and sectoral regulation, the UK has given concurrent competition law powers to a number of NRAs in the network industries. Finally, Spain and the Netherlands have gone the furthest, merging the NCA with the NRAs in the network industries and the consumer protection authority, into a broad authority (Comisión Nacional de los Mercados y la Competencia or CNMC, Autoriteit for Consumenten en Markten or ACM). While these different formulas are

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<sup>59</sup> here in the context of Article 38(2) EEC: *supra*, at para. 37-38.

<sup>60</sup> For instance, EEC, art.11.

<sup>61</sup> In the same vein, the UK has created a UK Regulators Network (UKRN) bringing together regulators in the network industries and the financial sector, yet without the competition authority.

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attractive and worth studying,<sup>62</sup> none of them appears feasible in the context of the relationship between the authorities in charge of implementing the NCT and other authorities tasked with the application of economic regulation,

### 3.4. Reconciliation mechanism

In the end, **given the need for cooperation and coordination, a reconciliation mechanism must also be provided. Such a mechanism was at the heart of *Deutsche Telekom*,**<sup>63</sup> a case where the Commission found that DT had breached Article 102 TFEU by engaging into a margin squeeze as between its wholesale access prices and its retail tariffs, leaving competing retailers with limited, and sometimes even negative margins. One of DT's main points in defence was that both its wholesale and retail prices had been approved by the German sectoral regulatory authority.<sup>64</sup> Following the Commission and the General Court, the CJEU held that Article 102 TFEU remained applicable even if the German regulatory authority had already dealt with the case, unless DT would have been positively compelled by the authority to act as it did (which it was not).<sup>65</sup> The underlying message was clear: a firm remains subject to competition law for its course of conduct, even if such conduct would not fall foul of sectoral regulation. Competition law therefore prevails.<sup>66</sup> In the subsequent *Spain v. Commission* case, a similar margin squeeze issue arose, with Spain arguing for the primacy of the decision taken by its sectoral authority. The General Court framed the issue more explicitly in terms of a reconciliation rule when it wrote at Rec. 55:<sup>67</sup>

In any event, even if the sectoral regulation referred to by the Kingdom of Spain derives from European Union secondary legislation, it must be stated that, in view of the principles governing the hierarchical relationship of legal rules, such secondary legislation could not, in the absence of any enabling provision in the Treaty, derogate from a provision of the Treaty, in this case Article [102 TFEU].

The rule arising from *Deutsche Telekom* and *Spain v. Commission* therefore **flows from the primacy of competition law (specifically Article 102 TFEU) – as primary EU law – over sectoral regulation**, which is secondary EU law. This rule is useful whenever Articles 101 or 102 TFEU is involved.

What about other situations where no hierarchical element is present, such as between two regimes of secondary law? Of course, the regimes in question could contain their own reconciliation rules, as is the case for instance with the EECC for

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<sup>62</sup> See Alexiadis and Da Silva Pereira Neto (2019).

<sup>63</sup> Case C-280/08P *Deutsche Telekom v. Commission*.

<sup>64</sup> RegTP, as it then was. The corresponding regulatory powers are now vested in the BNetzA.

<sup>65</sup> Case COMP/37.451 *Deutsche Telekom AG* [2003] OJ L263/9, para. 54; Case T-271/03 *Deutsche Telekom v. Commission* [2008] ECLI:EU:T:2008:101, para. 85-88; Case C-280/08P, para. 80-90.

<sup>66</sup> The reverse situation, where a firm would comply with competition law but not with sectoral regulation, has not yet been explored in the case law. In the 1998 Access Notice, the Commission states that in such a case, compliance with competition law does not prevent liability under sectoral regulation. In practice, such cases are unlikely to arise: since the 2004 reform (Regulation 1/2003), the Commission has ceased to issue non-infringement decisions under Articles 101 or 102 TFEU, and national competition authorities do not have the power to issue such decisions. Unless a firm would somehow have obtained a court judgment on the issue, it will accordingly not be in a position where it can invoke an actual decision to support a claim that it complies with competition law, in the course of regulatory proceedings.

<sup>67</sup> Case T-398/07, *Commission v. Spain* ECLI:EU:T:2012:173. In the same Recital, the General Court explicitly dismissed Spain's argument that Trinko was a relevant authority on this point.

electronic communications.<sup>68</sup> In the absence of such explicit rules, case-law on this point is not well established. Available principles of legislative interpretation could apply, but they do not carry the same strength as a hierarchical rule.

In some situations, a **general/specific articulation** could be used. In such cases, the Court tries to apply both regimes in a complementary manner when that is possible. For instance, in the electronic communications sector, the Court of Justice clarified that the sector-specific consumer protection rules (now in the EECC) are complementary – and not substitute – to the general consumer protections rules. Therefore, those general consumer protection rules apply fully to the electronic communications sectors and should be enforced by the consumer protection authority.<sup>69</sup> Otherwise, the more specific regime should apply first, but at the same time it should not apply so as to contradict the more general regime, unless the more specific regime explicitly deviates from the more general one.

Another possibility would be a **principal/accessory articulation**. For instance, in *UPC Nederland*, the CJEU used and left aside the regime that only applied to an ancillary element of the case.<sup>70</sup> A similar approach was followed by the CJEU in the collaborative economy cases to decide whether the sharing platform should be qualified as an information society service or as a provider of the intermediated service (such as transport for Uber or hosting for Airbnb).<sup>71</sup>

## 4. Recommendations for interplay between NCT and sector-specific regulation

### 4.1. Systemic relationship: Scope of the NCT

It was explained above that the EU approach to economic regulation sees the various regimes – general and sector-specific – **as complements rather than substitutes**. **Hence, we recommend that the NCT should apply across the board to all economic sectors**, including to sectors which might be subject to specific regulation.<sup>72</sup> This corresponds to options 1 or 3 of the Inception Impact Assessment. The presence of overlaps is a logical consequence thereof; to borrow from computer science, it is not a bug, it is a feature.

Indeed, the application of the NCT in a regulated sector may be justified and useful to remedy a Structural Competition Problem (SCP) that either cannot trigger regulatory intervention or for which available regulatory remedies would offer no effective solution. In other words, even if the NCT would be applied in a sector covered by specific regulation – electronic communications, energy, transport, financial services,

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<sup>68</sup> EECC, Art. 1(3).

<sup>69</sup> *Joined Cases C-54/17 and C-55/17, Autorità Garante della Concorrenza e del Mercato (AGCM) v Wind Tre and Vodafone Italia*, ECLI:EU:C:2018:710, para.60 noting that: ‘the term ‘conflict’ refers to the relationship between the provisions in question which goes beyond a mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end.’

<sup>70</sup> *Case C-518/11, UPC Nederland v. Hilversum*, ECLI:EU:C:2013:709.

<sup>71</sup> *Case C-434/15 Asociación Profesional Élite Taxi v Uber Systems Spain* ECLI:EU:C:2017:981, para.40 ; *Case C-320/16, Uber France* ECLI:EU:C:2018:221, para.22 deciding that: “that the intermediation service (provided by Uber) had to be regarded as forming an integral part of an overall service the main component of which was a transport service and, accordingly, had to be classified, not as an ‘information society service’ (...) but as a ‘service in the field of transport’ (...)”; *Case C-390/18, Airbnb Ireland* ECLI:EU:C:2019:1112, para.69.

<sup>72</sup> This is also recommended by Crawford, Rey and Schnitzer (2020).

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etc. – that **regulation may suffer from a “regulatory gap”**, i.e. the inability to deal with a SCP. By way of illustration of such a “gap”, one could think of the tight oligopoly structure that appears to be prevailing in electronic communications markets, as evidenced in a number of merger control assessments.<sup>73</sup> In December 2015, at the beginning of the last reform of the regulatory framework for electronic communications, BEREC pointed to the insufficiency of the (then) Directives to intervene in case of tight oligopolies and suggested to change in the law to broaden the possibilities of intervention.<sup>74</sup> However, the EU institutions did not adopt all the changes proposed by BEREC and, in doing so, may have left a regulatory gap which could be usefully closed by the NCT.<sup>75</sup>

A gap could also arise because an SCP occurs so infrequently that regulatory intervention for such SCP has been deemed too costly for the benefits it would bring. These costs include the cost of carrying out the intervention (inquiry, proceedings, decision), the cost of maintaining, enforcing and reviewing regulation, and of course the compliance costs and disincentives visited on market actors. Depending on how it is conceived and operated, the NCT could be less costly to use than sector-specific regulation. Finally, a gap could also arise as a matter of regulatory dynamics: the SCP in question could be a new occurrence that has not yet been acknowledged and identified by sector-specific regulation. Conceivably, experience could have been gained under the NCT in dealing with such a SCP in other sectors, in which case the NCT could offer a comparative advantage over sector-specific regulation.

It has also been suggested that the NCT could be useful to intervene in situations where a SCP could be addressed by sector-specific regulation but has not been remedied because of failure on the part of the NRA. For instance, the NRA may fail to successfully defend its decision on appeal, for reasons that are independent of its control,<sup>76</sup> the NRA may apply sector regulation in an incorrect manner and make mistakes<sup>77</sup> or the NRA may be captured.<sup>78</sup> In the jurisdictions that already have a

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<sup>73</sup> *Such tight oligopoly is a result of concentration on mobile communications markets (given the limited number of spectrum licenses), coupled with the relative transparency of the market and extensive infrastructure sharing. See for instance General Court, Case T-399/16, CK Telecoms UK Investments v. Commission ECLI:EU:T:2020:217, where the oligopolistic state of the UK mobile communications market is discussed at length, against the backdrop of EMCR case-law making comparable findings in other national markets. As for fixed communications markets, in most Member States they are at best duopolies.*

<sup>74</sup> *BEREC Opinion of 15 December 2015 on the Review of the EU Electronic Communications Regulatory Framework, BoR(15) 206, p. 14 noting that: “NRAs should be able to address duopoly scenarios – e.g. where NRAs are unable to find a single SMP operator in the relevant market but where two players are nonetheless not effectively competing. This is especially relevant, for example in the market for internet access, where the duopoly situations (with only two infrastructure-based competitors) is more likely to develop. As described in BEREC’s report on oligopolies, duopolistic/oligopolistic communications markets face a high risk of evolving in a non-competitive manner and are less likely to support efficient and sustainable competition (“two are not enough”). BEREC’s report on oligopoly analysis and regulation has identified several possible options for adapting the Framework regarding the regulatory treatment of oligopolies, including potential market indicators of non-competitive oligopolies.”; BEREC Report of 15 December 2015 on oligopoly analysis and regulation, BoR(15) 195.*

<sup>75</sup> *All the more since the General Court in Case T-399/16 CK Telecoms, supra, severely restricted the applicability of the MCR to mergers involving such markets.*

<sup>76</sup> *See the example of termination rates in the Netherlands, leading up to Case C-28/15 KPN v. ACM, supra, where the Dutch NRA duly applied EU law only to see its decision vacated on appeal. The reasons given by the court of appeal were severely criticized by the CJEU in its judgment at para. 42, with reference to the opinion of the Advocate-General for more detail.*

<sup>77</sup> *This has been used to justify the Commission decision in Deutsche Telekom, supra: see Geradin (2004) contra Larouche (2009). As discussed above, this is not how the CJEU explained the case: Case C-208/08P, Deutsche Telekom, supra. On the use of competition law actions to correct intervention of NRAs, see also de Streel (2014).*

functional equivalent to the NCT, the tool has sometimes been used to correct the inaction of the regulators.

However, the EU context is different from these national jurisdictions. We would recommend against any suggestion that the NCT is the relevant means to correct the (in)action of an incompetent or captured NRA. There are other legal means to do that, in particular the specific coordination mechanisms set up by the sectoral regulation in question<sup>79</sup> or, in last resort, an infringement procedure against the Member State of the NRA in question under Article 258 TFEU. It would be detrimental to the integrity of both the NCT and other economic regulation regimes if the NCT was seen as an additional means of recourse in regulatory proceedings. The existence of a regulatory gap should not depend on the quality of NRA enforcement activities, but rather on the inability of the regulatory regime to deal with a SCP in the abstract. Therefore, as it will be suggested below, if the NCT investigation concludes that the obligations necessary to remedy the SCP could in fact be imposed under existing regulation (hence, there is no regulatory gap at the end of the day), then it would be better to solve the SCP with existing sector regulation. To do so, the Commission, in its quality as NCT enforcer, could make recommendations to the authorities, often national, in charge of sectoral regulation.

An additional argument in favour of a horizontal scope for the NCT is that it will **alleviate uncertainty and costly litigation on the precise scope of the NCT**. The risks and costs of a sectoral scope instead of a horizontal scope could be illustrated by the constant frustration, in the longstanding process of ICT convergence, with the attempts to neatly delineate the respective ambits of sector-specific regulatory regimes through definitions. Intense negotiations have produced a complex definitional scheme involving “electronic communications” networks and services, to be distinguished from “Information Society services” and from “audiovisual media services” (themselves divided in both linear and non-linear subcategories).<sup>80</sup> The resulting pigeonholing exercise is profoundly at odds with the technological and economic reality of the ICT sector.<sup>81</sup>

It is also interesting to note that **in the other jurisdictions which have an NCT equivalent, this tool has a horizontal scope and has indeed been applied in regulated sectors**. In the UK, the CMA may launch a market investigation in any sector of the economy, including regulated sectors, as no sector is legally excluded from Part 4 of the Enterprise Act. The sectoral regulators may themselves make market investigation references for which the investigation will be conducted by the CMA. They will do so when it would be more appropriate to deal with a competition problem through a market investigation than under sectoral regulation.<sup>82</sup> In this

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<sup>78</sup> There are few actual cases where regulatory capture was at stake, even though by all accounts capture is not unheard of in the EU. A more striking case of legislative capture occurred in the case of the regulation of New General Network in Germany: Case C-424/07 Commission v. Germany, ECLI:EU:C:2009:749.

<sup>79</sup> For instance, Art. 32-34 EECC.

<sup>80</sup> Those respective definitions are now included in: EECC, Art. 2; **Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services**, OJ [2015] L 241/1, art.1; **Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)**, OJ [2010] L 95/1, as amended by Directive 2018/1808, art. 1(1).

<sup>81</sup> See for instance Case C-518/11, *UPC Nederland v. Hilversum*.

<sup>82</sup> Market investigation references: *Guidance about the making of references under Part 4 of the Enterprise Act, OFT 511, March 2006, para. 2.3 in fine.*

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regard, Whish (2020) indicates that 4 of the 20 market investigation references so far came from sectoral regulators.<sup>83</sup> Next to the market investigations done in regulated sectors at the request of the regulators, other investigations have been done in regulated sectors at the CMA's own initiative.<sup>84</sup>

Similarly, in South Africa, all the provisions of the Competition Act, including the market inquiries, apply to regulated sectors.<sup>85</sup> In practice, some market inquiries have been completed in regulated sectors such as the Banking Inquiry in 2008 and the Mobile Data Services in 2019.<sup>86</sup> This is also the case in Mexico where market examinations have been launched in regulated sectors such as transport or credit card payment systems.<sup>87</sup>

## 4.2. Substantive relationship

The NCT will fit into the broader landscape of EU economic regulation: as the paper by Motta and Peitz (2020) underlines, the **NCT can rest on solid economic analysis**, as do the other regulatory regimes. In the light of the experience with electronic communications regulation, however, we would like to emphasize that, even as regards the relationship with traditional competition law, there is no significant advantage to be gained by placing the economic inquiry to be carried out under the NCT within the straitjacket of competition law analysis (i.e. relevant market definition, followed by an assessment of whether the relevant market as defined – or the firms that populate it – meets certain criteria).

In particular, relevant market definition can introduce an element of rigidity that might impair the effectiveness of the NCT: it results in a snapshot view of markets, and the EU practice tends to be to define narrow markets. Competitive phenomena that might occur outside of or beyond the relevant market(s) have proven difficult to introduce into the analysis at the market assessment stage.<sup>88</sup> This is all the more critical if the NCT aims to deal with SCP in dynamic markets, where part of the competitive game involves reshaping markets through disruptive innovation, for instance.<sup>89</sup> Even if breaking with the standard formula of competition law analysis might perhaps wrongly create the impression that the NCT does not belong within competition law, the very rationale for the NCT is to bridge gaps in the coverage of competition law, some of which arise as a consequence of rigidities induced by relevant market definition.<sup>90</sup>

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<sup>83</sup> Those were: (i) the Office of Rail and Road made a reference of Rolling Stock Leasing in April 2007 and the Competition Commission reported in April 2009 (ii) OFCOM made a reference of Movies on Pay TV in August 2010 and the Competition Commission reported in August 2012; (iii) OFGEM referred Energy in June 2014 and the CMA reported in June 2016; (iv) the Financial Conduct Authority referred Investment Consultants in September 2017 and the CMA reported in December 2018. Moreover, in one other case in 2005, OFCOM accepted undertakings from BT in lieu of a market investigation reference

<sup>84</sup> This was the case of the market investigations in retail banking or in investment consultants.

<sup>85</sup> Article 3(1A) of the South African Competition Act No. 89 of 1998 as amended.

<sup>86</sup> <http://www.compcom.co.za/banking-enquiry/>, <http://www.compcom.co.za/newsletter/data-market-inquiry/>

<sup>87</sup> <https://www.cofece.mx/wp-content/uploads/2018/11/COFECE-047-2018-English-.pdf>

<sup>88</sup> By way of example, see how the relevant market definition exercise prevents the Commission from perceiving what is truly at stake in Facebook/WhatsApp, namely the acquisition of one of the most likely springboards for disruptive innovation by the very powerful platform: Decision of 3 October 2014, Case M.7217 Facebook/WhatsApp. See also LEAR (2019) and Fletcher (2020) cautioning against the reliance on rigid market definition in the digital sectors.

<sup>89</sup> Larouche (2020).

<sup>90</sup> In that respect, one could argue that the NCT would merely follow the trend already underway in merger control, where the horizontal guidelines in both the US and the EU put forward analytical methods that

What is truly important for the NCT to fit within the broader landscape of EU economic regulation, we would suggest, is a clear commitment to the theoretical and methodological foundations of EU economic regulation. In other words, the NCT should be solidly anchored in economics. Instead of insisting on the analytical structure of competition law, it is preferable to invest time and resources to ensure that the rationale for the NCT is well developed, and that the provisions of the NCT legislation properly render or translate the underlying economics. In all likelihood, this will mean that the NCT is formulated in more precise terms than current competition law (which relies on general notions such as “agreement”, “restriction of competition”, “abuse” and “dominant position”). A more precise formulation would also reduce the need to use concepts such as market definition in order to put boundaries on the discretion of the authority. We would also suggest that the NCT contains devices designed to foster sound economic analysis, such as a requirement that a cogent theory of harm be formulated, tying all the economic features into a coherent analysis.<sup>91</sup> This implies that the NCT should be based on structural problems and not on the finding of a dominant position. This corresponds to the options 3 and 4 of the Inception Impact Assessment.

Furthermore, the experience with sectoral regulation also leads us to emphasize the significance of **technological neutrality**, and with it the use of economic or functional concepts in the design of the NCT.<sup>92</sup> Technological neutrality is especially important if the NCT is to apply across the board to all economic sectors as suggested above.

Finally, also in the light of the experience with sectoral regulation, we would **caution against too great a reliance on soft-law instruments for the substantive development of the NCT** and its coordination with other regulatory regimes. If the NCT is intended to be enforced by the Commission alone, these soft-law instruments will bind the Commission, as recognised by case-law. Nevertheless, some soft-law instruments could be used to set out the relationship between the NCT and other economic regulation regimes, and hence between the respective authorities. In certain cases, case-law indicates that a “comply or explain” effect can be achieved, but only with the use of recommendations or with the addition of an obligation to “take utmost account” of the instrument. In our view, informed by the experience of the last 20 years, it is **preferable to try to lay down the fundamentals of the NCT substance and of its relationship with other regimes in the NCT legislation itself**, even if it requires a greater expense of time and resources during the legislative process. Soft-law instruments can be used later to build and elaborate on these existing fundamentals, without running any risk for the validity and legal force of these fundamentals.

### 4.3. Institutional relationship

#### *(a) Vertical cooperation between the Commission and the NCAs*

Considering the number of regimes making up EU economic regulation, we think that, at the institutional level, the NCT should not be set up as yet another stand-alone

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*reduce the need for market definition to carry out a conclusive assessment in cases of monopolistic competition (markets with significant product differentiation amongst competitors).*

<sup>91</sup> This is also the direction suggested by Motta and Peitz (2020).

<sup>92</sup> This is also recommended by Crawford, Rey and Schnitzer (2020).



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regime, an institutional island whose authorities need to coordinate and cooperate with those in charge of every other regime. Since the **NCT is closely linked with EU competition law, we would recommend that its institutional structure be embedded within that of competition law**, in particular that of Regulation 1/2003. After all, the NCT is likely to be applied by the Commission or the NCAs or both. It would stand to reason that the mechanisms of Regulation 1/2003 would then be used to achieve coordination and cooperation with the authorities applying competition law.<sup>93</sup>

In concrete terms, this would mean that a round of consultation within the ECN would be undertaken every time the Commission (or an NCA) proposes to launch an investigation under the NCT.<sup>94</sup> This would allow for a discussion, within the ECN, of whether the use of the NCT – as opposed to standard competition tools (Articles 101 or 102 TFEU) – is appropriate, and of which authority is best placed to investigate. Similarly, at the end of the investigation, the proposed measure could be circulated for consultation within the ECN<sup>95</sup> or the Advisory Committee,<sup>96</sup> depending on whether an NCA or the Commission led the investigation. Relying on the tried-and-true mechanisms of Regulation 1/2003 for institutional coordination between the NCT and the rest of competition law would be an effective and efficient choice.

*(b) Transversal cooperation between the Commission and the NRAs*

As the authorities in charge of sector-specific regulation are often national,<sup>97</sup> **transversal cooperation between the Commission and the NRAs** would be needed when the NCT is applied in sectors subject to specific regulation.<sup>98</sup> In the different countries having an equivalent to the NCT, cooperation between the NCA and the NRA is often foreseen for all the tasks of the authorities, including the enforcement of the NCT equivalent.<sup>99</sup> This is the case for instance in Greece,<sup>100</sup> or in South Africa.<sup>101</sup>

At the beginning stage, an NCT inquiry could be *launched* ex officio or upon a complaint. There are pros and cons as to whether NRAs should be able to lodge a complaint under the NCT with the competent authority. On the one hand, NRAs are ideally placed to identify regulatory gaps in the sectors that they scrutinize. Indeed, in the UK, sectoral regulators can make a reference to the CMA for a market investigation. On the other hand, as we set out above, the integrity of both the NCT and sector-specific regulation would be prejudiced if the NCT could be used as an additional battlefield for sector-specific regulation. Accordingly, NCT legislation should clearly define the circumstances under which an NRA can lodge a complaint: there must be a regulatory gap, i.e. a situation where the NRA either has no competence to

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<sup>93</sup> This is in line with the analysis put forward by Schweizer (2020).

<sup>94</sup> In line with Regulation 1/2003, Art. 11(2) and (3).

<sup>95</sup> Regulation 1/2003, Art. 11(4).

<sup>96</sup> Article 14(1) of Regulation 1/2003.

<sup>97</sup> There are some notable exception like the supervision of the systemic done by the EU Single Supervisory Mechanism.

<sup>98</sup> The possible NCT stages are described in Schweitzer (2020; p. 17 et sq).

<sup>99</sup> Generally, on the relationships between NCA and NRA, see OECD (1999) et (2005).

<sup>100</sup> Article 24 of the Greek Law 3959 of 2011 on the Protection of Free Competition.

<sup>101</sup> Article 82 of the South African Competition Act No. 89 of 1998 as amended. On that basis, the Competition Commission of South Africa (CCSA) has concluded several Memoranda of Understanding with sector regulators: <http://www.compcom.co.za/mou/>



intervene or no adequate remedy at its disposal, in the abstract, even if it discharged its functions in the best possible fashion.

During the enquiry and the *information gathering* process about possible SCP in a regulated sector, the Commission should consult the relevant NRA(s). The Commission should also be able to receive confidential information from those NRAs, provided it ensures the same level of confidentiality as the NRA which gathered the information.<sup>102</sup> Such exchange of information should be foreseen in the law and possibly organised through cooperation agreements between the Commission and the NRAs.<sup>103</sup> The same principles may apply to the sharing of information in the other direction, i.e. information gathered in the course of investigating under the NCT being shared with an NRA.

The *identification of the market features and the SCP* justifying the imposition of remedies under the NCT should be done, in a regulated sector, in close cooperation with the relevant NRAs and/or the EU-level forum regrouping those NRAs (for instance, BEREC for electronic communications, ACER for energy, the ESAs for the financial). In that regard, the NCT legislation could require the Commission to consult the relevant NRA(s) and that EU-level forum before issuing a decision on the SCP.<sup>104</sup> The NCT legislation could also enable the relevant EU-level forum, if any, to issue a non-binding opinion on the Commission draft decision, thereby extending the advisory power of those fora to Commission action under the NCT.<sup>105</sup> In the light of the discussion above, we would advise putting the Commission under a requirement to “take utmost account” of the NRA or EU-level forum opinion, in order to add credibility to the consultation process. With such a requirement, the Commission is bound either to follow the opinion or to provide explanations as to why it is not appropriate to follow that opinion, in the view of the Commission.

However, we do not think that there is a need to go any further than cooperation and consultation. In particular, we do not see why, as some have suggested, the NCT should be implemented by the NRAs themselves when applied in a regulated sector.<sup>106</sup> If the NCT forms part of the EU competition law regime, as envisaged, then NRAs might not be suited to carry out an NCT investigation.<sup>107</sup> Moreover, in the context of a new regime like the NCT, enforcement should be in the hands of the same authority irrespective of the sector where it is applied. It took almost 40 years of experience under EU competition law before the law was thought to be sufficiently well developed for Regulation 1/2003 to introduce fully decentralised application by national

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<sup>102</sup> A similar provision to exchange information between NCA and NRA is included in the EECC, Art. 11. Such sharing of information should comply with the fundamental principles of procedural fairness guaranteed by Article 41 of the Charter of Fundamental Rights of the EU. To do so, Schweitzer (2020) explains that two conditions must be met: “(i) the transfer of information must be provided for by law; and (ii) the information transferred must not have been obtained under an investigatory regime [here the sectoral regulatory regime] that provides for a lower degree of procedural protection than the one that is applicable in the context in which the information shall be used after the transfer [here the NCT regime]”.

<sup>103</sup> Cooperation agreements between NCA and NRA often contain provisions on information sharing between agencies.

<sup>104</sup> Such cooperation is also foreseen between the NCA and the regulatory authority in Mexico: Article 94(III) of the Mexican Federal Economic Competition Law of 2014.

<sup>105</sup> For instance, the current advisory powers of BEREC are listed in Regulation 2018/1971, Art. 4(1), esp. 4(1)(b).

<sup>106</sup> This has been suggested by BEREC in its Response to the Public Consultation on the DSA and the NCT, p.37.

<sup>107</sup> Except maybe in Member States where the relevant NRA is merged with the NCA in a super-authority (e.g. Netherlands or Spain for network industries), but there the super-authority in its quality as NCA would be in a position to undertake the investigation.

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*competition* authorities without fear of fragmentation. If any national authority should get the power to apply the NCT, it should be the NCA, and then only in the medium to long term, provided it has sufficient resources for these tasks.

At the remedial stage, if a SCP has been identified in a regulated sector, then the Commission should *design the remedies* in close cooperation with the relevant NRAs. This is all the more justified since, in designing the remedies, the Commission would be well advised to take into account the different objectives the NRAs might be pursuing. Inspiration may be taken from the UK system where the CMA should take into account the various objectives of sectoral regulation when designing the remedies in a market investigation.<sup>108</sup> As explained by Whish and Bailey (2018: Chapter 11), “those remedies may go beyond preventing adverse effects on competition: for example there is a legal obligation to ensure the maintenance of a universal postal service.”

The *implementation of the remedies* depends on the competence of the NRAs:

- If the NRAs have the competence - under their national law transposing EU law or directly under EU law - to remedy the SCP, then there is no regulatory gap at the end of the day. In such a case, the Commission could issue a recommendation to the NRAs to implement the designated remedies under their respective sectoral framework, with a requirement to take utmost account of the Commission recommendation. This case is perhaps unlikely, but not impossible: it is conceivable that, at the end of a long NCT investigation, the additional information and knowledge gained through the investigation leads to a different conclusion than what was expected earlier. What seemed like a regulatory gap, on the basis of the information available at the outset of the investigation, could turn out to be actually solvable with the existing array of regulatory remedies. Our suggested approach would be similar to the Mexican system where the NCA could notify to the NRA the finding of barriers to competition and free market access for it to determine, within the scope of its jurisdiction and according to the procedures in prevailing legislation, what actions should be taken to achieve competition conditions.<sup>109</sup>
- If the NRAs do not have the competence to remedy the SCP (hence, there is truly a regulatory gap), then the Commission should be able to impose appropriate remedies, thereby ensuring that the NCT usefully complements sector regulation.

Finally, the *monitoring and the control of compliance* with NCT remedies in a regulated sector could be delegated by the Commission to the NRA. In this case, the NRA should regularly report to the Commission, which would remain in charge of sanctioning any failure to comply with the remedies imposed under the NCT.<sup>110</sup>

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<sup>108</sup> UK Enterprise Act 2002, s. 168.

<sup>109</sup> Article 95 of the Mexican Federal Economic Competition Law of 2014.

<sup>110</sup> This setting was relied in the merger NewsCorp/Telepiu, Decision of 2 April 2003, Case M.2876, para. 259.

**Table 3: Transversal cooperation mechanisms between the Commission and the NRA**

Phase of NCT proceedings	Cooperation Commission - NRA
1. Initiation	NRA reference in proven case of regulatory gap
2. Information gathering	Exchange of confidential information
3. Identification of Structural Competition Problem	Opinion of NRA or EU-level network
4. Remedy design	Opinion of NRA or EU-level network
5. Remedy implementation	- If NRA can act (hence no gap), recommendation to NRA - If NRA cannot act, NCT remedy fills regulatory gap
6. Remedy monitoring	Possible delegation to NRA

#### 4.4. Reconciliation mechanism

Given the extensive cooperation and coordination mechanisms suggested above, there should be few cases where divergences between the NCT and specific regulation needs to be reconciled.<sup>111</sup>

We have explained in the previous section that standard competition law (Articles 101 and 102 TFEU) prevails over sectoral regulation mainly because of the hierarchy of law: competition law is primary EU law and therefore enjoys primacy over sectoral regulation, which is secondary law. The NCT will itself not be primary law. Since it will potentially have a broader scope than standard competition law (in particular if it is structure-based, as in options 3 and 4 of the Inception Impact Assessment), it may even not be considered as an implementation of primary EU competition law like Regulation 1/2003 or, to some extent, the MCR.<sup>112</sup> Thus, an argument based on the hierarchy of law is more difficult to make.

As a starting point, we would be against an absolute hierarchical rule based on “fields” or “competences”, without any regard for the concrete implementation and enforcement by the respective authorities. To wit, such a rule would state that there is a NCT “field” where sector-specific regulation cannot thread, irrespective of what has been done under the NCT, or vice-versa. Indeed, absolute NCT primacy over sectoral regulation would lead to difficulties when the two legal regimes have different objectives, e.g. to remedy different market failures, which is often the case.

Conversely, sector-specific regulation should not either prevail over the NCT as an absolute rule. Some favour such a solution because sectoral regulation would be a *lex specialis* in relation to the more general NCT, applicable across the board to the whole economy.<sup>113</sup> Even if this argument could apply in a horizontal relationship (between

<sup>111</sup> Coordination between the NCT and current competition law is discussed in Schweitzer (2020).

<sup>112</sup> The legal basis of the NCT may also play a role in this assessment. If the NCT is based not only on Art. 103 TFEU, but also on another legal basis such as Art. 114 TFEU (as suggested in the Inception Impact Assessment) or Art. 352 TFEU (as it is the case for the Merger Regulation), then the direct link with EU primary law (Art. 101 and 102 TFEU) will be loosened.

<sup>113</sup> See BEREC Response to the Public Consultation on the DSA and NCT, p.36.

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two national regimes or two EU regimes), it is less convincing in a transversal situation pitting EU law enforced at the EU level (the NCT) against another EU legal regime, often a Directive, applied at the national level (sectoral regulation). In such a situation, a primacy rule in favour of sectoral regulation risks undermining the internal market by fragmenting the effect of the NCT.

We would accordingly propose a much narrower rule, based not on abstract notions of “fields”, but on the concrete actions of the respective authorities. As a starting point, **both the NCT and sector-specific regulation should apply concurrently, unless their concurrent application puts a firm in a situation where it cannot comply with both regimes at the same time.** Such cases should be exceptional. There would thus be no need for reconciliation if, under one regime, a firm is put under a regulatory obligation, whereas under the other regime, regulatory analysis led the firm to be exempted from any obligation.<sup>114</sup> In such a situation, the firm can comply with both regimes. To the extent that the two regimes are complementary, there should not be any significant proportionality issue, since the respective interventions of each authority are presumably necessary and proportionate to the aims of the respective regimes (NCT and sectoral regulation). In any event, if – as is assumed – the application of the NCT in a regulated sector is premised on the existence of a regulatory gap, there can be no divergence since sector-specific regulation cannot be applied.

Under such a narrow rule, the emphasis would be on institutional mechanisms for the **Commission and the NRA to cooperate and coordinate their actions**, along the lines described above, so as to avoid a situation where the firm is put in an impossible bind.

In spite of the above, should a firm find itself in a position where it cannot comply with one regime without breaching the other, then we would suggest the following reconciliation rule. Our starting point is that in principle, the **NCT will be used to impose obligations across the EU.** Sector-specific regulation, on the other hand, is usually applied at Member State level, with a specific set of obligations for each Member State.<sup>115</sup> In a case where the scope of the two conflicting regulatory obligations is different, then the regulatory obligation applicable across the EU (usually coming from the NCT) should prevail, out of concern for the internal market.

## 5. Conclusion

In the end, we conclude that that the **proposed NCT could easily be integrated in the existing body of EU economic regulation.**

In order to achieve this integration, hereunder are our specific recommendations in short order:

- The NCT should have a **horizontal scope and apply across the board to the whole economy, including regulated sectors;**
- As for the substance of the NCT:

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<sup>114</sup> With the possible exception of a situation where the exemption from any obligation is essential for the overall effectiveness of the regulatory instrument in question.

<sup>115</sup> Our reasoning would not necessarily hold if the starting assumptions (NCT applied uniformly across the EU, sectoral regulation applied to the specific set of circumstances of a Member State) are not met.

- the NCT should **rest on the same theoretical basis and methodology as existing EU economic regulation**, without being straitjacketed within specific competition law methodology;
  - the NCT should be **formulated in technology-neutral terms**, i.e. using economic or functional concepts;
  - the fundamental elements of the NCT should be set out in legislation, and the **role of soft-law** – if any – **should be limited** to developing or elaborating on these fundamentals;
- As for the institutional framework of the NCT:
- NCT implementation and enforcement be **embedded within the institutional framework for coordination under Regulation 1/2003**, to ensure proper coordination with competition authorities;
  - If and when the NCT is applied in regulated sectors, a **close transversal cooperation should be set in place between the Commission** (or any authority enforcing the NCT) **and the relevant NRA(s)** (or other regulatory authority) at every stage of the NCT implementation:
    - At the *initiation* stage, **NRAs should be able to make an NCT reference** when they cannot deal with a SCP in their sector because of the existence of a **regulatory gap**, as this term is specifically defined in this paper
    - At the *information gathering* stage, the Commission and NRAs should be **able to exchange confidential** information provided, confidentiality is respected at both ends of the exchange;
    - At the *SCP identification and remedy design* stages, the NRAs (and relevant EU-level networks) should be able to **issue an opinion on draft Commission decisions**, and the Commission should be bound to take the utmost account of such opinion;
    - At the *remedy implementation* phase, the Commission should be able to **impose remedies when the NRAs cannot act**. However, if the NRAs are able to act (hence there is no regulatory gap ultimately), then the Commission should make **recommendations for action**, of which the NRAs should take utmost account.
    - At the *remedy monitoring* stage, the Commission may **delegate to the NRAs the compliance** monitoring as well as the evaluation of the remedy.
  - **The NCT and sectoral regulation should apply concurrently**, except in the rare case where a firm would be put in a position where it could not comply with one without breaching the other, in which case an EU-level remedy under the NCT should prevail over a national sectoral remedy.

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