

Inputs to the NCT-consultation from FBRT

Dear BEUC,

Thank you for engaging passionately in the important debate about NCT. We definitely support the notion that the existing framework in the area of competition is insufficient in terms of tackling the new challenges arising as a result of most notably, digitalisation. The call for a change in the current market structure and its resulting competition issues has to be addressed most fiercely. In the following, we would like to mention a few things that we believe should be emphasised and others which should be treated more in depth*.

We have chosen to deliver the input as follows and thus not merely filling out the distributed questionnaire.

Ex-ante regulation and third-party responsibility

- We firmly follow the notion that ex-ante regulation may be a too potent tool in terms of principles for legal certainty and related issues. Taking into consideration the fast-developing development of new technologies following an algorithmic logic at the risk of arriving at crucial tipping points calls for a stronger competition tool with ex-ante competence is necessary.
- BEUCs role in the upcoming examination of Amazons business model are appreciated and applauded by us when discussing use of third-party sales to promote own products. Overall, we support looking into possible uses of ex-ante regulation to counter some of the rising challenges. In terms of tipping point. This comes in handy to prevent harmful distortion of market mechanisms.
- Clearly, ex-ante regulation must not be too harmful for competition nor legal certainty – just like we have experienced in others markets where certain affairs require specific permission. These worries are also driven by the insights into network effects in i.e. social networks where the responsibility when dealing with user-generated content can be questioned. The transparency concerns and division of responsibility must be well thought out here.

Development of the estimation of 'willingness to pay' in the algorithmic era:

- One of the major changes in online algorithmically-driven market places are the enhanced estimation of 'willingness to pay', which leads to enlargement of producer surplus at the expense of consumers that fundamentally increases power inequality (information) of markets. Resulting in disequilibrium with sticky prices due inadequate information, possible tacit collusion and more.
- This may result in decreased total market surplus that cannot be in the interest of society or anyone besides few gatekeeper companies that lucre on data expropriation.
- Also we must demand transparency of pricing mechanisms to ensure fair competition and market prices (i.e. Amazons tendency to capture market share by temporarily apply a cost-based pricing strategy setting price under cost in certain product groups). Like AI-technology, the right of explicability must apply – without companies having to reveal their 'secret', but merely providing customers with better navigation tools.

Disturbing power of gatekeepers

- Using the gatekeeper power to capture market shares are questionable in terms of competition and furthermore difficult to enforce when platforms take on a two-faced role as provider and seller at the same time i.e. Amazon with their Prime-subscription simultaneously promote single-home.
- The two-faced role is also present in the case of Apple owning both hardware and software there is a strong force towards keeping consumers in the closed eco-system due to lock-in features. In terms of payment solutions, the NFC-chip is blocked for other service providers than Apple Pay, which leaves competing apps with the only option to settle with inferior Bluetooth-technology.
- Facebook has foreshadowed introduction of the 'stable' coin Libra, which further limit competition through de-facto controlling both input, output and the means of payment and transaction in toto.
- The ban of cartels and splitting up markets, potential abuse of a dominant position alike as well as deals that harm competition at the expense of users and consumers must be questioned critically.
- Pricing algorithms regulated through huge data capacities makes it nearly impossible for smaller companies to compete with the large companies who have great data power (and market power). This makes it virtually impossible to capture market shares through traditional pricing strategies.
- The misconduct of dividing markets via mechanism mimicking *tacit collusion* between gatekeeping powers must be taken firmly care of. In a traditional market menu cost in menu costs mean that firms may be reluctant to change their prices; however in a digital market these cost approaches zero, which may be harmful to the competition situation. Namely, this happens when digital technologies undermines the delay, which otherwise causes dynamic effect in traditional markets. Moreover, profiling of costumers and users on platforms with single-home characteristics.
- Competition in the area of payment solutions suffers from sub-optimal structures, which ultimately disadvantages consumers. Existing actors in the area has next to zero costs when conducting the marginal payment. This surplus deriving from economics of scale does not benefit consumers. PSD2-regulation has diminished this challenged, but has not performed as well as intended; which calls for further regulation to ensure efficiency, consumer benefits and better data market structure.
- As a consumer, these tendencies including data collection, rating and pricing makes it difficult to navigate and to know whether the search results through a de-facto monopoly of service provider, Google, will actually led you to the best prices online relative to navigating consumers towards partner companies or own products through target marketing driven by large-scale data collection.

Product quality as a parameter

- Digitalisation reinforce the tendency of viewing price as the primary parameter for costumers, but price is not everything and that notion has to be contemplated when designing the NCT. In example, even though the lifetime of technological products i.e. smartphones have decreased notable, this does not seem to interfere in the general considerations. Studies from i.e. the healthcare sector has shown that price is often valued below price, costumers service, general confort and more.
- There is no guarantee that the quality of a certain product or service is reflected in the price or ratings. Increased information deficits in buying situations i.e. when choosing a dentist online.
- Consumer experiences has to not only feel good, but be good. A labelling scheme within NCT-framework may resolve some of the challenges arising in online interaction to ultimately ensure an adequate consumer protection and information in the analogous world and digital world alike.

Learning to think of data shares in addition to traditional market shares

- Traditional competition law has had to do with market share determined by production of largely material products and more recently human services. However the digital era requires rethinking of this and learning to think of data shares important itself. Competition in the algorithmically driven attention economy is a radically new phenomena. One could think of capital requirements that limit market power is just like data power that make it almost impossible for smaller actors to get their fair share.
- The very large market shares and data shares alike constitute distortion of competition itself. In their existence alone, consumers will not have the opportunity to choose an alternative, as such will not materialise in the current market, as gatekeepers – and not just dominating companies that have too much data power. In relation to this, we must move closer to a revised understanding of platform-based markets that are essentially global. For this, data should also be used as a delimitation of a market (what type of data is collected, etc.) and thus be equated as a mean of payment as mentioned in the directive on digital content and others.
- It is widely adopted that data has a value and is thus not 'zero price'. Now we must learn to understand data as more than digital information and to figure out how to fully operate with data as i.e. mean of payment. Denmark has implemented rather well-functioning consumer protection legislation that defines rules for what kind and extent of data that payment solutions may collect. In this instance, GDPR is not sufficient due to its status of framework law, which could be problematic when considering the above-mentioned foreshadowing of i.e. Libra currency and other new inventions, which most likely would be rather difficult to enforce compliance with legislation.

***Future work and inputs to the process of NCT**

FBRT has a huge interest in contributing to the process of NCT and the digital field more broadly. Noting that DSA and NCT are different policies and following different consultations, we would like to ask how BEUC envisions to coordinate the work between the two. We are happy to hear from you and answer any questions that may arise in the light of the considerations presented in the above-mentioned.

Best regards,

// Morten Bruun Pedersen, chief economist The Danish Consumer Council (FRBT)