

European Commission
DG COMP A.1

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8 September 2020

The Danish Chamber of Commerce contribution to the European Commission’s Public Consultation on the initiative: “New Competition Tool (‘NCT’)”

The Danish Chamber of Commerce welcomes the opportunity to provide input to the public consultation on the Commission’s initiative: “New Competition Tool (‘NCT’)”.

General remarks

With this new initiative, the Commission seeks to explore the need for a possible new competition tool (“NCT”), that will allow the Commission to address structural competition problems present within the Single Market, in a timely and effective manner. For this purpose, the Commission is asking for input on (i) whether there is a need for a new competition tool to ensure fair and competitive markets, and (ii) the characteristics that such a new competition tool should have.

The Danish Chamber of Commerce supports the Commission’s objective of ensuring fair, undistorted and contestable markets and acknowledge the Commission’s concern regarding the existence of such structural competition problems. Furthermore, the Danish Chamber of Commerce fully agrees with the Commission’s statement that ensuring such fair, undistorted and contestable markets require a holistic approach, and that a vigorous enforcement of the existing competition rules is a very important part of this approach.

The Danish Chamber of Commerce is however not convinced that a holistic approach requires the introduction of two new initiatives, e.g. ex-ante regulation of digital platforms and a new competition tool. Additionally, we are very critical of the four policy options reflected in both the Commission’s Initial Impact Assessment (“IIA”) and this public consultation on a New Competition Tool (“Consultation”), as they are very extensive and neither sufficiently described nor justified.

It is the general position of the Danish Chamber of Commerce, that new legislation – to the furthest extent possible – should be general in nature, so that it may be applicable regardless of industry, sector, technology or business-model.

Legislation targeting general issues, but aimed only at specific industries, sectors, technologies or business-models risk becoming obsolete or dated very quickly, thereby creating unintended loopholes and barriers, fragmentation of the Single Market, and a stifling of innovation and development. The focus must be on creating a level playing field.

In those very limited situations where specific regulation aimed at larger companies are called for, the regulation must be limited to addressing discrepancies and issues which prevents the Single Market from performing effectively.

While the Commission does make a clear statement of respecting the fundamental rights of European companies, specifically mentioning the companies right to defence and the right to judicial review, which we consider very positive, the Commission fails to address the issue that with the proposed NCT, European companies will be left in a situation where they will not know what rules apply, or what to stay away from in order to avoid being subject to NCT remedies.

Companies spend a lot of time and resources developing their business strategy and marketing plans and coming up with innovative new ideas, with the hope and aim, of creating a successful business. We fear that the proposed NCT whereby European companies, which do not violate or intent to violate the existing competition rules, will lead to a situation where European companies may not have the same drive to further develop their businesses, as the successful development of a company in a given market, may lead to the Commissions finding of either a structural risk for or structural lack of competition in the specific market. As such, we fear that the proposed NCT may result in a situation where European companies fall victim to their own success.

This concern is primarily due to the fact, that neither the IIA or the Consultation adequately describe the structural competition problems identified by the Commission, which cannot be addressed – or addressed effectively – by existing competition rules.

Simply mentioning monopolization strategies by non-dominant companies with market power as an example of a structural competition problem that the Commission cannot address using the existing competition rules, and parallel leveraging strategies by dominant companies into multiple adjacent markets as an example of problems which cannot be addressed in the most effective manner, is in our opinion not sufficient to describe the need or justification for the proposed NCT. We therefore request the Commission to elaborate on these issues in the upcoming Impact Assessment (“IA”).

It is the position of the Danish Chamber of Commerce, that Article 101 TFEU and Article 102 TFEU already provide a solid foundation for European competition law and are sufficiently flexible to address the changing markets. It is our understanding that it is the long-standing position of the Commission, that market developments should be addressed in the block exemptions and the accompanying guidelines. This is a position which we do not believe should be changed.

Specific remarks

Re. structural competition problems

The Consultation makes references to certain structural competition problems which the Commission has identified as part of its experience with enforcing the EU competition rules. These are described to be problems which the current competition rules cannot tackle or cannot address in

the most effective manner and are categorized as either “structural risks for competition” or “a structural lack of competition”.

However, neither of these types of structural competition problems are described in any greater detail in the Consultation. As such, there is no description of what these structural competition problems consist of, if there are specific sectors or situations in which these problems are more likely to occur, or why the existing competition rules are not enough to address these problems.

While the Danish Chamber of Commerce shares the Commission concern that a lack of competition can lead to higher prices, lower quality, less choice and innovation, we are not convinced that the proposed NCT is appropriate or necessary to address the identified structural competition problems.

The Danish Chamber of Commerce further questions whether the possibility of conducting sector inquiries – together with existing competition rules – does not already give the Commission enough tools to investigate and address problems arising in specific sectors.

Furthermore, the Danish Chamber of Commerce requests that the upcoming IA contains a description of the new definitions which the Commission is using in the IIA and Questionnaire, but which has not previously been defined. One example is the definition of the term “gatekeeper” in section 18 of the Consultation.

Re. assessment of policy options

Understanding that the proposed NCT is intended to be used in conjunction or addition to the existing competition rules addressing anti-competitive agreements and concerted practices between companies in Article 101 TFEU and abuse by a company of a dominant position in Article 102 TFEU, the proposed NCT should have the same general character, flexibility and scope.

Additionally, it is the position of the Danish Chamber of Commerce, that Article 101 TFEU and Article 102 TFEU already provide a solid foundation for European competition law and are sufficiently flexible to address the changing markets. It is our understanding that it is the long-standing position of the Commission, that market developments should be addressed in the block exemptions and the accompanying guidelines. This is a position which we do not believe should be changed.

As regards the authority which the proposed NCT will grant the Commission, e.g. the power to impose especially structural changes on private companies, the Danish Chamber of Commerce has always been opposed to the competition authorities being given such extensive, invasive and wide-ranging powers, as this is a quantum leap from what is known today. This being even more the case considering these measures may be imposed on private companies, which has neither violated current competition rules nor may be considered an “essential facility”. Consequently, the Danish Chamber of Commerce cannot support any initiative whereby the competition authorities are being granted such extensive, invasive and wide-ranging powers.

It is the opinion of the Danish Chamber of Commerce, that if a NCT is to be introduced, its application must be reduced to behavioural precautions and applicable only under very specific and narrow conditions, and only after a rigid sector inquiry has documented the existence of such structural competition problems. There must be a razor-sharp definition of which type of behaviour the Commission will be able to intervene against.

Acknowledging that sometimes competition issue arises as an unforeseen consequence of another EU-legislation, we encourage the Commission to take the appropriate steps to ensure, that the competition problems the Commission seeks to address with the proposed NCT is not in fact an unforeseen and unintended ripple effect stemming from another EU-legislation. Furthermore, we also encourage the Commission to investigate whether the structural competition problems can be addressed by adjusting existing EU-rules, rather than introducing a new competition tool.

Similarly, before any NCT is introduced, the Commission should take special care to ensure that such NCT does not undermine the application of existing competition law or sector specific legislation.

Furthermore, any NCT must pay special notice to avoid being used, interpreted or constructed in such a way, that it will de facto protect certain types of industries, sectors, technologies or business-models at the expense of others. The application of the proposed NCT should therefore not be limited to only digital companies, or companies which can already be classified as dominant pursuant to Article 102 TFEU.

Considering the ongoing review of the existing competition tools, including the horizontal and vertical block exemption regulation and the guidelines, as well as the public consultation on the definition of the relevant market published by the Commission on 26 June 2020, and while we are waiting on the upcoming report on the Commission's investigation of the existing merger rules, the Danish Chamber of Commerce is surprised that the Commission has launched this proposal for a NCT at this time.

The NCT initiative appears even more premature taking into consideration, that neither the IIA nor the Consultation address the question of why the structural competition problems cannot be addressed through the existing – maybe revised – competition rules.

The Danish Chamber of Commerce suggests that any further work on a potential NCT should await the outcome of the current reviews, as to determine if the existing competition rules – maybe post review – may in fact be enough to address the structural competition problems the Commission are referring to.

Re. institutional set-up of a new competition tool

The Danish Chamber of Commerce considers it imperative, that any new competition tool is subject to strict oversight and is accompanied by appropriate safeguards, rights of defence and due process.

While we understand and respect the Commission desire to act quickly against competition problems within the Internal Market, sometimes even before the competition problem is a problem, this must be weighed against the companies justified expectation that if they follow the rules, they are free to develop, expand and run their business as they see fit.

Considering the extensive, invasive and wide-ranging powers the NCT will grant the Commission, of imposing behavioural and structural remedies on companies which has in fact not violated or breached any currently legislation, it is crucial that the requirements for the Commission investigative process are very strict.

As a minimum, the Commissions investigative process and showing of market failure must fulfil the requirements necessary for imposing sanctions and fines subject to existing competition rules. Consequently, the Danish Chamber of Commerce share the Commissions position, as it is stated in the Commissions press released, that a rigorous market investigation must be carried out, before any NCT remedies may be applicable, but would like the Commission to elaborate on this in the upcoming IA.

As far as the Commissioners investigative powers, it is important to adjust these to the situations in which the NCT is intended to be used, which is in situations where there is in fact no violation of existing competition rules.

The possibility of using the invasive investigative tools applicable to ordinary competition cases, such as possible cases of collusion or misuse of dominance must not be allowed against companies which are not suspected of any wrongdoing. The possibility of conducting dawn raids should for example not be possible, while the possibility of imposing fines may be considered, where the companies do not meet certain reasonable deadlines. At the same time, there must be specific deadlines within which the Commission must decide whether to make use of the NCT-remedies, so that the companies are not left in uncertainty for years.

The Danish Chamber of Commerce considers it a necessity for the introduction and application of the proposed NCT, that the companies' right to defend themselves are respected both throughout the investigative process, but also in connection with any subsequent measures. This includes - but is not limited to, the right to be heard during the investigation, the right to be heard on the proposed measures, as well as the right to judicial review by the European Court. We acknowledge the Commissions statement to that fact in the IIA, but would like the Commission to elaborate further on this in the upcoming IA.

Best regards,

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The Danish Chamber of Commerce