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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**
**COMPETITION COMMITTEE**

## Global Forum on Competition

# HOW CAN COMPETITION CONTRIBUTE TO FAIRER SOCIETIES?

**- Summary of Discussion -**

**29 November 2018**

The attached document is a summary of the discussion held during Session I of the Global Forum on Competition on 29-30 November 2018.

More documents related to this discussion can be found at: oe.cd/cfs.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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# *Summary of Discussion*

## *By the Secretariat*

1. The **Chair,** Johannes Laitenberger, Director General of the European Commission's Competition Directorate General opened the panel noting that it is an urgent and societies challenging theme.

2. As a start to the session, Mr. Laitenberger introduced the panel that represented a diversity of substantive and of geographical views and perspectives. The panel consisted of Professor Pinar Akman, Director of the Centre for Business Law and Practice of the School of Law at the University of Leeds; Mr. Arsenio Balisacan, Chair of the Philippine Competition Commission; Professor Jonathan Baker, research professor of law at the American University Washington College of Law; and Professor Frederic Jenny, the Chair of the OECD Competition Committee and Professor at ESSEC.

3. The Chair set the context of the session before inviting the panellists to take the floor. In the wake of the financial and economic crises over past decades, and in particular over the last 10 years in Europe, the United States, and around the world, uneasiness and discontent have grown. This unease has had an impact on every public institution, but it has had a special impact on competition authorities. There is a perception by consumers, businesses, and citizens, that "the game is rigged" or that "the system works for the few not the many". This is a particular challenge for competition authorities that are tasked with ensuring consumer welfare through undistorted competition. It is a particular challenge to the conviction that a distributive process empowered by undistorted competition is the best tool to deliver consumer welfare. Furthermore, it is an even greater challenge for jurisdictions where the fairness ambition is embedded in the law for competition, for instance in the European Union. In the EU, fair competition is identified by the legal texts as a bedrock of what authorities strive for and what they must ensure. To reference sociologist Niklas Luhmann, this can be seen as an effort to ensure acceptance and legitimacy by procedure. Legitimacy through due process in the way in which we apply the rules, and legitimacy through a competitive process that is delivered on the merits. The merit notion makes the link with fairness very clear. All of us intuitively see an outcome as fair that has been acquired on the merits, and an outcome as unfair that somehow has not been acquired on the merits.

4. The Chair then challenged delegates with a series of pertinent questions delving further into this notion of merit. Does this perceived unease and discontentment lie in the inability of competition authorities, or the competition community, to explain clearly correctly what they do and why? The Chair asked delegates to consider if in fact the framework of legal rules and economic analysis is legitimate or not, and if it is correct than does it need to be applied better. The topic comprises different dimensions and that come back to the same question: "Can we make sure that the invisible hand is not deflected through collusion or strong-armed to abuse? What does it take, in our present economic and societal environment, to ensure this?" There may not be a one-size-fits-all answer.

5. The Chair then introduced Pinar Akman for her presentation.

6. **Pinar Akman** started her presentation by referring to the paper by Sean Ennis and OECD colleagues, which states that "policies that enhance competition essentially by their nature can help to reduce inequality." If inequality were considered as one understanding of fairness, then by enforcing competition, competition authorities would, as a by-product, also reduce inequality in a society. The paper also states, "…this is not to say that competition law and policy should specifically target inequality in day to day competition actions."

7. Ms. Akman explained that she would focus her presentation on the role of fairness or the role of unfairness in competition law enforcement, specifically, and how competition authorities should or should not consider it when enforcing competition law. Fairness has a limited role to play in competition law enforcement. There are several ways in which fairness might be taken into account by competition authorities, but there are many other reasons why fairness should not be taken into account.

8. Fairness should almost certainly taken into account when it comes to procedural fairness and how the authorities actually enforce the law. Looking at prohibitions of bid rigging and prevention of state-aid, there is an element of fairness there as well which make sense. Numerous jurisdictions have rules, including the European Union and those jurisdictions who have modelled their competition laws on the law of the EU, which explicitly refer to a notion of unfairness, such as the prohibition of unfair pricing.

9. Notions of unfairness or fairness should not be a substitution for an assessment of the anti-competitive effects of a product on the marketing question. Fairness cannot replace economic analysis. Furthermore, it is not necessarily appropriate for authorities to pursue cases on the basis that the practice appears unfair, no matter how unfair it looks. In particular, fairness or unfairness should not be used to protect competitors of a company from competition in competition law assessments.

10. Ms. Akman then explained why, in her perspective, fairness has such a limited role to play. She noted the distinction between procedural fairness and substantive fairness, not just in competition law but also in all areas of the law. Judges who decide on cases based on a certain aspect of unfairness are a lot more comfortable with scrutinising procedural fairness rather than substantive fairness, that is, the substantive fairness of an outcome. Other areas of law, such as contract law, consumer law, or even unfair commercial practices law, do not generally scrutinize the fairness of the outcome. In some cases, the law may scrutinize some aspect of the bargain when the outcome reached appears to be grossly unfair to one of the parties. For example, in contract law, scrutiny could take into consideration aspects like inequality of bargaining power or economic duress, i.e. one party is signing a contract with a gun to the head, which explains the unfairness of the outcome. Even when the law is interested in the outcome, it is usually through the indirect means of scrutinising the process through which that outcome was reached.

11. In regards to competition law, there are many aspects of procedural fairness, which are explicitly and clearly in the rulebooks, for example: the right to be heard; access to file; the opportunity to have an oral hearing at proceedings before competition authorities. These elements all ensure that the outcome is reached through fair means of procedure. Rules against bid rigging and state aid can be consider on the same grounds. The process of competition is disrupted when a government gives state aid to one party and not the other. There is an element of procedural fairness even in the prohibition of bid rigging and state aid. As soon as the assessment of fairness starts to move from this procedural aspect to a more substantive fairness assessment, there are formidable difficulties.

12. The first obstacle is that we do not know what "fairness" means although we have an idea. Research shows that even monkeys have an inherent feeling of unfairness: they know when they have been unfairly treated. It is difficult to translate this feeling into actual practice and arrive at a consensus on a single definition of fairness, which can be used for a legal assessment of a business's practices. Fairness can be interpreted as treating everybody same way but I can also mean that only like-for-like should be treated in the same way. Does fairness refer to distributive justice, implying that people should be treated differently given that some are more deserving than others depending on the circumstances are? Does fairness mean "an eye for an eye and a tooth for a tooth"? Some behavioural models suggest that when parties are reacting to unfairness, they are returning to what they perceive to have received from the other side.

13. Assuming a single definition of fairness can be identified, our societies generally lack a final arbitrator who would decide on this definition. Who makes the judgement that a certain practice is fair or unfair? Perhaps more importantly, when do they make that decision? Business law relies on legal certainty. Is it possible to identify if a conduct occurs the outcome is unfair or is this mostly an assessment that is done ex-post? Finally, what are the objective criteria on which the judgment of fairness will be made and who has the authority to make that judgment? Competition authorities would also have to decide on recipient of their efforts to promote fairness. Authorities could focus on fairness to competitors or alternatively protecting the competitors from one another when an authority believes one is acting unfairly. This latter proposition is close to the prohibition of unfair competition. Unfair competition laws and competition laws serve very different purposes. Unfair competition law aims explicitly to protect market participants from one another. Competition law aims to protect the competitive process in the market in the interest of all market participants. The Court of Justice of the European Union expressed this quite explicitly when it said, "Sometimes rules of unfair competition may actually be anti-competitive in themselves, because it's about protecting the competitors for the sake of protecting the competitors, not about protecting competition on the market." In this case, the Court of Justice gave a ruling in relation to an unfair competition law prohibition, which prevented eye-catching individual price comparisons. This was considered as unfair according to the unfair competition law of the Member State, but the Court stated "but there's nothing in itself that is anti-competitive because it's preventing illegitimate types of price comparison or price competition from taking place on the market."

14. Fairness to competitors is one alternative, however we might also mean fairness to customers or fairness to consumers which can result in different outcomes. The interests of the customers, for example, of a dominant undertaking, are not necessarily aligned with the interests of the consumers, the final users of the product. A practice that harms the customers of a dominant undertaking may even benefit the final consumers of that product and vice versa. We could mean fairness to competitors, customers as well as consumers, but in reality that might be impossible to achieve concurrently, because those interests will not be aligned.

15. The prohibition of Article 102 of the Treaty on the Functioning of the European Union demonstrates the challenges facing authorities when they try to enforce rules with aspects of fairness, specifically the prohibition of unfair pricing and the prohibition of discrimination. According to Article 102, an abuse of a dominant position refers to a dominant undertaking directly or indirectly imposing an unfair purchase or selling price. In the United Brands case, which is the seminal ruling on unfair pricing in Europe, the Court of Justice said, "…a price is abusive if it has no reasonable relation to the economic value of the product." The Court then stated, "…there are two stages to deciding whether there is no

reasonable relation to the economic value of the product: in the first step the competition authority should decide whether the price is excessive, and when it's decided that it is excessive, it should then consider, and it's not an alternative, it has to then consider, whether the price is unfair in itself or it's unfair when compared to competing products." It is not a prohibition of excessive pricing, but a prohibition of unfair pricing. The Competition Appeal Tribunal recently sent the Pfizer-Fling case back to the Competition and Markets Authority (CMA) because of the specific way in which an authority might have to prove that the price is unfair in itself or unfair when compared to competing products.

16. The EU Commission identified, that the case law of the Court of Justice of the European Union and the decisional practice of the European Commission do not provide much guidance on how to determine whether a price is unfair in itself. Ms. Akman also asserted that the same may apply to whether the price is unfair in comparison to other products. There is little case law on unfair pricing and most commentary on the topic precedes based on what is prohibited is excessive pricing rather than unfair pricing, which is not the case. There are numerous problems with this prohibition. How can the price be unfair if somebody has already purchased that product at that price? If the price is about the willingness to pay of the customer, the customer should not have bought the product. If we want to have a competition law prohibition that looks at the level of prices, we should be more concerned about the customers unable to purchase the product, because the price was so high. We should be focusing on the deadweight loss rather than the ones who have been able to purchase the product. Ms Akman demonstrates in her research that one of the only ways to make sense of that unfairness of the price is look at the procedure. The bargain that took place between the two parties, and whether that is what makes the price unfair.

17. There are inherent problems with operationalising the prohibition on unfair pricing. If we are going to take the unfairness notion seriously, then traditional law and economics approaches will not provide the answer to when an outcome is unfair. However, work done in behavioural economics, which looks at different notions of fairness and unfairness, could help. In Ms. Akman's earlier research, she, along with a colleague, took one of these models, the principle of deal entitlement from Kahneman and his colleagues, to see whether this could be used to operationalize unfair pricing in competition law. Insights from other behavioural economics models suggest that the fair price might require discrimination, because the fair price is one that is based on the willingness to pay of the individual in question and therefore when everybody has different willingness to pay, the fair price for every individual will be different. In order to price fairly, the company would have to price discriminate. However, under EU law, and those modelled on it, this creates a catch-22 situation in the context of abuse of dominance, because the rules of the jurisdiction prohibit not only unfair pricing but also price discrimination. Therefore, if the fair price is a discriminatory price, how can a dominant undertaking comply with both prohibitions: the prohibition of unfair pricing and the prohibition of discrimination?

18. Behavioural models tend to involve relativity and subjectivity. The notion of fairness is usually relative in a particular context between those two transactional parties, rather than an objective notion of fairness. Legal and business certainty would be undermined if we were to have a fairness concept that was based on subjectivity.

19. As the OECD also noted a few years ago, price discrimination or any type of discrimination, would most likely create an assumption of unfairness amongst the general population. However, discrimination may actually make that market more competitive, for example, by making more seats available on a particular flight. For example, OFGEM, the UK energy regulator, imposed a non-discrimination license requirement on energy retailers

in the United Kingdom and stipulated that energy companies cannot charge different mark-ups in different regions in order to alleviate some of the disadvantages suffered by those vulnerable consumers. This regulation was imposed when the energy markets were opened to competition incumbents. OFGEM found that those who switched to the entrant in any given region was getting a much better deal than those who stayed with their incumbent. Those who did not switch to the new entrant were mostly the vulnerable consumers – economically poorer, and/or pensioners - because they did not have the abilities or access to means of switching. The entrants were stealing consumers capable of getting a better deal from the market anyway. It appears that this introduction of the non-discrimination rule increased offline tariffs, but also increased significantly the discounts that energy retailers gave for their online tariffs. The non-discrimination rule essentially pushed the energy retailers to segment the market in another way. Energy retailers could not discriminate between regions, but they could discriminate between online and offline tariffs. These vulnerable consumers were unable to benefit from the price reductions because the retailers were now giving the best prices for online Direct Debit payers and most of those were not the vulnerable consumers that OFGEM‘s rule was supposed to protect in the first place. The rule itself probably caused further detrimental distributional effects by the market segmentation along the lines of offline and online. Most likely, the discrimination rule actually made the prices go up for everyone. As this example illustrates, pursuing a policy based on fairness might actually lead to other unfair outcomes.

20. In conclusion, Ms. Akman emphasised the distinction between fairness and welfare. Legal rules are better selected based on their effects on the well-being of individuals, rather than notions of fairness. In the context of competition policy and enforcement, legal certainty has to be at the forefront when authorities consider adopting rules or decisions based on fairness notions. Fairness poses a serious challenge to that business and legal certainty aspect of competition enforcement. Legal certainty is not only a fundamental principle in modern laws; it is also a human right in many laws. There has to be sufficient business certainty when the enforcement is directed towards business practices, so that the parties involved can, with sufficient certainty, can anticipate outcomes with reasonable certainty should it come under scrutiny. Even when pursuing explicitly a policy or an action based on fairness, the outcome might actually lead to unintended or might pose unintended consequences. Market dynamics are not necessarily predictable. Competition law is not unfair competition law, and even experienced authorities can fall into that challenge of reacting because something seeming to be grossly unfair has happened to a competitor, as opposed to reacting when the market conditions are distorted. Fairness is obviously a guiding principle, but not a tool for competition authorities to apply in cases they pursue. As Commissioner Vestager said, most of the time competition authorities get consumers a fairer deal simply by keeping markets competitive; that is, by keeping markets competitive by applying competition rules with the traditional legal and economic tools that the authorities have. Thank you.

21. The Chair thanked Ms. Akman for this very rich introduction to this morning's subject. He then turned to **Arsenio Balisacan** to discuss the legal and economic interpretations of fairness Illustrated through the Asian experience.

22. Mr. Balisacan started by saying that since the idea of fairness is very vague; to simplify the presentation will take “fairer societies” to mean a more equitable distribution of income for reported opportunities generally. Countries are very diverse economically and institutionally, and competition policy should not be taken in a vacuum. That diversity means that the competition policy and its effectiveness are not framed in a vacuum and

they are situated in particular space, time and a country's economic conditions and circumstances.

23. Asia is the fastest-growing region in the world. In Asia, some of the many big countries contribute to that growth and associated rising inequality. Of note, compared to recent growth trends, the period in the 1960's and 1970's growth did take place without necessarily or without substantial increases in inequality. Even with that growth and rising inequality, poverty has declined substantially. There is no comparable period in modern times where such decline in poverty has taken place. Contributing to that rapid decline in poverty is the structural transformation that has taken place in many of the developing countries where employment opportunities were created for the vast number of unskilled and skilled workers, particularly in manufacturing facilitated by globalisation, technological change and in many cases adoption of policies that are friendly to investment and growth.

24. Asia includes both countries with low inequality at the start of rapid growth with a strong response of poverty reduction to such growth, for example for China, Vietnam, and Indonesia. However, there are also countries where inequality has been high to begin with and the response of poverty to growth has not been as strong, for example, the Philippines. There are also cases where inequality appeared to remain high, and interestingly Vietnam is a very good case. There has been substantial poverty reduction and yet despite the rapid growth inequality has not decreased that much.

25. This rising inequality poses a serious threat to further poverty reduction. More importantly, the rise in inequality may undermine the sustainability of growth and reduce the potential for growth in the future. Three channels could lead to such outcome.

26. First is the political polarisation and breakdown of social cohesion that rising inequality can bring. Such a breakdown can stifle the investment climate and therefore lead to future rapid growth decline. The second one is attributable to this imperfect credit market argument, is that the rising inequality would reduce the opportunity for the poor to invest in public human capital, therefore leading to waste of human resources and such waste would lead the lower productivity and income growth. The third channel, the focus of this presentation is referred to as that economic power begets political power, that is the economic constraints and concentration and market power could increase political inequality and political power reshaping the rules of the game that perpetuate economic inequality. In other words, economic power brings about a concentration of market power that will then change the rules of the game to ones that favour the economic elite. This would further perpetuate economic concentration, an issue that is becoming more pronounced in some Asian countries, Korea for example.

27. Mr. Balisacan then turned to the case of the Philippines to illustrate these dynamics. During the past 40 years, the country has achieved an unenviable record in poverty reduction, vis a vis developing Asia. This has been a result of the combined impact of low per capita GDP growth in the country compared to most of its neighbours, and importantly, the weak response of poverty to growth. The second one has been, or could be, attributed to the persistently high level of inequality in the distribution of income and wealth or opportunities in general. In the literature, there is an increasing evidence of a causal link between excessive income inequality and lower future income growth.

28. Since the late 1990s, the Philippine economy has exhibit strong performance, becoming one of the fastest growing emerging economies in Asia and in the world. At the same time, looking at the social indicators, growth remains weakly inclusive, real wages

hardly changed. Absolute deprivation remains high. The question remains, given the channels cited earlier, could this growth be sustained? The Philippines has recognised the problem with inequality and the 1987 Constitution mentioned the problems with the economic elites, problems with income distribution.

29. Since the reform efforts started in the 1980s, competition policy has been included as one of the key elements for creating and sustaining economic growth. While it has taken 35 years to implement competition policy, other components of the reform agenda have contributed to the growth that seen in the last decade. In the last three years, there has been a tremendous political commitment to pass a competition law, despite the pressure started by the elite. Competition policy is recognised as a key to sustaining rapid growth and achieving a more equitable distribution of incomes and opportunities. The political commitment to pass a comprehensive competition law in 2015 stems from the observation that despite the recent economic growth, though rapid, it has not been inclusive and this time the goal is to keep that growth rapid and sustainable. Competition policy has been mainstreamed in the development agenda and is part of the Philippine development plan to 2022.

30. The Philippines competition law has broad goals: protecting consumer welfare and advancing economic development by preventing economic concentration and market power that unduly stifles competition. Despite the broadness of the goals and other considerations for example public Interest considerations, in practice the competition authority employs filters such as, consumer welfare, the likelihood of success, and resource constraints, to prioritize enforcement recognising that there are other policies of government to achieve inclusive growth. Competition policy is complementary to other policy tools.

31. One of the filters the Competition Commission uses in choosing its cases or activities is the potential impact on consumer welfare. The pursuit of the consumer welfare standard has the effect of enhancing economic growth, while achieving a fairer distribution of income thus addressing mutually reinforcing effects of market policy distortions, market power and rent seeking activities. These effects perpetuate market inefficiencies, pushing consumer welfare down and inhibiting economic growth. By using the consumer welfare standard, the Commission achieves the greater objective of enhancing overall welfare and overall efficiency in the economy, therefore allowing for a more sustainable growth. Looking at the issue of food, for the poorest 30% of the population 16-21% of their income goes to food. Food markets in the Philippines are highly distorted causing a rise of prices of almost 50% higher in the absence of such distortions. The removal of these distortions would result in a significant impact on the welfare of consumers and result in an increase in real incomes. The pursuit of competition policy, particularly advocacy towards removing those distortions works for fairness as defined earlier.

32. Competition policies and their effectiveness cannot be discussed in a vacuum. They must be situated in a specific space and time. Competition policy is part of the Philippines economic reform agenda in order to achieve inclusive development. The pursuit of consumer welfare standards in competition policy enforcement enhances economic growth while achieving a fairer distribution of opportunities. That might not be the case for developed countries, but is in the case of developing countries where you have distortions working against the poor.

33. The Chair thanked Mr. Balisacan noting that the presentation tied in naturally with the presentation of Mr. Jonathan Baker.

34. **Mr. Baker** discussed how competition could help reduce inequality. He recalled that when he spoke earlier in 2018 at the OECD, he discussed reasons why market power

is growing and the economic evidence should be interpreted as reflecting market power. In his presentation at the GFC, Mr. Baker asked delegates to consider the premise that market power and inequality, as well, are each growing in advanced economies. These trends are most acute in the US but they are also apparent elsewhere.

35. Growing inequality reduces economic growth. Financial hardship and credit market imperfections combine to reduce people's ability to invest in education and training, to change jobs, to learn new skills or start new businesses. Inequality harms the morale and the work effort of those who are left behind. It also leads to an inefficient provision of public goods that benefit the non-wealthy, like transportation and education even if they would foster overall economic growth. Growing inequality tilts public policy to favour the interests of the wealthy, which potentially creates a vicious public policy cycle that could perpetuate inequality and market power and threaten democracy. Inequality undermines the legitimacy of the social order, it lessens the sense that everyone has a fair opportunity and an equal voice, and finally many people would say inequality is objectionable morally. Put in utility terms, the marginal dollar may be more valuable socially if it is given to a struggling family to spend than to a wealthy one. There is a wealth transfer from the victims of market power to the firms exercising it. There are allocative efficiency losses and there is wasteful rent seeking as firms invest to create, obtain or preserve market power. Within the markets that are affected by market power, innovation and productivity improvements slow.

36. In summary, market power slows economic growth and increases inequality. The main reason that market power increases inequality is that the rents accrue mainly to those who are already much wealthier than most. According to OECD economists, market power plausibly accounts for 10-25% of the wealth of the richest 10% of the population in OECD countries. Market power also raises the return to capital, while lowering an economy's growth rate, which suggests it tends to worsen inequality in Thomas Piketty's framework.

37. Antitrust enforcement alone cannot eradicate inequality. Antitrust laws do not necessarily reach all exercises of market power but can help to address it. That may be clearer for the United States because anti-competitive conduct is a predicate for antitrust enforcement in the US. However, in all jurisdictions competition policy may not be able to reach market power that is protected by the government or by intellectual property rights. Inequality has many causes, of which market power is one contributing factors.

38. Mr. Baker emphasised a causal link that goes from market power to inequality, but there may also be feedback in the other direction. Firms with market power may be able to use their political power to extend or entrench their economic position and that possibility increases the importance of deterring the exercise of market power through competition policy, even if antitrust enforcement is just one of many policy responses to inequality.

39. Steve Salop and Mr. Baker identified seven options, organised into categories, for the response of competition agencies to inequality. Each option has advantages and disadvantages, and should be considered for discussion not as recommendations.

40. The first category involves strengthening competition overall which promises to reduce inequality indirectly by lessening market power generally. Strengthening competition can be achieved by giving enforcement agencies greater resources or by reforming the rules. The second category points out two ways that competition agencies can target inequality in the exercise of enforcement: case selection and remedies. Agencies could prioritize cases where enforcement benefits the less advantaged and the middle class.

For example, attacking anti-competitive conduct in food manufacturing, retailing, fuel and health care.

41. Targeting the exercise of monopsony power against workers and small businesses competition agencies could also benefit less-advantaged victims. An agency might condition a merger of cable television or broadband providers on the merging firms providing subsidies to low-income buyers. The remedy always needs to address the competitive problem first and it may not be effective when buyers can resell the subsidised products.

42. The third category involves recalibrating competition policy goals. Competition policy is concerned with quality and innovation, not just price and output. Welfare losses should be evaluated within an antitrust market using a partial equilibrium framework. Competition policy should focus on preventing anti-competitive conduct that reduces buyer surplus, not aggregate surplus, when sellers exercise market power and on preventing anti-competitive conduct that reduces seller surplus, not aggregate surplus when buyers exercise market power. Competition policy should be concerned with harm to buyers whether they are intermediate buyers or end consumers; when the sellers exercise market power; and with harm to workers and other suppliers when buyers exercise market power. This is more or less what United States courts and enforcers do now, except that the enforcement agencies in the US will sometimes decline to challenge mergers that harm competition in one market when the merger greatly benefits competition in another market.

43. Relying on the welfare standard does not directly prevent wealth transfers to those at the top of the distribution, but it should slow them. In some cases, though this welfare standard could increase inequality; for example, it could prevent price fixing by a worker-owned manufacturer of luxury goods. The second option is for competition policy to recognize excessive pricing by dominant firms as an antitrust offence. Some jurisdictions do this now. However, US antitrust law is predicated on enforcement. It does not consider exploitative monopolistic conduct except possibly under the Federal Trade Commission Act but that would have to be tested in court.

44. The final option in the third category is to adopt reduction of inequality as an explicit competition policy goal. While it would have the advantage of directly targeting inequality, but inequality as a goal could also have substantial disadvantages. It may not be practical: implementing an inequality reduction goal would require a detailed and potentially difficult distributional analysis and it is especially difficult to determine distributional effects of a conduct when the competitive harm involves intermediate goods. It may also be hard to evaluate the wealth distribution of shareholders, for example, when a firm's equity is owned by a pension plan that benefit workers. Pursuing equality as a goal would probably require a complex analysis of the incidence of taxes that are paid by corporations and their owners. Another disadvantage of an inequality reduction goal is that it would require explicit trade-offs across groups, which may be difficult, controversial and divisive. Courts would need to answer some very difficult questions, such as, should harms to the poor count more than harms to the middle class? Can the benefits to the wealthy ever outweigh losses to the less wealthy? Would we be comfortable allowing low-income consumers to exercise monopsony power against payday lenders that charge them a very high rate while not allowing hospitals to exercise monopsony power against nurses? Would we allow automakers to agree jointly to set high prices for luxury models if that same agreement offsets that by lowering prices for entry-level models?

45. The recent US debate over antitrust goals may be a response to the two secular trends emphasised in Mr. Baker’s presentation: growing market power and growing

inequality. Before the late 1970s, US courts often referenced other social and political goals along with economic goals, particularly a concern with the threat to democracy and personal freedom from concentrated economic power and a concern to provide small businesses with a realistic opportunity to compete. Articulation of these goals may have been helpful ensuring political support for antitrust enforcement. In practice before the 1970s in the US, the social political goals were pursued only indirectly. They reinforced the economic justifications for presuming competitive harm from market concentration, but US enforcers never litigated the political power of large firms like Standard Oil. The monopolisation cases were concerned only with economic harms. In other words, courts in the US never considered political and social considerations when resolving individual cases under the antitrust rules. The courts and enforcers need to protect the deeply entrenched norm against direct political influence on antitrust enforcement, in order to discourage special interest protectionism, partisan misuse of the antitrust laws and crony capitalism.

46. Some conservatives create a false choice between the status quo and the adoption of public interest goals when they dismiss efforts to strengthen the antitrust. Some call themselves neo-Brandeisians who do that by equating the current goal with what the Chicago School commentators advocate. Furthermore, they question whether enforcers and courts care about harm to quality and innovation and harm to the suppliers and workers. In the US, antitrust could be strengthened and the error cost balance can be recalibrated to enhance deterrence by recognising that US antitrust already aims to prevent welfare losses to trading partners that result from lessened rivalry.

47. Mr. Baker perceived the US "goals" debate as a distraction from the discussion on how best to strengthen antitrust rules. However, some non-US jurisdictions that have a tradition of looking to public interest goals where it may be more consistent with the legal and historical norms to incorporate fairness and other social and political goals more extensively than it is in the United States. What is right for the US may or may not be right for other nations.

48. The Chair thanked Mr. Baker and turned to the Chair of the Competition Committee, Mr. Frédéric Jenny, to address in more in detail the issues raised by the previous panellists.

49. **Mr. Jenny** introduced his presentation by explaining that he would talk about perceptions more than reality and outcomes more than procedures. In contradiction to Ms. Akman's point that competition law is in the interest of all market participants, Mr. Jenny hypothesised that in Europe, and possibly, in other developed countries, labour now challenges this assertion. When examining competition and fairness, labour is part of the discussion. There is a resurgence in populism in the world and particularly in Europe. Populism is based on two types of opposition: opposition between the people and the elite with the idea that the elite is corrupt and does not represent the desires of the people. Another opposition is between the inside and the outside. A crucial element of populism is protectionism, which sends the argument back to international trade. Many of the developments that we have seen in competition come from or are consequences of developments in international trade. As stated earlier, one of the elements of populism is protectionism, including economic protectionism, which highlights the threat to domestic producers from cheap foreign goods, to domestic workers from cheap foreign labour, and to domestic debtors from foreign creditors. Similarly, competition is disrupting the lives and the status of people.

50. Two studies undertaken by the Bruegel Institute examine the recent rise in populist views. One study concerns the US, which is the vote for Trump; and the other, is the vote

for Brexit in the UK. In both cases, one finds the same result: there is a relationship between the rise of inequality and a reaction against free markets and competitive markets. In both cases, voting led to an attempt to restrict the importance of foreign competition and competition in more general terms. The drivers of economic resentment is the claim that the elite is, by promoting international trade, international competition, and domestic competition, lying and pushing an agenda which works against the people.

51. Mr. Jenny then questioned the impact of competition on labour. The last WTO report, amongst other studies, notes that many governments have adopted protectionist measures, which has an effect on trade. However, in contrast, in the 1980s and the 1990s, international competition, and international trade were considered as good for development and the promotion of welfare. He then noted that the current model of competition refers to the efforts of firms to become more efficient. Firms who cannot become more efficient disappear and their resources are recycled in other sectors. There is free entry and circulation in the sector. In the end, there is an equilibrium which is to consumers due to efficiency, the lower prices etc. However, this model assumes that behind the product market competition, there is a labour market, which is undifferentiated, competitive and very large. Therefore, if there is job loss, bankruptcies because of competition, employment can be found somewhere else for the same level of wages. However, labour markets do not function in this way. They are fragmented geographically and by skills; people are not mobile. The result is that people become trapped undermining the assertion that the competition law is in the interest of all market participants. People, who are unemployed and unable to relocate for a new job, do not believe that competition is serving their purposes. They feel that competition tends to work well for capital, because capital is mobile. Competition tends to work well for highly skilled people because they have the means to find jobs more easily. For the unskilled people who are caught, competition does not work well.

52. Mr. Jenny cited studies that compare the competition coming from China into the US. In principle, from trade theory, the impact will be diffused throughout the whole economy, not any particular region or people. However, David Autor points out that this is not what happens. Long lasting effects are very localised. Little evidence suggests that employment gains in non-exposed local industry substantially offset losses in exposed industries.

53. Unskilled labour is often not mobile due to diverse reasons. More than one family member may be employed, rendering relocation difficult or even impossible. Housing prices fall as unemployment in a given area rises, locking in people who cannot access the investment in their house to move elsewhere. Studies on labour mobility show that both in the US and in Europe over the last 30 years labour mobility has declined significantly, which could be attenuated if effective ways to redistribute income to displaced people were in place.

54. The development of the digital economy further widens the skills gap as demonstrated by a plethora of studies in the US and Europe. Competition authorities are either naive or misinformed when they assert that labour issues are not their concern. If competition leads to disruption and if disruption leads to victims that cannot retool themselves, those people are going to suffer. A study, for example, on the US federal government's program to help workers who lost their job concludes that the effect is very bad. In France, adult education to retool unemployed people who are unemployed does not work very well.

55. The trade debate illustrates that when there is intense competition with disruptions, capital labour markets do not adjust as economic theory assumes. The losers are the low-skilled wage earners. Capital is on the winning side because it is very mobile as is highly

skilled labour, which seems to be able to reallocate itself. This creates the idea that maybe competition is unfair. Unfair to those people who are caught leading to the growing rejection of competition as part of the social economic social contract. If we include labour, than unlike the common discourse, competition does not benefit all market participants. Competition has an unequal effect. Dani Rodrik recognised that in a formula that could be applied to competition, that we have "mismanaged the process of trade liberalisation very badly" because the unfairness of the result or the perceived unfairness of the result has not been taken into consideration.

56. Angus Deaton, Nobel Prize in Economics, also addressed this issue saying that fairness is really the problem in these issues. Inequality can have dynamic benefits. However, when inequality can be addressed, then inequality may be interpreted as being a lack of fairness to people. Furthermore, median income stagnation is the direct result of rising income and wealth at the top, which links into points raised in the presentation by Mr. Jonathan Baker.

57. Unfairness leads to populism. Rod Simms, the head of the Australian Competition and Consumer Commission (ACCC), described the "Pub test" "…if you can't explain it in a pub, there must be something wrong with it. I applaud the economists who wade into the public sphere and will ground their contribution in the facts of everyday life particularly when that means relaxing the often-abstract assumptions of theory".

58. What is fairness? Referring back to Ms. Akman's presentation, Mr. Jenny noted that she takes a strong stance stating that fairness is an undefined concept while addressing different dimensions about procedural fairness. Mr. Jenny asserted that the real issue is vertical fairness: the relationship between the employed and the firm that employs. Vertical fairness can also be between the person negotiates the contract and whoever is offering services. Thaler and Kahneman state that people react with respect to a reference transaction. For example, a small shop employs for USD 9.00 (United States dollars) an hour. Wages in the region go down and the shop reduces wages from USD 9.00 to USD 7.00. This reduction is see as unfair because there was a reference, (USD 9.00). On the other hand, if the employee leaves and a new employee is paid USD 7.00, this is considered a fair market price.

59. Behavioural economics tell us that fairness matters to people. There is a cost to ignoring the issue of fairness. As a result, our societies are very fragile politically, because we refuse to talk about fairness. However, according to Mr. Jenny, there are some possible solutions for consideration along the lines of those proposed by Mr. Baker. First, competition authorities should interest in the impact of the competitive mechanism on the labour market. Second, it is incumbent on competition authorities who have advocacy powers to consider advocating for the preconditions that are going to make competition work and be acceptable.

60. Second, according Mr. Jenny, competition authorities have always taken a more narrow view of the goals of their advocacy function. With the adoption of a law that restricts competition, competition authorities will emit an opinion stating that this is not a good development and the law should be repealed. However, there could be other types of opinion. Competition authorities could militate for factors, such as education, geographic mobility, that would make a labour market more flexible and complement education.

61. Third, authorities could prioritise cases that are also patently unfair. Mr. Jenny referred back to the discussion on excessive pricing in pharmaceutical that took place during the meeting of the Competition Committee in December 2018. As a hypothetical

example, a pharmaceutical company will increase its price by X hundred percent. These cases can be seen as unfair and considered a hold-up problem: a patient started a treatment, which one assumes would be a reasonable cost, and which cannot be substituted. When the cost of the treatment is multiplied by 10 or by 20, the patients become victims of the hold-up. It could be useful to have prioritisation criteria designed to facilitate the life of consumers or labour who could be particularly hurt by this kind of competition issue.

62. Fourth, authorities could deal with the labour implications of competition decisions. One aspect of unfairness goes through the labour. One solution maybe how to look at mergers. Taking a hypothetical merger as an example: 5000 people will be laid off should the merger be approved. On can consider if it should be the role of the competition authority to signal that this merger could create distrust in market, and possibly an inefficiencies, unless support is provided to help labour find other employment.

63. Behavioural economics is not sufficiently advanced is to introduce fairness as a criteria for looking at competition cases. In the French experience fairness is, officially at least, out of the scope of the considerations. The question is whether this is a good position to have, if nobody can change the competition law. Two recent experiences illustrate issues of fairness. There is a debate about the pressure on farmers by large retail scale distributors. Farmers are not very geographically nor professionally mobile. As a result, a resale price maintenance condition was placed on large-scale retailers to stop them from competing on prices on food products. This condition states that they cannot resell food at less than ten percent more than the price at which they bought it. The hope was that this would decrease the tension at the downstream level and therefore decrease the pressure on the farmers. The public debate noted this would reduce consumer welfare. These concessions to the welfare of farmers resulted in the removal of a significant amount of the competitive pressures because there was a perceived unfairness and that competition did not seem to solve that problem. In fact, competition seemed to make it worse and it was unacceptable politically and socially.

64. In the second case, there was a horizontal merger between two firms in the canned food sector, which is more or less a declining market in France. The number one firm was bankrupt and under acquisition by the number two in the market. Because the Authority blocked the merger, the Minister of Economy intervened immediately, stating, "…this is unacceptable and therefore I'm going to overturn the decision because I have the right in special circumstances". The Minister justified the decision by the fact that the bankrupt firm was going to laid off employees particularly in regions where the labour market was depressed and alternate employment difficult, if impossible, to find. The Minister used the failure of the labour market as the reason for overturning competition. Would the competition Authority have made a different decision if it had considered the labour implications of a decision? From an institutional perspective, it is questionable to have a minister overturn the decision of a competition authority.

65. It is clear that the discourse that says, "fairness is not our problem" is not a winning answer these days. Mr. Jenny concluded by stating that from the perspective of Europe, and possibly North America, we need a discourse on fairness. This discourse would explore what can be achieved without imperilling the main objectives of competition law enforcement.

66. The Chair then turned to Tyrie, the new Chairman of the United Kingdom Competition and Markets Authority for his presentation.

67. The **United Kingdom** noted that there were three points he would make in his presentation. The first is that sense of unfairness and mistrust in markets among ordinary people is now very deep. The UK asserted that it is so serious and persistent that many people are describing this as a crisis of capitalism. Even more seriously is the extent that populism generates protectionism triggered by the failure of labour markets to adjust, among other things. The second point is that resolving the crisis will require engagement of competition authorities everywhere. While competition authorities cannot resolve the issue, they are certainly a part of the issue. The third point is that if action is not taken to address this sense of unfairness, the issue will become more grave.

68. Legal frameworks will need to be bolstered. New powers are almost certainly going to be required, and the delegate from the United Kingdom noted that he would be making recommendations of that type to government

69. Competition rules are part of a settlement about how we are running the globalised economy. The language of mistrust and unfairness is largely a rhetorical shorthand for the collapse of confidence in that settlement. The settlement consisted of an open rules-based system of international trade and economic cooperation and a commitment to sound money, and competitive markets. It is a technocratic settlement. It has been held to benefit from the delegation of key elements of economic decision-making, including monetary and competition policy, from ministers to those technocrats. The argument being that they are better able to take decisions than politicians who may be swayed by what they could gain by varying those decisions at the ballot box, and freeing the decisions from pressures of the electoral cycle.

70. It is that settlement that is being challenged despite huge economic success that has come with it. Since 1990, the proportion of the world living in absolute poverty has fallen from one in three to one in ten and the global middle class has trebled on world bank definitions from 1 billion to 3 billion. We are witnessing what is undoubtedly the most spectacular improvement in the material condition of humanity in recorded history, including benefitting many of the poorest.

71. Globalisation has also brought some very unwelcome side effects an. The first side effect is that the benefits of integration in some countries are delivered to small but highly visible elite, for example, in the United States, as pointed out by Mr. Baker. Secondly, immigration has generated considerable discontentment and tension that is related to the labour market points raised by Mr. Jenny. Thirdly, the pace of change that has come with globalisation has left many with a sense of insecurity about their own and their family's jobs and livelihoods. That insecurity will be aggravated by artificial intelligence (AI) which will both eliminate and create millions of jobs at great pace. These three issues, with the exception of AI was going on before the financial crisis in 2008. However, the crisis focused people's minds leading them to draw conclusions.

72. A first conclusion was that large financial companies were there to rip people off. The second was that they, the public, were going to have to foot the bill for the mistakes of these financiers. Third was that no one was going to be held accountable for any of this. In fact, the bankers appeared to walk away with a good deal of money from the crisis. The institutional fabric of our societies in and beyond the OECD was already being challenged before 2008, but it has received a second, very powerful challenge, as a result of the consequence of the financial crisis reinforcing the first. Since the crash, many people have started losing faith in the established institutions of their country. What's more, those people are much better equipped than they used to be to make themselves heard. Nearly 90% of

people have internet access; many are using social media to express their discontent. Nearly half of young people in OECD countries have tertiary education.

73. The second major question is "how much of all this is really the business of competition authorities?" Well part of the settlement described previously was the orthodoxy that economic growth and productivity are supported best by market competition of which there is now a rising public and political scepticism about the orthodoxy. Three fifths of people in the UK do not trust business and nearly half of those people think that business does not operate honestly and that it takes advantage of the average worker. Anti-capitalism is not a fringe movement. The discontent is now deeply entrenched across a wide political and social spectrum, and again the problem is not merely one of perception. Whether it is catastrophic mishandling of personal data by the likes of Equifax and Facebook, excessive charges for essential banking services, price gouging by big pharmaceutical firms, price discrimination against the vulnerable for energy, insurance and other essential services. All of this adds to a growing sense that consumers are poorly served and left behind, and that they are being poorly served and left behind by exactly those people they thought were charged solving the issues.

74. Many argue that rent seeking is prevalent. In the United Kingdom, profit margins have risen from 1.2 in 2007 to 1.7 today, even as the share of investment in GDP has fallen. Very high profits look to the ordinary consumer like exploitative practice. There are claims that increasing market concentration led to a rise in profit margins. Significant academic literature exists about the importance of this trend. Concentrations shot up in the financial sector after the financial crisis. According to the best polling evidence, financial services account for over half of all consumer indebtedness in the United Kingdom. What's more, looking at it at a global perspective, the market valuations of some of the tech giants implies that they will become still more dominant in the future and that therefore they are expected to find new opportunities for rent seeking. While the growth of the digital economy has dramatically improved consumer welfare and empowered small firms to obtain access to vastly larger markets, it has also thrown up new opportunities to exploit monopoly power.

75. The United Kingdom then considered if competition authorities should take any substantive action. However, a general argument is that competition authorities, by addressing unfairness, would be exceeding their remit. Considering unfairness would undermine the credibility of the work of competition authorities. Competition authorities' work as unelected technocrats extends to securing economic efficiency by preserving and promoting the competitive process. Anything beyond those bounds, including the protection of the vulnerable from the depredations of the modern economy should be a matter for politicians. This argument may have seemed strong at one point, but could be considered anachronistic now. Competition policy and economic regulation more generally may not be a panacea to all forms of economic injustice, but authorities cannot and should not do nothing. Either authorities need to ask for powers and duties to address some of the unfairness, or at least authorities must have the courage to tell politicians publically, that it is their responsibility. Unless authorities get those tools and use them or at least, have the confidence to speak up, authorities will inflame the crisis of legitimacy. We may damage not just the process of competition regulation but the wider settlement alluded to earlier. The United Kingdom referred back to financial regulators after the 2008 financial crisis. Several of them, in the United Kingdom, were abolished altogether and replaced. In other countries too, there was radical regulatory reform in response to the financial crisis. If competition authorities as regulators cannot be part of the solution, they may be seen as part of a problem and that will put at risk the foundation of an independent regulatory regime.

76. There is a growing gap between what politicians and the public expect of regulatory authorities, including competition authorities, and what the public are actually getting. As a result, competition authorities are at risk of allowing our moral authority to dwindle and what could be described as the social license to operate.

77. In conclusion, the UK provided three points. First, regulators do consider fairness, even if they say they do not. Current tools can be used. Secondly, authorities can set out what new duties and powers could be needed. Thirdly, authorities can be much more deeply engaged in public discourse about the problem and its solutions.

78. On the second point, the existing tools, the CMA has been trying to put concerns about fairness and trust closer to the centre of its agendas. In recent months, the CMA has acted to improve standards in the care home sector, undertaken a study into the funeral home market and the CMA has been acting to clamp down on secondary ticketing rip-offs, recently winning an important case. In practice, the CMA is often thwarted, even when the detriment is blatant. The central problem for the CMA is that despite great theoretical powers and responsibilities, it appears unable to act with the speed and flexibility increasingly demanded of politicians. Responding to public and political dissatisfaction will require quite a fundamental rethink about the duties, powers and approach of competition authorities.

79. Authorities need to be prepared to reconsider the framework as a whole by putting the consumers' interest first, rather than orientating competition authorities as a body concerned with competition first. Competition for the benefit of consumers. It may have more profound effects on the way the law is interpreted. The United Kingdom then questioned whether competition authorities should try to take specific account of vulnerable consumers since it is specifically their reasonable complaints that politicians are reflecting back on to competition authorities. The UK wondered if it is ever legitimate for unelected technocrats to exercise discretion over matters of distributional fairness. The boundaries of where the regulator's duty to vulnerable consumers end and the government's begin is unclear. It is also unclear how authorities could manage a conflict between the interests of vulnerable consumers specifically and consumers more generally or the trade-offs between overall economic welfare and fairness? The United Kingdom may appear to be in a good position to deal with these issues but it is hemmed in by procedural restrictions. It could turn out that that the framework needs tools that are more robust if businesses are going to have a stronger incentive to comply earlier with recommendations. Authorities need to take the decision themselves either to demand those powers or to explain to government what they themselves now need to do. In the UK, the statutory duties and the strategic steer we get from government already demands that kind of advisory steer now. . Authorities need to be aware that this may involve speaking out against the tendency of all governments to protect vested interests or to buy votes with popular, but ultimately misguided intervention.

80. Addressing fairness and trust is the business of competition authorities. New tools maybe needed to make a difference. Authorities need to engage much more with governments and the wider publics to explain why. The framework and the settlement is probably right, but if we don't get on with this work authorities will find ourselves being forced to reform it in ways that damage it rather than make it more robust.

81. The Chair thanked the United Kingdom and turned to the Trade Union Advisory Committee (TUAC) to comment.

82. **TUAC** noted the lively and controversial debate to that point. To the trade union movement, there is no neutral approach possible. Competition does need to take responsibility in the fight against inequality and it is done already. A fair treatment of consumers is seen as a goal for competition. Market power becomes dysfunctional when there is no incentive for quality and innovative products at a fair price. However, more is needed than the usual competition discourse. TUAC referred to the very concrete of the case of online platforms, specifically, market concentration in the sector of online platforms. Online platforms are a very sexy topic: everybody talks about it, including in the OECD. The OECD defines an online platform is a digital service which facilitates the interaction between several and independent producers and users. The dominant position of online platforms has already alerted a number of authorities, especially with regard to the data capture of such companies. These platforms already adapt and target their selling techniques according to the huge collection of personal data. TUAC stated that they are aware of techniques such as price algorithms where platforms are able to adapt and adjust their prices and selling techniques according to personal behaviours on the internet. Considering the high level of innovation required in the tech sector, considerable investment must be made into research and development. A solid financial position is required for digital companies and online platforms as well. A dominant position is not prohibited *per se* in competition law. It is the abusive use of dominant position that is prohibited.

83. TUAC continued by stating that it wished to make a case for breaking up the dominant position of online platforms in the name of fairness and in the name of equity. Monopsony is a situation where there is a single or dominant buyer on the market. It is particularly problematic when it comes to labour market monopsony. Such monopolies lead to lower wages and more precarious working conditions. For example, an online platform for micro tasks where workers compete to offer DIY jobs. According to a study of this year, should the platform pay a 10% lower wage the platform would only lose around 1% of the workers willing to perform the task. Thus demonstrating a very high degree of market power linked to significant wage losses. USA and UK Amazon are subject to terrible working conditions, poor health and safety, and very aggressive anti-trade union tactics. Jeff Bezos announced a wage increase in the United States recently, in parallel, benefits have been suppressed in the United Kingdom and there is no indication of fair wages United States in the rest of the world. Other platforms such as Deliveroo, and Uber, rely heavily on self-employment business models whereby the workers are self-employed, and they are paid less than if they were actual employees. They nonetheless remain under the full control of the platform. There is also a problem of contribution to public finances. These are not unrelated notions that burden competition authorities.

84. These unfair terms and conditions can easily be translated into competition terminology. Unfair terms and conditions refer to, for example, algorithms marking workers for bad behaviours. Price fixing: the price in this case being the wage. The wages are being fixed. There are also contractor arrangements preventing workers from working for different platforms, i.e. no poaching clauses. Linked to the price fixing problem is the refusal to deal. The platforms do not recognize collective bargaining and there is a very aggressive anti-union tactics. Limiting production: it is now demonstrated at Amazon that its business model has led to a considerable number of job losses in the US. There is a clear need for all competition authorities to integrate the employment aspect into the competition policy.

85. Often heard is that the saving made by the buyer in the case of a monopsony will be passed on to the consumer, but in a case of a labour market monopsony, the consumer is the worker. Therefore, when you have a market concentration that leads to poor working conditions, the workers suffer the double penalty. As a worker, working conditions are

worsened, but as a consumer, purchasing power is shrinking. We see a drop of wages, that affects inequality deeply and this effect is not addressed by hypothetical drop in prices.

86. Market concentration is rising and integrating employment into competition is actually going to help competition authorities to address the anti-competitive effects of market power. To regain ground, competition does need to build bridges with other parts of policymaking. TUAC then provided five recommendations for further work. Number one, the first challenge for competition authorities will be to develop a well-functioning methodology to include employment in order to assess the existence of a dominant position. The ability of online platforms to impose lower wages and poor working conditions without losing their workforce is a strong indicator of market concentration, problematic market concentration. Recommendation number two: develop policies to strengthen labour law and collective bargaining. Collective bargaining allows workers to address the asymmetries by raising collective voice to set unacceptable standards. Recommendation number three: the potential impact of mergers and acquisitions on employment does need to be assessed. In particular, careful consideration should be given to labour market monopsony before approval is granted. Number four: look at good corporate governance, which competition authorities do not currently do. However, in the OECD, it is also well recognised that digital companies and online platforms are developing techniques to shield their own corporate governance from the scrutiny of investors and the public in general. Good corporate governance elements and policies designed to increase transparency, and accountability should be a part of an effort to bring the spotlight on unfair business practices. The fifth and final point: coherence with other policies such as trade and tax is particularly important. On trade in particular, domestic policies that aim at facilitating the entry of smaller competitors on the market should not be treated as a form of protectionism. Quite the contrary, they are here to contribute to healthy competition markets, and authorities have a role to play to develop or to help this discourse. There is also an issue with regard to the taxation of large digital companies, and authorities should start some work on the volume and handling of data by online platforms joining the work of tax experts who are currently discussing if and how intangible assets should be taxed.

87. The Chair thanked TUAC for its intervention and invited Ireland, CUTS, Consumer International and South Africa to take the floor in that order.

88. **Ireland** explained that its intervention would address some of the experiences of the Irish Competition and Consumer Protection Commission in dealing with issues of atypical employment or vulnerable employees in Ireland. In 2004, the competition authority had issued a decision finding that specific categories of self-employed individuals, such as voiceover actors, session musicians and freelance journalists, were undertakings and as such were not subject to the protections of the trade union law nor did they did have collective bargaining rights. The unions concerned obviously opposed this decision and proposed legislation at various stages to rectify this situation. The authority again opposed these efforts, not because these were particularly significant markets, but because of a “slippery slope” argument. Other self-employed professionals who provide services to the state and where the state spends significant financial resources, for example, doctors in general practice, and lawyers, could then organize collectively and act effectively to threaten to withdraw their services and strike. In 2017, legislation was passed providing an exemption from competition law, specifically Section four Article 101 of the Act, which addresses those particular categories of employees and provides for the possibility for others employees to apply to the minister for similar treatment. Certain protections ensured it would only apply to smaller markets and would not apply where a significant cost would imposed on the state by these collective bargaining rights.

89. In competition law, we treat people as consumers, but people are also employees. They are also citizens. This situation illustrates the pros and cons of having specific exemptions or separate legislation rather than expecting competition authorities to factor these exemptions or issues into their decision-making under the current legal framework. Regarding the "pros": exemptions, separate legislation provide clarity. Competition agencies are not expected to factor areas, which are not necessarily within their expertise into their judgments. The negative side is best illustrated with the slippery slope argument: at what point does this start to impinge on the expenditure of the state, and at what point does it start to create costs for consumers? Within that category of atypical employees, there is a degree of inequality. The ones who are exempted are unionised. There are many other categories where workers are not unionised, for example in delivery services.

90. The Chair then turned to CUTs for its intervention.

91. **CUTS** asked the speakers about fairness for whom. If fairness is the goal, then the beneficiaries need to be taken into consideration. For example, fairness applied to relatively well-off consumers based in developed countries or fairness for the poor cotton farmers based in Zambia.

92. **Consumers international** started its intervention by noting that fairness is embedded deeply in consumer protection regimes. For example, as illustrated in unfair terms in consumer contracts in the EU and fairness provisions in other countries such as Australia. The practice in consumer protection has been to develop notions of fairness, often in specific sectors as aims for the industry. Although fairness might be woolly and ill-defined now, the experience from the consumer policy sector, or consumer policy enforcement, shows that it can be a useful conversation to have. The fairness conversation could focus on corporate culture and looking at enforce gaps or failures, such as excessive pricing, data harvesting or privacy invasions. The language of regulation is as important as the fact of that regulation. Taking on board the discussions of fairness in the competition community could help the legitimacy, understanding, and the potential to act that this community has.

93. **South Africa** noted that authorities know about the problems related to fairness, and how the laws address it. Unfair pricing, excessive pricing, price discrimination, are founded on the notion of fairness. Problems occur when authorities try to identify how to act and identify the tools within the competition space to address fairness. South Africa encouraged delegates to think out of the box about the balance between efficiency and inclusivity. When it comes to small business, South Africa said that it accepted that there might be some inefficiencies in certain markets. However, when there is a large SMME sector, often informal, it should be integrated into the formal economy, and one must promulgate rules to help the SMME sector. It is accepted that this sector employs more people, and drives innovation. There can be more direct tools used by competition authorities to mitigate the impact of large mergers on vulnerable employees who not only sometimes lose jobs, but also sometimes lose their bargaining position. The market power acquired by large firms simply enable them to bargain better terms with employees.

94. The **Chair** asked each panellist to provide one last thought.

95. Ms. Akman summarised by saying that if fairness is to become a part of the assessment, it has to be done on a principled basis, on the basis of a framework that has been established by Parliament or by authority policy ex ante before the event rather than after the event. We do not have that framework or anything close to that principle ex ante framework in terms of how to incorporate fairness. Until that point, competition authorities

will serve society is best if they continue doing what they are most apt at doing, which is to serve the interests of consumers by tackling anti-competitive practices in the usual way.

96. Mr. Balisacan maintained that in the context of developing countries, job creation is far more important from the viewpoint of welfare than protecting jobs. In less developed countries, nobody can afford not to have jobs, but the question is whether the job is of high quality enough that it could improve well-being. Competition policies can make a better society when they create opportunities by making markets work so that labour can move to where they can secure higher returns.

97. Mr. Baker understood from this discussion is that in the current political environment competition authorities are facing increasing pressure to address concerns about distribution when attacking market power. Agencies can respond successfully with stronger enforcement and prioritising the cases to investigate and propose remedies to account for distribution. Agencies could thus reasonably address fairness without altering their focus on the traditional competition goals. Mr. Baker cautioned in addressing fairness this way: it is not necessary nor advisable to bring in politics when determining whether competition has been harmed. Bringing in politics is a recipe for bad outcomes in the long run that undermine competition under the guise of protecting it.

98. Mr. Jenny added to South Africa's intervention emphasising the fact that this issue of fairness and competition is also quite relevant in developing countries. In particular, when it comes to that part of the population that is in the informal sector, not by choice, but by an inability to enter into the formal economy. The upcoming discussion on gender equality addresses this issue because in certain parts of the world, women make up most of the informal sector due to a lack of opportunities. The system treats them unfairly. Over and beyond the specific situation of Europe, this discussion about fairness, without compromising goals of promoting efficiency, can be applied in many different environments.

99. The Chair thanked the panellists noting that it had been an extraordinarily rich discussion that is far from exhausted. Fairness has indeed a procedural dimension, a due process dimension, and therefore a timeliness dimension. As part of the reflection of unfairness, before new frameworks and tests are adopted, cases should be subject to judicial scrutiny now, rather than building scruples. Accuracy is fundamental, but justice delayed is justice denied, as the saying goes.