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**English - Or. English**

**2 September 2020**

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

**Cancels & replaces the same document of 14 August 2020**

## **Global Forum on Competition**

### **ABUSE OF DOMINANCE IN DIGITAL MARKETS**

**- Session II - Calls for country contributions**

This document is a call for country contributions for Session II of the Global Forum on Competition to be held virtually from 7 to 10 December 2020 (with Zoom). GFC participants are invited to submit their contributions by **30 October 2020** at the latest.

**JT03464837**

## TO ALL GLOBAL FORUM PARTICIPANTS

### RE: Roundtable on “Abuse of Dominance in Digital Markets”

#### 19th Global Forum on Competition (7 to 10 December 2020)

Dear GFC Participant,

In December, the Global Forum on Competition will hold a discussion on “Abuse of Dominance in Digital Markets”. We are writing to provide you with some information on the topic and organisation of the session, and to invite you to submit a written contribution.

Digital markets have been a major focus of competition policy discussions in recent years, including at the OECD. These markets give rise to a variety of challenges for competition authorities, ranging from the need to adapt analytical tools to the multi-sidedness of digital platforms, to the need to advocate for procompetitive regulatory frameworks in these markets. Concerns about misconduct in these markets, in particular abuses by dominant firms, have been a major theme of these discussions.

While the Competition Committee has discussed abuse of dominance cases in many roundtables, including a general discussion as far back as 1996, this will be our first opportunity to focus on abuse of dominance at the Global Forum. This topic was selected due to the high level of interest among delegates in the evaluation forms we receive at the end of each Forum.

Abuse of dominance cases can be particularly challenging and resource-intensive. Indeed, some newer authorities choose to prioritise merger and cartel enforcement over abuse of dominance due to challenges associated with investigating and prosecuting these cases. However, the competition policy community is in the midst of a major debate about the effectiveness of our current tools, and the state of market competition. Digital markets are a particular focus of this debate, and calls are increasing for additional action with respect to these markets. Greater efforts to bring abuse of dominance cases is one approach being advocated, and so this topic is a particularly timely one.

The concept of an abuse of dominance is based on the idea that dominant firms, by virtue of their market power, are in a unique position to engage in anticompetitive behaviour. Market power, the ability to unilaterally and profitably raise prices or reduce quality beyond the level that would prevail under competition, is not in itself a cause for competition concern – especially if it is temporary and contestable. However, if that power is used to engage in some types of conduct, it may harm competition and consumers. It should be noted that a large market share is not on its own proof of market power: dominant firms enjoy not just a large market share, but also are not constrained by significant competitive pressure from either current or potential competitors. A common reason for this phenomenon is the presence of significant entry barriers that insulate the dominant firm from competition.

One of the reasons why abuse of dominance is often mentioned in debates about digital markets is that the size of the largest digital firms may be indicative of a dominant position in at least some markets. Indeed, many digital markets exhibit characteristics that result in high market shares for a small number of firms, namely low variable costs, high fixed costs and strong network effects. In some cases, this can lead to “competition for the market” dynamics, in which a single firm captures the vast majority of sales.

Firms in these concentrated markets may possess sufficient market power to hold a dominant position. This outcome is not in itself proof of a competition law violation – it may, in fact, simply be the reward for offering the best or most innovative products. However, it becomes a competition policy concern when it is the result of an anticompetitive merger, or when it is enhanced or protected through an abuse of a dominant position. Digital platforms are a particular focus of concern, given their ability to affect market outcomes on their platforms, particularly when they offer products for sale on those platforms.

There is an ongoing debate about whether competition policy is adequately making use of this tool in digital markets today, including various expert reports and growing academic literature. However, authorities face numerous challenges when bringing abuse of dominance cases in digital markets:

- First, determining **whether a firm is dominant** is a substantial challenge in digital markets. Competition authorities must assess whether a firm with a market share faces significant competitive constraints, including from other markets whose boundaries may rapidly evolve. Further, in markets where a product is provided at a price of zero, market power may need to be assessed in terms of quality, and take into account other sides of the market that do pay a positive price.
- Second, authorities must decide **whether to use new theories of harm** pertaining to digital markets. Traditional theories focused on access to essential inputs may not fit current concerns about data. Theories about tying and bundling may not be easily applied to issues regarding efforts to limit compatibility and create seamless product ecosystems. Exploitative abuse theories are being broadened to cover concerns regarding consumer data and privacy. And new theories are being identified, such as **self preferencing** (for example, when a platform gives an advantage to its own products over other firms' listed products, or when it limits interoperability with rival products), **limiting multi-homing** (meaning that consumers are less able to use multiple competing digital products, which in the view of some authorities may harm competition), and **hampering data portability** (thus increasing consumer switching costs). These new theories may be challenging to establish and prove, but are being considered by several authorities around the world.
- Third, abuse of dominance cases can be lengthy and resource-intensive. Thus, competition authorities must decide **when abuse of dominance enforcement action is the best approach** to addressing competition concerns in digital markets, compared to other competition tools including market studies, regulatory advocacy, or future vigilance in merger control.

*The Secretariat will prepare a background note that explores these issues. The OECD webpage on “Abuse of dominance in digital markets” will be the primary vehicle for conveying documentation and related links on this subject. It will become available on the main roundtables page at [www.oecd.org/competition/roundtables](http://www.oecd.org/competition/roundtables) and the GFC website at [oe.cd/gfc](http://oe.cd/gfc). Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site.*

*I would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. I invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively the Secretariat will produce one, but given the time constraints you might not be in a position to check it before distribution on O.N.E.*

We refer you to the suggested reference materials at the end of this letter and to the list of questions included in the Annex. The list in the Annex is not exhaustive and you are encouraged to raise and address other issues in your submission and during the discussion.

We would encourage you to submit a written contribution that describes your experience or views on pursuing abuse of dominance cases in digital markets. Should you wish to provide a contribution, please inform the Secretariat by **11 September 2020**. Written replies to this call for contributions are due by **30 October 2020** to enable the Secretariat to prepare the summary of the responses in advance of the session. Please note that not meeting this deadline may result in your contribution not being distributed to delegates in a timely fashion in advance of the meeting.

All communications regarding documentation and logistics for this roundtable should be sent to Angélique Servin ([angelique.servin@oecd.org](mailto:angelique.servin@oecd.org)). All substantive queries regarding this session should be sent to James Mancini ([james.mancini@oecd.org](mailto:james.mancini@oecd.org)).

## Annex I. Suggested questions for consideration in written contributions

1. How many abuse of dominance cases has your authority undertaken in digital markets in the last 10 years? Do you expect these cases to become an increasing priority in future years?
2. Please describe any recent abuse of dominance cases your authority has undertaken in recent years, and in particular the challenges you faced, both analytical and legal, in bringing these cases.
3. Do you believe that digital markets involve particular challenges in abuse of dominance cases, for example in terms of determining whether a position is dominant, market definition, evaluating effects (e.g. zero price markets) and negotiating remedies?
4. Does your authority have sufficient legislative tools and resources to bring cases based on new theories of harm? Have there been any proposals in your jurisdiction to modify, or make greater use of, abuse of dominance provisions in digital markets?
5. Has your authority considered pursuing new theories of harm associated with abuses of dominance in digital markets, such as self-preferencing, or issues associated with data portability? Why, or why not?
6. What is the view of your authority regarding the effectiveness of abuse of dominance cases in addressing competition concerns in digital markets relative to other competition policy tools?

### Suggested Bibliography

A complete listing of OECD resources on abuse of dominance can be found at:

<https://www.oecd.org/daf/competition/abuse-of-dominance-competition-roundtables.htm>.

Digital Competition Expert Panel (2019), *Unlocking Digital Competition*,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).

Holzweber, S. (2018), “Tying and bundling in the digital era”, *European Competition Journal*, Vol. 14 (2-3), <https://www.tandfonline.com/doi/full/10.1080/17441056.2018.1533360>.

Schweitzer, H. et al (2018), *Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)*,

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3250742](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742).

Botta, M. and K. Wiedemann (2019), “Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision”, *Journal of European Competition Law & Practice*, Vol. 10 (8),

<https://doi.org/10.1093/jeclap/lpz064>.