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

**Global Forum on Competition**

**COMPETITION POLICY: TIME FOR A RESET?**

**Summary of Discussion**

**7 December 2020**

This document is a summary of the discussion held during Session I of the 19th meeting of the Global Forum on Competition on 7 – 10 December 2020.

More documents related to this discussion can be found at [oe.cd/cptr](http://oe.cd/cptr).

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## *Summary of Discussion*

*By the Secretariat*

### **1. Introduction by the Chair**

1. The **Chair** welcomed the delegates, invited experts and distinguished guests. He noted the opening panel would discuss how well prepared competition policies and competition law are to face the numerous new technological and public policy challenges they face. He then gave the floor to Secretary-General Angel Gurría.

### **2. Opening remarks by the Secretary-General**

2. The **Secretary-General** welcomed the participants and applauded the fact that, despite the current difficulties, the competition policy community remained connected. He highlighted the historical challenge posed by the COVID-19 pandemic by illustrating the social and economic impacts, for example, the USD 6 trillion reduction in global GDP by the end of 2022 compared to pre-pandemic projections.

3. He noted that many governments have taken decisive action to cushion the effects of the crisis and to ensure the survival of the firms and the livelihoods of people, and that such measures must be managed in a way that do not distort the market competition. He highlighted that new business creation has declined by as much as 20% relative to last year and stated that competition policy has a paramount role to play in the recovery to keep markets open to entry.

4. The Secretary General recalled that competition drives innovation and ultimately economic growth. He referred to concerns about anticompetitive conduct by large firms, and noted that policies that undermine the level playing field will be counterproductive at best and harmful at worst. He also explained that calls are growing, particularly since the pandemic, for competition authorities to incorporate other dimensions into their work such as inequality, sustainability and the worker's welfare.

5. He highlighted the need to ensure competition enforcement is well equipped to address concerns in digital markets, especially since the pandemic has accelerated the digital transformation. This includes ensuring digital expertise within competition authorities and greater attention to novel concerns that may arise in these markets.

6. Lastly, he said that competition authorities should consider new tools to help address competition problems in markets outside the context of more traditional enforcement proceedings, including market studies. He concluded by saying that competition authorities have a very important role to play in the design of the economic recovery and that the Global Forum on Competition is an opportunity to exchange and to think boldly about the challenges to come.

### 3. Keynote address by Margrethe Vestager

7. The **Chair** thanked the Secretary-General. The Chair noted that the Forum and the OECD Competition Committee focus on trying to ensure that competition authorities have the best possible tools and opportunities for collaboration to meet the challenges raised by the digital age. He then noted that the theme of this first day of discussion was “Competition Policy: Time for a reset?”

8. The Chair explained the range of challenging questions facing competition policy. First, there are questions in the literature about whether or not competition policy has been effective enough in recent years given trends associated with concentration and mark-ups. Second, he described discussions about industrial policy and whether it could be a complement to competition policy. Third, he mentioned the pressure to include public policy goals at the international level, which has led to the question of whether competition can be fairer and whether enforcers can incorporate objectives such as sustainability. Fourth, the Chair explained that the need to adapt competition policy to the digital economy is a major area of focus, including the need to adapt competition authorities’ tools.

9. He then introduced the keynote speaker, Executive Vice President of the European Commission and Commissioner for a Europe fit for the digital age, Margrethe Vestager. The Chair thanked the Commissioner and noted the various European Commission initiatives underway that are relevant to the themes of the day’s discussions.

10. **Margrethe Vestager** started by observing the loss of lives, loss of jobs, and deep economic recession stemming from the pandemic. She stated that citizens have demonstrated great adaptability, including competition enforcers - for instance, the European Commission has adapted its procedures and at the same time began preparations to deal with a significant increase in state aid cases.

11. Executive Vice President Vestager then explained that the activity of the Commission in terms of merger control had slowed down only temporarily during the pandemic. She gave the example of several cases managed by Commission staff in recent months, including mergers and anticompetitive conduct. She opined that we should seek not just to return to pre-pandemic conditions but rather move our economies forward in terms of both the digital and green transitions.

12. In this context, she noted that the question of whether competition policy must change is on the table. She stated that the aims of competition law enforcement must remain unchanged and are as essential as they have ever been. Beyond the traditional benefits of competition - lower prices, wider choices for consumers and benefits for businesses - it is important, even from a democratic point of view, that the consumer is the one being served by the marketplace and that their choices make a difference. Moreover, competition can support the green transition by providing incentives for business to respond to consumers’ demand for greener products. Competition also ensures that digital technology benefits consumers and that the drive to innovate stays strong so that we can realize the full potential of what digitization has to offer.

13. Thus, according to Executive Vice President Vestager, competition can help economies to respond to the challenges of recovering from the pandemic and redirect energies towards the industries of the future. She then repeated that the aims of competition policy should be preserved. She also mentioned that the European commission would continue to use its antitrust powers to protect competition in crucial markets like digital services and pharmaceuticals.

14. The Executive Vice President continued by stating that competition policy does not need a reset, but must ensure that the tools used to achieve the goals of competition policies and law are up to date. For instance, the Commission finalized a consultation on how competition and “Green new deal” policies can work best together.

15. Then, she pointed out that big digital platforms could become gatekeepers with the ability to collect data and to set the rules that govern how companies using those platforms connect to their customers. To avoid this, the European Commission developing regulations that set out the precise duties for these companies in advance, complemented by competition law enforcement to deal with individual cases. She noted that a Digital Markets Act, setting out clear do’s and don’ts, will be soon proposed, which will allow regulation and competition law enforcement to work jointly. In addition, the Commission has been consulting widely on how to bring the Market Definition Notice, issued 23 years ago, up to date, and is reviewing the anti-trust guidance and rules on both vertical and horizontal agreements. She concluded by stating that competition enforcement needs to evolve without compromising the aim to keep markets competitive and fair. Competitive markets help the whole economy to be innovative and make sure that it works for everyone.

16. **The Chair** thanked the Executive Vice President for her speech and for having agreed to answer a few questions. He first asked her why politicians of high popularity may avoid or fail to communicate the benefits of healthy competition to the public and whether there is a way to be better understood.

17. **Margrethe Vestager** gave two explanations. First, the benefits of competition are often taken for granted. Second, when some companies must leave the marketplace, it can have significant economic consequences for a region and people in terms of job losses. Thus, the drawbacks of competition can be strongly felt by few people while the benefits are thinly felt by many people. This discrepancy can lead to a very negative narrative. Yet, she noted that, in a recent poll, 85% of Europeans said that competition was a good thing.

18. **The Chair** drew a parallel between the results of the poll and the “market failures” that can be found in terms of privacy or sustainability. In the same way that the cost of privacy is that people do not have all the functionalities they might enjoy, or the cost of sustainability is that people must pay a higher price, one of the costs of competition is that it creates more insecurity than there would be in a different system. He then asked the Executive Vice President whether there is a sort of market failure and whether it is an important issue.

19. **Executive Vice President Vestager** said that even if there is often a misunderstanding on what competition is, people eventually feel the need to have it. In a context of supply chain dependencies and reassuring of businesses, she insisted on the need to preserve competition so that the consumers do not pay too high a price and in the meantime, economies can recover quickly.

20. **The Chair** asked Executive Vice President Vestager to give few examples of how green policies and competition can work together.

21. First, **Executive Vice President Vestager** said that competition is fundamentally good for greening the economy because if a company wants to have affordable prices for its end customer it should use as few resources as possible. Secondly, she said that using auctions in deciding the subsidy, for renewal energy production for example, can be a very efficient way of achieving sustainability objectives. She noted that deeper discussions are needed in order to get the right balance between for example consumer prices and sustainability objectives.

22. The Chair then asked about how the General Data Protection Regulation in Europe can facilitate competition and privacy in digital markets, and whether upcoming possible regulation on gatekeepers will affect consumer data rights.

23. On the first question, **Executive Vice President Vestager** welcomed the reference of the Regulation in one of the German Bundeskartellamt's cases on Facebook. She stated that competition law enforcers should remain vigilant so that privacy is not used as a shield against competition - to limit interoperability for example. On the second question, she recalled that large companies are keeping the gates to certain markets and setting their own rules, and for that reason, people should be better able to take action and in particular have control over their data. She added that upcoming legislative proposals would set up a framework for intermediaries to enable sharing and using data in a safe environment. She lastly mentioned that in 2021, the European Commission would propose a European digital identity that will allow European citizens to have better control of their data.

24. **The Chair** finally asked whether the proposed market investigation tools are intended to be a more efficient tool than traditional enforcement for addressing problems in market. The Executive Vice President responded by indicating it would be more of a complement.

#### 4. Introduction of the panellists and program of the discussion

25. The **Chair** then introduced the six panellists:

- **William Kovacic**, Global Competition Professor of Law and Policy; Professor of Law; Director, Competition Law Centre, George Washington University
- **Diana Moss**, President, American Antitrust Institute
- **Damien Neven**, Professor Economics, Graduate Institute of International and Development Studies, Geneva and Senior Academic Advisor, Compass Lexecon
- **Hiroshi Ohashi**, Dean, the Graduate School of Public Policy, Professor of Economics, University of Tokyo
- **Thando Vilakazi**, Executive Director of the Centre for Competition, Regulation and Economic Development (CCRED), University of Johannesburg
- **Christine Wilson**, Commissioner, US Federal Trade Commission

26. The Chair outlined the seven questions that would be explored during this discussion.

- Whether the higher concentration observed in the market is the sign of the fact that competition has declined or is declining, and if so, whether there has been a failure.
- How we should think about the relationship between competition policy and industrial policy and how they can complement each other.
- Whether globalization has been mismanaged and created an uneven field of competition, and if so, how competition authorities should fix it.
- What has been learned about the inclusion of public interest goals and competition law from past experience.
- Whether the economic interpretation of competition law over the last 20 years is legitimate.

- Whether the consumer welfare standard has been too rigidly enforced, or whether there are more flexible ways to interpret it.
- Whether we are up to the challenge of the digital economy.

27. He then turned to Professor Ohashi, who has been studying increasing concentration in Japan, and asked him the first question about higher concentration and higher mark-ups as an evidence of the decline of competition.

## 5. Evidence of a potential decline in competition

28. **Hiroshi Ohashi** started by saying that digitalisation is at the heart of the question of resetting competition. He called for a new way to govern the digital economy given potential intrusions or constraints on individual liberty.

29. He then explained that there have been three types of governance regimes in history. The first one is state regulation through industrial policy in order to correct market failures for the benefit of society, especially by export promotion through state subsidies. The second type is opposed to the first one and relies on market mechanisms, reflecting a view that the damage caused by governments' failures may be much greater than the market failures themselves. Thus, it pushes towards a smaller role of government. The third type is a hybrid of industrial policy and competition policy where the government can play a role to ensure the market functions better. Several hybrid types have been proposed, and implemented, including experimental regulations, responsive regulations and core regulations.

30. He then said that when there is harmful conduct, competition authorities must deal with two problems. First, enforcement must catch up with the pace of innovations. Second, there may be challenges whenever the conduct connects various markets, such as the case of multi-sided or zero price markets or zero prices.

31. Next, he noted an IMF report that found, compared to 27 other countries, Japan's mark-up remains flat and stagnant. He gave three hypotheses to explain this. The first hypothesis is that Japan's population is aging, and supply is slow to adjust, thus creating excess supply. The second hypothesis is that Japan may lack certain digital products or services. The third hypothesis is digitalisation, and in particular, that digital firms may choose to assign profits to different jurisdictions for tax purposes. He pointed out potential policy responses to this final issue, in particular in terms of international taxation agreements.

32. **The Chair** thanked Professor Ohashi and noted that the evidence suggests Japan has seen an increase in concentration but not in market power. Then he gave the floor to Commissioner Christine Wilson.

33. **Commissioner Wilson** said that in the US there is also a significant debate on this topic. She said it is important to distinguish between products where consumers have a range of price options and those where they do not. A consumer goods company with a strong reputation may obtain relatively higher margins than a retailer's store brand, and these differences in margins depend on the quality. She observed that in the US, higher prices and higher margins without lower-cost alternatives consistently occur where regulatory capture and rent seeking are prevalent. This is in her view particularly the case in the healthcare sector, where there are state laws that limit entry and expansion into this sector and immunize healthcare providers from antitrust scrutiny. Therefore, patients and insurers must pay the higher prices that result from reduced output.

34. She continued by explaining that capitalism, which she defined as a system in which the production of goods and services is based on supply and demand in the market and where government intervenes only where necessary to address market failures, is what we hope to achieve. In contrast, crony capitalism, a system in which lobbyists and other special interests engage in rent seeking, and legislators end up picking winners and losers, is the real problem. Therefore, the FTC, which has a strong and robust competition advocacy program, encourages Federal State and local municipalities to roll back these kinds of restraints on competition. She concluded by saying that the right approach is not to give up capitalism but to clear away the obstacles to free market competition that government has created.

35. **The Chair** thanked Commissioner Wilson and gave the floor to Diana Moss.

36. **Diana Moss** said there is a growing body of literature about rising concentration in almost all sectors within the economics community and the public policy community and she encouraged industrial organization economists to be more active because they play a critical role in contributing to understanding on this issue. She added that the implications for broader findings on rising concentration and their connection to antitrust enforcement cannot be ignored. She highlighted the example of pharmaceutical sector mergers, in which over 60% of reviewed mergers were four to three mergers or mergers to monopoly.

37. **The Chair** thanked Diana Moss. He concluded from the discussion that there is good concentration or mark-ups, due to innovation and differentiation, and bad concentration or mark-ups due to rent-seeking, regulations or possibly a lack of competition enforcement. The Chair stated that further research is needed to understand which applies in markets today.

## 6. Relationship between competition policy and industrial policy

38. **The Chair** then turned to the issue of how competition policy and industrial policy can interact. He explained that governments are considering being more assertive in their industrial policy. Nevertheless, competition authorities have had limited involvement in industrial policy, likely due to fears about competition impacts. He then asked Professor Bill Kovacic whether competition authorities should be more active in this debate and draw the attention of policymakers to what would be a pro-competitive industrial policy.

39. **Bill Kovacic** explained that there are many ways in which governments favour competition, especially by giving subsidies, developing human capital, investing in research and development and creating intellectual property systems. According to him, public procurement has been for a long time a key feature of industrial policy, and area of interest for competition authorities.

40. He then gave an example where industrial policy and competition policy did work. In 2006-2007, the FTC allowed the creation of a joint venture between the only two US producers of launch vehicles for national security launches: Lockheed-Martin and Boeing. This was a merger to monopoly. Entry was the decisive question in the FTC's review. The FTC was concerned about what would happen when they would become dependent on a single supplier. NASA began then to think about alternatives and how they could encourage entry. There was a prospect that advances in digitalisation, electronics and materials could be used by new entrants to build launch vehicles at a much lower cost. This is how NASA decided to invest in SpaceX project, which is in his view arguably the most successful and innovative space launch vehicle producer today.

41. For Professor Kovacic, three lessons emerge from this example. First, the advocacy and engagement of the public competition agency with the government agencies enable a strategic approach to creating options for procurement. Second, the public authority had to take risks and encourage entry over time in a very innovative market. Interest in high tech sectors and innovation drove the engagement with NASA and the Department of Defence. Third, public procurement officials needed to be entrepreneurial, willing to take risks, think strategically and encourage entry, considering very innovative companies that were not active in the field before.

42. **The Chair** thanked Professor Kovacic and turned to Professor Thando Vilakazi to speak about the respective role of competition policy and industrial policy in rebuilding economies.

43. **Thando Vilakazi** started by saying that we must accept that competition outcomes cannot only result from the decisions taken by competition authorities, because economies are very complex systems where various actors interact. He stated that competition authorities, which are used to making decisions relating to the structure of particular industries or about pricing outcomes for instance, have always been doing industrial policy. Therefore, the question is not whether but rather about how best to do it.

44. He emphasized that competition authorities, more than other government departments, have the great ability to understand the intricacies of markets. They understand for instance the nature of barriers, or the conditions needed to enable entry. This allows competition authorities to contribute to the objectives of industrial policy. He also emphasized that competition is not an objective in itself, but rather contributes to broader objectives such as helping the economically vulnerable.

45. **The Chair** thanked Vilakazi and gave the floor to Professor Damien Neven.

46. **Damien Neven** noted that industrial policy works best when there are competitive interactions. Further, he discussed the risks of public interest or industrial policy goals interfering with competition enforcement. He explained that, because environmental protection involves a mix of objectives, taking it into account would open up the scope for capture and make enforcement much less predictable than it is today. Therefore, according to Professor Neven, public interest considerations must be applied according to a common metric to look at the consequences for consumers from both a competition and environmental point of view.

47. **Thando Vilakazi** replied that some metrics do not account for the broader socioeconomic or environmental industry context in which a particular competition law decision has been taken. Even in economic sectors where a very effective competition law regime was implemented, it was not until there were complementary industrial policy or public policy interventions that entrants started to emerge.

48. **Bill Kovacic** added that this issue places an especially high value on the clarity with which policymakers are willing to describe what they have done, and not to hide trade-offs that they are making. This requires a degree of honesty and confidence that is hard to achieve because the trade-offs in many instances are challenging, and so there is a temptation to mask them.

49. **The Chair** concluded there are complementarities between competition and industrial policy. In addition, he suggested we should not introduce industrial policy goals into competition policy but rather introduce a competition dimension into industrial policy. He recalled the importance of convincing industrial policymakers to have strategic options in order to maintain an element of competition, and of transparency.

## 7. Has globalization been mismanaged and created an uneven field of competition?

50. **The Chair** then turned to the next question. He explained that many citizens may feel disfavoured by international competition, and the lack of a level playing field. He asked Damien Neven what competition policy or competition authorities can do to address this and whether the solution should come through areas other than competition policy such as regulation.

51. **Damien Neven** started his argument by highlighting the extent to which the playing field is currently unlevelled. A major concern is that some firms may receive subsidies and compete in global markets thanks to these subsidies while others may not receive any. Such an advantage can have important long-term effects, as firms that are supported may dominate or have a strong position in global markets. To manage this issue, Neven stated that the WTO regime on subsidies is not adequate. First, because countries, contrary to what they are supposed to do, do not report and notify about subsidies. Second, the WTO regimes has a very narrow scope as it only covers subsidies affecting exports in goods markets.

52. He noted there are some countries in which the state is providing support to state-owned enterprises, which also affects competition globally. Subsidies can indeed affect competition for particular assets and competition for markets as a whole. He noted 90% of the acquisitions by Chinese firms in the EU were undertaken by state-owned enterprises.

53. Neven also pointed out that there is also a concern about how regimes with respect to foreign direct investment affect opportunities for firms competing globally, because some regimes are actively managed in such a way as to optimize transfers of technology. Foreign firms may not be able to access these markets after technology transfer has occurred. He also discussed the risk of strategic enforcement of competition rules to advantage domestic firms.

54. Neven welcomed the fact that the EU has started to address this lack of a level playing field but raised questions about the scope of these measures. Specifically, the proposed measures focus on distortions in the European internal market, whereas subsidies that will affect the operation of foreign firms in their own domestic markets have an impact that will not be captured. He also underlined the risk of diversion effects, in which, in order to avoid the EU control, foreign governments might rather support firms in domestic markets or support domestic firms that operate in these markets, and use these advantaged to then export their products.

55. He acknowledged that one of the main achievements of the last 20 years has been to make enforcement predictable. However, clear signals are also needed in international relations support a level playing field.

56. **The Chair** asked Neven whether competition authorities should look at competition differently depending on whether some firms have access to significant support or domestic advantages whereas others do not.

57. **Damien Neven** reiterated his view that long-term analysis must take into account state support or advantages that may lead to market dominance.

58. **Bill Kovacic** added that if a reset or a reboot of competition is needed, he would bring that back on to the agenda at the WTO. He would advocate reopening the working group on competition policy, taking account of the work that has been done with the government procurement agreements that have major competition dimensions, and integrate as integral elements the concerns about the global trade system mentioned by Professor Neven.

59. **Hiroshi Ohashi** said that there is a conflict between national economic security, competition policy and the free trade that should be addressed in this process.

## 8. Inclusion of public interest goals in competition law

60. **The Chair** thanked the speakers and turned to the next topic about public interest goals in competition laws. He mentioned that at least half of the countries that have a competition law do have public interest goals included. He then noted the example of South Africa, where public interest considerations are assessed according to a transparent process. He then asked Professor Thando Vilakazi whether competition decisions could support these public interest objectives, or whether they are ineffective in promoting development, for example.

61. **Thando Vilakazi** said that in the South African case, the prominence of public interest issues in the act is an important part of the political legitimacy of the competition regime. Moreover, authorities can now operate independently and transparently thanks to this legitimacy.

62. Concerning the opportunity to include public interest goals in the competition law, Professor Vilakazi said that the question is not whether South Africa should have done it, since many other countries have done it as well, but rather whether those public interest goals should be broader and whether they achieve their desired impact.

63. He mentioned that there are now guidelines that help with the interpretation, provide certainty, and ensure that the commission is not wavering on its commitment to driving some of these objectives through its powers in the competition act. It also makes sure that there is market and business certainty around how these issues will be treated in order to have predictable enforcement governed by a set of publicly available principles.

64. He opined that South Africa does not shy away from considerations of efficiency just because they are also interested in the impact of a transaction on employment, because these are complementary objectives. He said that that it is a mistake to think that because competition law only focuses on the individual cases, it could not have a wider societal impact. In fact, a case-by-case approach has brought vigilance to the wider implications of competition law decisions with respect to employment in a country that has a high rate of unemployment.

65. He concluded by giving an example illustrating how public interest considerations are an important bridge that links to competition law. There was recently a large merger in a concentrated industry and the transaction could potentially result in substantial job losses. He pointed out that without public interest considerations, the job losses would not have been revealed. It would have then affected a thousand households, whereas upon closer inspection through the public interest considerations, there was a middle ground that was reached, protecting at least some employment and in the meantime allowing the firm to pursue the transaction. He ended by saying that, especially in developing country contexts, small impacts can have a huge knock-on effect in the economy.

66. **The Chair** thanked Professor Vilakazi. He then asked Commissioner Christine Wilson whether the concept of efficiencies being weighed against restrictions of competition should be changed.

67. **Christine Wilson** agreed with Professor Neven that if there are multiple goals within competition law, it creates the potential for capture and detracts from predictability. In her view, public interest goals are best addressed in the US by agencies that are set up specifically to address particular concerns, whereas a public interest mandate for competition authorities can result in uncertainty for firms and for consumers.

68. She suggested that the vagueness of public interest standards for other regulators has led to wild swings in regulatory policy. She cited the example of the Net Neutrality debate in the US, and its consequences for investment.

69. She opined that, to be effective, promoting industry through a public interest standard would need to be done in a competitively neutral way. Indeed, according to Wilson, competition agencies have an important role to play in regards to competitive neutrality, by being an advocate for a level playing field, and against industrial policies that distort competition and risk provoking trade retaliation, which ultimately harm consumers and backfire on the domestic economy.

70. **The Chair** closed this part of the discussion by noting that in some countries where the public is less familiar with the benefits of competition, public interest standards may be crucial for obtaining support for competition law.

## 9. Legitimacy of the economic interpretation of competition law

71. **The Chair** then asked Commissioner Wilson to comment on whether competition enforcement is excessively influenced by current economic thinking rather than legal foundations. He further asked whether the current economic approach of competition law is illegitimate.

72. **Christine Wilson** started by noting that the courts spent several decades developing workable standards associated with the Sherman Act to determine what conduct should be illegal. They intended to ban only unreasonable restraints of trade. Certain kinds of restraints were held to be per se illegal, meanwhile the rest must be judged under the rule of reason, which assesses both the benefits and the harms of the conduct at issue.

73. She noted that economic research thus began to play a more important role in helping evaluate what kinds of conduct should be perceived as lawful. In the *Continental TV vs. GTE Sylvania* case, the Supreme Court in 1977 relied on economic reasoning to hold that non-price vertical restraints should be evaluated under the rule of reason. After decades spent trying to balance a mix of economic, social and political goals for antitrust, the US Supreme Court in 1979 described the Sherman act as a consumer welfare prescription. Wilson added that using economic analysis to guide antitrust enforcement is not an ephemeral trend but something that has been done for decades because it looks at whether competition is actually harmed and is more likely to lead to the right answer.

74. She explained that the move toward an effect-based analysis is not unique to the US. Multiple jurisdictions around the world began with what she referred to as inflexible rule-oriented competition enforcement, and evolved toward a less form-based approach. She welcomed the work of multilateral organizations like the OECD and the ICN to this end.

75. She then said that the bipartisan consensus on antitrust in the United States may now be fraying. She cautioned against replacing sophisticated economic analysis with bright line rules, and against replacing the consumer welfare standard with a public interest standard. For her, it would require enforcers to engage in an almost unavoidably political calculus of whose interests to serve, and greatly increase subjectivity and uncertainty. She emphasised that the consumer welfare test is straightforward and easy to administer on a case-by-case basis, meanwhile adding goals would bring less predictability and administrability.

76. However, she opined that the FTC should publish more written explanations for its decisions and the budgets of the FTC and the Department of Justice (DoJ) should be increased to keep up with size of the economy.

77. **The Chair** made two observations. First, he wondered if a purely economic approach would lead to the use of a total welfare surplus standard. Second, he pointed out the contrast between principles of economic democracy and scientific credibility.

78. **Christine Wilson** added that the total welfare standard could be attractive. It could enhance sustainability by ensuring that all resources go to their highest valued use, which enables consumers to maintain their standard of living and reduce their consumption of resources in the meantime. Moreover, the total welfare standard would maximize the size of the entire pie, in contrast with the consumer welfare standard that maximizes consumer surplus. She mentioned the view of some commentators that enforcers are best suited to maximizing total surplus, and then legislators and other agencies can decide how to distribute it. Yet, she noted, the application of the total welfare standard can give rise to significant challenges. For example, if there is a merger of two foreign-owned firms, harm would fall on domestic consumers and cost savings would happen outside the jurisdiction.

79. **Thando Vilakazi** agreed on the importance of regimes being able to offer certainty and predictability, but he insisted that these questions only become relevant once society has accepted competition legislation that incorporates its values.

80. He opined that one issue is how large tech mergers have been allowed because economic evidence is the only determining factor. He suggested this will lead to ex ante regulation, given questions about the traditional approach leading to structural impacts that are very hard to reverse.

81. He concluded by saying that the South African Authority has shown the ability to adapt, look back, review and amend where there have been issues of a lack of certainty. He opined that competition law must be responsive to the society in which it exists, as it responds to wider societal issues and not only business certainty.

82. **Bill Kovacic** explained there is a debate between those who insist on an economics-based framework and those who propose a broader notion of citizen welfare that encompasses not just the interests of individuals as buyers of goods and services, but as workers, as residents in communities that are subject to distant control by large companies, and as owners of small businesses.

## 10. Interpretation of the consumer welfare standard

83. **The Chair** then turned to the topic of the consumer welfare standard. He asked whether some of the debate is attributable to different perceptions about the appropriate time horizon to consider. He took the example of an agreement between automobile firms to go beyond regulatory standards on emissions, which some suggest would have short-term impacts on prices but long-term sustainability benefits. He asked Diana Moss whether there is currently a focus on a very narrow, immediate interpretation of consumer welfare.

84. **Diana Moss** indicated that enforcers must think about the scope of the consumer welfare standard and more globally about the competition policy toolkit. According to her, enforcers often lose sight of the fact that competition law is one tool in a broader toolkit, also including economic regulators, social regulation, labour policy, trade policy, intellectual property policy and sustainability. Ideally, those tools should work together to support antitrust enforcement, but this can be challenging.

85. She recalled that competition enforcement is law enforcement and therefore an evidence-based process, subject to judicial review. Thus, the concepts of standards and administrability do play an essential role.

86. In her opinion, the consumer welfare standard is more competent in addressing issues than it has been given credit for. In particular, it focuses on participants that are adversely affected either by market power exercised on the buyer's side of the market (monopsony) or on the seller side (monopoly). This gives the standard the ability to address harms at any level in a supply chain. Furthermore, the standard addresses both static short-term effects, like prices, and dynamic longer-term effects, like quality.

87. She noted that the consumer welfare standard addresses conduct that transfers wealth from consumers over to producers. It also inherently addresses the ability of consumers to discipline the exercise of market power.

88. She explained that in spite of the convenience of the consumer welfare standard, it has not been well implemented in her view. For example, she opined that defendants in antitrust cases and merging parties have been very successful in arguing that conduct or transactions that might produce short-term adverse price effects can still be acceptable because they produce longer-term consumer benefits, as well as short-term cost savings. This asymmetry between the application of the standard on the competitive effects side and the application of the standard on the efficiency side has been at the root of what she believes has been lax merger enforcement, even though it is difficult to prove that short term prices effect will be overwhelmed by cost reductions and longer-term consumer benefits.

89. She argued it is dangerous to replicate the public interest standards used by sector regulators. Further, she noted there may be future conflicts in the area of digital sector regulation, specifically tensions between the consumer welfare standard and public interest considerations.

90. Finally, she identified some improvements to the current approach to assessments under the consumer welfare standard, including verifying efficiencies and their pass-through to consumers with merger retrospectives. She also indicated that efforts must be made in market definition, competitive effects analysis and entry analysis to factor in external policy constraints, such as environmental or privacy regulations.

91. **The Chair** then observed the difference in the debate regarding efficiencies in the US compared to Europe, where efficiency defences are generally not accepted. He suggested more thinking may be needed on identifying the optimal approach.

## 11. Are competition authorities prepared to face the challenge of the digital economy?

92. **The Chair** then turned to the last issue: whether competition authorities are prepared to face the digital challenge and how they should prepare for it. He gave the floor to Commissioner Christine Wilson.

93. **Commissioner Wilson** said she believes that the antitrust laws are sufficiently broad and flexible to take into account the dynamics of the digital sector as it exists today and as it will evolve in the future. She said that the FTC has spent a great deal of time focusing on these issues. They held hearings on competition and consumer protection and formed what is now the technology enforcement division for example. They are also looking at past acquisitions by the large tech firms that were not previously notified to them to determine whether notification standards need to be changed. She stated that the FTC is also working on refining its analytical tools.

94. She said that the fact that antitrust is tethered to economic analysis allows the US agencies to take account of evolving economics. They have, for instance, brought monopolization cases against tech companies that involve network effects. For example, last year the FTC sued a health information company for allegedly using both illegal vertical and horizontal restraints to maintain its monopolies over multi-sided electronic prescribing markets.

95. **The Chair** noted that in some cases, it may be difficult to wait for economic analysis to catch up to conditions in digital markets because it could lead to irreversible outcomes. Therefore, there should be more tools to intervene even without having the benefit of all the economic thinking.

96. **Damien Neven** focused his answer on whether there is a need for new tools. He mentioned that in the last couple of years, there have been a number of important reports highlighting these issues in the EU, in particular the Furman report and the Kremer-Schweitzer report. Professor Neven expressed concerns about current proposals for regulation because they consist of an analysis by a regulator of whether particular firms should be subject to the regulations. After having been assessed based on a number of criteria - entry barriers, the role of the firm in the ecosystem, etc. - the designated firms would be subject to a list of prohibited conduct and a set of obligations to ensure market contestability. He noted that the prohibited conduct can relate to multi-homing, self-referencing data portability, data sharing, access to key inputs and interoperability.

97. Professor Neven expressed doubts about whether enforcers have a completely stable economic theory in support of the very strong presumptions inherent in this regulatory approach. He said that empirical evidence about how platforms compete and enforcement experience on these issues is not sufficient. Therefore, according to him, there is a risk of only allowing innovation by small firms and preventing large firms from innovating.

98. **Hiroshi Ohashi** then recalled that because of the monopoly and consequential network effect, digital platforms have a strong bargaining position against domestic business partners. He noted that Japan's competition law can address these concerns by use of prohibitions on the abuse of superior bargaining positions, but such investigations may take too long in view of the speed of innovation.

99. To address this, the government has adopted a co-regulation approach under the Transparency Act in May 2020. This act regulates digital platforms with the mutual understanding of other stakeholders, including platform operators themselves. First, the government asks the largest digital platforms to make a proposal as how to improve transparency and fairness of their platforms. Next, this proposal is to be evaluated by the government, which can ask the platforms to revise their pledge. Eventually, the final proposal will be viewed by the public, and reputational damage will follow if it is not respected.

100. **Bill Kovacic** observed that new regulatory regimes will soon be in place, especially in the EU and in the UK. The regulatory follow-up may take longer in the US, but there is a range of enforcement cases ongoing. Professor Kovacic laid out a number of questions that must be on the table, such as whether the regulatory function should be given to competition authorities, as was done in jurisdictions like the Australia or the Netherlands where the authority has other regulatory responsibilities as well.

101. Concerning human resources, he wondered if competition authorities have enough tech scientists and more generally, whether the institutions that are making big policy decisions have enough people with the right experience and technical training. In his view, legal and economic perspectives must be complemented by technical expertise.

102. He also pointed out that there is not enough integration and co-operation taking place across jurisdictions, since the decisions made by the big economically significant jurisdictions will have global spillovers.

103. **Diana Moss** said there are two major groups of issues raised by this coming potential collision between antitrust and regulation in digital markets. First, she explained that the ecosystem business model is unique and different from how enforcers typically think about traditional integration. This business model is important for antitrust because it raises several concerns about leveraging, especially by using the consumer data.

104. She echoed that competition authorities would benefit from a multi-disciplinary approach and that lawyers' and economists' contributions are not sufficient. She said that enlarging the community will allow it to think constructively about the digital challenge, and might make the enforcers rethink some of their assumptions.

105. Lastly, she expressed concerns about the intersection between any digital markets regulation and antitrust. For instance, if digital regulators are in a position to impose remedies, will they work with, or conflict with, anti-trust remedies?

## 12. Concluding remarks

106. **The Chair** summarized some key messages from the panel discussion.

107. On the question of whether concentration shows that competition enforcement is ineffective, the answer was that more research is needed and that we cannot jump too quickly to conclusions.

108. With respect to the second question on industrial policy, the panellists concluded that competition authorities must play an active role in its development and should proactively reach out to policymakers.

109. On the third question regarding the unevenness of international competition, experts advocated for restarting international negotiations and incorporating imbalances in the playing field in economic analysis.

110. On the fourth question about public interest goals, the Chair noted different points of view. These goals can be very difficult to administer, but if needed for legitimacy purposes, transparency is important to maintain predictability and certainty.

111. On the fifth question on the legitimacy of the economic interpretation of competition, the panellists generally replied in the affirmative, even though there were different perceptions between those who believed that certainty and legitimacy were the justification for the economic interpretation, and those who thought they were not sufficient.

112. On the sixth question of whether the consumer welfare is administered too strictly, there was recognition of the flexibility of the standard. Yet, the current approach to efficiencies was questioned, and some experts opined that the time frame of the analysis needed to be reconsidered.

113. Finally, on whether competition authorities are prepared to face the digital challenge, several experts agreed that we are waiting for economists to tell us more about how competition works in the digital world. The Chair recalled how digital issues were frequently discussed at the OECD, a starting point for much-needed international co-operation.

114. He then gave the floor to The Trade Union Advisory Committee (TUAC) to talk about whether a new focus for competition policy is needed.

115. **The Trade Union Advisory Committee (TUAC)** introduced its contribution by highlighting the significance of the relationships between trade unions and competition policies as well as sustainability. The delegate underlined increasing economic precarity and widening inequalities, particularly during this pandemic period. She explained that competition authorities may fear that by integrating public interest objectives, these demands may overburden the authorities or disturb the existing system. She then argued that these fears are not justified since some activities can be undertaken with existing tools, although in the longer term legal changes may be needed.

116. Then the TUAC representative introduced three messages: First, she then called for a “just transition” whereby workers’ rights are secured when shifting towards sustainable production. She argued that the involvement of workers is an essential element for balancing power within a firm, and that competition authority and worker representatives should work hand in hand when it comes to enforcement and monitoring.

117. Secondly, she argued for authorities to address monopsony within the labour market by connecting collective bargaining and competition enforcement. She also deplored the conflict between industrial policy and competition policy by saying that these two elements should work in a complementarity manner.

118. Finally, she advocated for long-term changes such as widening the consumer welfare standard, and expressed support for the idea of a reset to competition policy.

119. **The Chair** concluded the round table by noting how the discussion underlined the importance of competition and competition authorities’ work. He thanked the panellists for sharing their insights.