

Unclassified

English - Or. English

19 May 2021

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

Global Forum on Competition

COMPETITION POLICY: TIME FOR A RESET?

- Executive Summary -

7 December 2020

This executive summary by the OECD Secretariat contains the key findings from 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.

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JT03476716

Executive Summary

*By the Secretariat**

On 7 December 2020, the OECD held the opening session of the Global Forum on Competition, featuring a keynote presentation and expert panel on the theme of “Competition policy: time for a reset?” Considering the opening remarks by the OECD Secretary General, the keynote address and the discussion by the expert panellists, the following key points emerged:

1. *Competition policy continues to play a paramount role in promoting growth and productivity, particularly in the wake of the COVID-19 pandemic.*

The core objectives and frameworks of competition policy remain relevant, and indeed essential for driving economic growth, spurring innovation and tackling inequality. Competitive markets can also be supportive of a range of policy objectives, ranging from sustainability to development. Conveying this message to the public and policymakers will be essential, particularly given recent interest in competition issues and the effects of competition (as well as competition policy) on wellbeing.

At the same time, it is important for the competition policy community to remain open-minded about potential improvements or adjustments to their tools and approaches in response to new phenomena and new insights. Competition authorities are considering adjustments with respect to both their analytical tools, such as market definition, and their legislative powers, such as with respect to digital markets and market investigation instruments.

2. *Further research is needed to understand the cause of recent trends in mark-ups and concentration, as well as the contribution of competition policy and enforcement to these trends*

There are some differences among jurisdictions in terms of trends in mark-ups as well as sector- and market-level concentration. While sector-level concentration on its own is not likely to be informative in assessing competitive conditions, there are several indications that competitive intensity may be on the decline in at least some sectors and jurisdictions (including lower firm entry rates in digital-intensive sectors).

A range of potential causes has been identified with respect to these trends, although further research is needed to identify which are relevant, and in particular whether the intensity of past competition enforcement has played a role.

Beyond competition enforcement, some observed differences in mark-up trends among jurisdictions could potentially stem from: (i) distortions in the distribution of digital firm revenues for tax purposes; (ii) differences in the evolution of demand (in particular aging populations and supply that is slow to adjust); and (iii) differences in regulatory regimes that may have anticompetitive impacts (such as unintentionally facilitating co-ordination, or distortions from industry capture).

* This executive summary does not necessarily represent the consensus view of the Global Forum participants. It does however identify key points from the panel discussion, including the views of the expert panellists and the participants’ oral and written contributions.

3. *Competition policy should be a key pillar of any industrial policy. In particular, the effectiveness of an industrial policy measure will be limited if its design does not consider the effect on competition, and does not harness the forces of competition to achieve its objectives.*

Industrial policy is a longstanding topic of interest for policymakers. However, it has begun to receive greater attention recently in the context of policy measures to promote the economic recovery following the COVID-19 pandemic.

Competition authorities will have a key role to play in advocating for industrial policy measures that do not unnecessarily hamper competition. One key message to be amplified is that policies that favour certain firms over others, and undermine the level playing field, will be counterproductive at best, and harmful at worst. Further, it can be emphasised that competition policy is itself a means of encouraging economic growth and innovation, and thus efforts to limit its application to certain sectors for example may undermine these outcomes.

More broadly, the effect of industrial policy interventions may be limited if the target firms or sectors are not subject to competitive pressures, such as price signals. Thus, competition authorities are well-positioned to assist in the design of industrial policy measures given their capacity to analyse issues such as the presence of market power and entry barriers.

At the same time, competition policy need not only play a limiting role in the design of industrial policy – it can in fact propose specific areas in which industrial policy can create an enabling environment for competition to flourish. This can include, for example, investments in human capital, as well as procompetitive R&D supports and intellectual property frameworks.

More broadly, competition policy, including active competition enforcement, can be effective in contributing to some of the goals of industrial policy. However, additional measures to supplement competition enforcement may be needed to encourage entry in a market – particularly in the context of developing economies. Sector regulation can also play either a supportive or limiting role.

Public procurement can effectively promote competition and encourage new entry in markets where the government is a major purchaser. In these cases, procurement policy can be used as a market-based tool for achieving industrial policy objectives and encouraging innovation. This is particularly relevant in markets where public authorities currently have limited options and are obtaining poor results from procurement processes. Past successes of such an approach can be attributed to: (i) active engagement between competition authorities and the public entity making purchasing decisions, (ii) a strategic approach to procurement rooted in creating options and alternatives in a market, and (iii) a degree of tolerance for risk-taking and entrepreneurial thinking in procurement decisions in order to encourage future entry and innovation.

4. *Competition distortions in globalised markets, due in particular to differences in trading systems and government support measures across jurisdictions, remain a key challenge and will require further action on the part of policymakers.*

Government policies that undermine a level playing field, such as distortionary state support or discriminatory enforcement of competition laws, risk generating long-term harm for market competition. Specifically, these policies can lead to market power both domestically (since domestic markets become more difficult to contest due to distortionary policy), and in trading partner markets (since beneficiary firms will have an advantage over rivals in foreign markets). Since this market power is not due to the competitive process, and it may be particularly durable, it is likely to result in substantial competition harms.

These harms may exacerbate negative public perceptions about the effects of globalisation and international competition.

Current global agreements seeking to address the anticompetitive impact of subsidies are inadequate for preventing these harms, in particular given limited scope and compliance. Several experts emphasised the importance of further international negotiations at the World Trade Organisation (WTO) to address these issues.

Policymakers in several jurisdictions are also considering or developing their own measures to address the distortive impacts of foreign state support in their domestic markets. At the same time, the design of these measures may involve significant challenges. For example, it may be difficult for a jurisdiction to capture indirect sources of competition distortions, such as when a foreign state's support focuses on a firm's activities in its domestic market (which may nonetheless affect its competitive decision-making in international markets).

5. *Public interest objectives in competition law may give rise to questions about trade-offs and predictability in competition enforcement. However, they may be an important way to build public support for competition policy, in which case they should be applied using transparent and clear assessments.*

In jurisdictions where public awareness of, and confidence in, the benefits of competition are limited, public interest objectives may be necessary in order to build support for competition law. Further, these objectives may give competition authorities greater independence in their decision-making. In addition, many public interest objectives can go hand-in-hand with competition; for example, small business opportunities can be greater in contestable, competitive markets. Some also argue that public interest objectives can help better capture the long-term effects of anticompetitive conduct, such as long-term implications for environmental sustainability. Finally, others suggest that the case-by-case approach of competition law provides sufficient flexibility to address public interest objectives only when particularly relevant.

However, there are also risks associated with the application of public interest objectives in competition law. In particular, when these objectives are applied according to unclear or inconsistent approaches, they may significantly harm business certainty and disincentivise some procompetitive conduct. Further, complexities may arise when an authority must trade-off competition relative to another objective in their assessments. Some caution against the application of public interest objectives when these trade-offs are significant, and when the assessment will thus depart significantly from competition and consumers. In addition, having multiple competing objectives could lead to unpredictable and constantly-shifting enforcement decisions, as well as potential risks for competition policy objectives such as competitive neutrality. While agreeing with the need for transparent assessments, some proponents of public interest objectives caution against ignoring public interest issues due to the lack of a simple measurable indicator.

As a result, it is essential for any public interest objectives deemed necessary to be accompanied by clear guidelines for interpretation and assessment. Such guidelines can also include the identification of specific issues that will not be dealt with as part of an authority's assessment.

6. *Economic analysis is likely to remain a core part of competition enforcement proceedings, although its focus and role may continue to evolve.*

There has been a growing debate about the role of economics in competition enforcement. On one hand, some suggest that enforcement cases have departed too far from the original intention of competition law in some jurisdictions, as a result of an undue reliance on economic analysis and theory. On the other hand, proponents of grounding competition enforcement in economic analysis suggest that it ensures the predictability, credibility and administrability of competition law.

One particular focus of this debate relates to the role of effects-based assessments. While competition enforcement analysis in many types of cases has become more rooted in the analysis of effects than in earlier periods of competition law, some are calling for new “bright-line” rules to address concerns, particularly in the digital sector. This has led to questions about whether such an approach is consistent with a focus on consumer welfare and available empirical evidence. However, some suggest that certainty rooted in specific economic techniques should not be the main objective of competition enforcement, and that problems may be left addressed if an undue focus is placed on economic analysis that is rapidly evolving in any event.

As this debate continues, there are ways that competition authorities can improve the quality and role that economic analysis plays in enforcement. First, they can make greater use of ex-post assessments to refine their approaches and identify improvements or blind spots. Second, they may need to advocate for greater budgets for economic teams to ensure they can match the resources of firms under investigation or merger review. Third, they can publish more details about the economic analyses undertaken in decisions, including decisions not to take action, and they can improve their public guidelines.

7. *The consumer welfare standard remains a relevant concept for competition enforcement, however the precise interpretation of this standard may be subject to different and new interpretations.*

While jurisdictions and courts vary in terms of their adoption and assessment of the consumer welfare standard, it remains an important element of many types of competition analysis. In particular, it focuses on anticompetitive mergers or conduct that produce harm stemming from market power. This can include both static and dynamic, as well as short-term and long-term effects. Some also suggest that it is sufficiently broad to capture concerns about monopsony, or buyer, power.

Nonetheless, there are questions about the interpretation of consumer surplus. With respect to efficiencies, there are varying debates taking place in different jurisdictions about whether current enforcement practice accurately assesses the impact of efficiencies, and on the balance between potential short-term harms with longer-term dynamic efficiencies. Some also suggest the interpretation of the consumer surplus standard should be broader, for example to include the effects of a merger or conduct on consumers in other markets, and consumers as workers or as individuals that may be affected by environmental impacts. Further, there may be tensions between consumer surplus standards and proposals for public interest objectives.

8. *New analytical and potentially legislative tools may be needed for competition authorities to address competition concerns in digital markets. However, the fundamental objectives and frameworks of competition policy remain relevant when tackling these concerns.*

Digital markets must be competitive in order to reach their potential for consumers and the economy more broadly. Competition authorities and policymakers in many jurisdictions are considering a range of measures to ensure competition enforcement is well-equipped to address concerns in digital markets. This includes new analytical tools to assess multi-sided and zero price digital business models, digital ecosystems as well as misconduct enabled by algorithms. At the same time, competition authorities have also launched a range of investigations and market studies using existing tools.

In some jurisdictions, new legislation is being considered to adapt or complement competition enforcement in digital markets. New merger notification thresholds are being considered to capture the acquisition of emerging competitors. Changes are also being considered with respect to presumptions regarding the anticompetitive impact of certain conduct or mergers.

New regulatory approaches are also being developed that are specific to certain digital firms with market power (including “gatekeepers”), specifically with respect to access to data, self-preferencing, and restrictions on multi-homing as well as interoperability, among others. In some jurisdictions, this may include a co-regulatory approach with digital firms making commitments that are then reviewed and monitored by public authorities. These approaches address issues that may not be easily captured under existing competition enforcement frameworks, or for which enforcement action may not be rapid enough to prevent harm from becoming permanent in a market.

However, some have called for caution in implementing wide-reaching changes based on economic theory that is still developing, and with limited empirical evidence. They highlight in particular the potential consequences for innovation incentives.

Nonetheless, given that regulatory measures are already well-advanced in many jurisdictions, policymakers should keep in mind several key considerations regarding their implementation. First, in terms of the authority responsible for implementing and enforcing these regulations, competition authorities may be well placed, since they are established and thus may be less vulnerable to concerns about regulatory capture. Second, ensuring adequate staff and expertise will be critical. In particular, this will also require multidisciplinary teams with expertise beyond law and economics, potentially including finance, marketing, management and technology engineering. Third, extensive international co-operation will be necessary given that the decisions made by a given jurisdiction can have significant economic spillover effects.