

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

Global Forum on Competition

ABUSE OF DOMINANCE IN DIGITAL MARKETS

- Executive Summary -

8 December 2020

This executive summary by the OECD Secretariat contains the key findings from the discussion held under Session II at the 19th Global Forum on Competition on 7-10 December 2020.

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

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Executive Summary

By the Secretariat¹

On 8 December 2020, the OECD held a roundtable to discuss abuses of dominance in digital markets as part of the Global Forum on Competition. Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by delegates and the expert panellists, the following key points emerged:

1. *Many digital markets exhibit characteristics that could lead to durable market power.*

Strong network effects (the gains enjoyed by consumers of a product when more consumers use that product) play a particularly important role in digital markets. They can strengthen the position of incumbents, lock in consumers, and make it difficult for new entrants to gain a foothold in a market. If consumers face significant switching costs, or if using multiple competing services (multi-homing) is not feasible, the market power of incumbents may be amplified.

Economies of scale resulting from low or zero marginal costs can add to the impact of network effects, providing incumbents with a significant advantage and discouraging entry. In addition, many digital markets exhibit strong economies of scope, allowing incumbents to easily enter a related market, and in so doing protect their position in their original market. Potential rivals unable to replicate these economies of scope may find it difficult to contest either market.

Demand-side behaviours in digital markets (such as a tendency to favour defaults) may also, either on their own or when capitalised on by incumbents, exacerbate the situation and limit competitive pressures in a market.

Economies of scale and scope as well as network effects each offer significant benefits to consumers. However, these benefits, and the broader economic potential of digital markets, may be limited if market power becomes entrenched and incumbent positions are not contestable. In particular, when sufficiently strong, these characteristics could make a market vulnerable to tipping towards a single dominant firm with a durable position.

While competition policy more broadly may seek to address the causes and consequences of durable market power, competition law does not prohibit firms from possessing market power. This is a recognition of the fact that market power may be the legitimate result of providing the best or most innovative product. However, market power can also be used to implement anticompetitive strategies, capitalising on the conditions described above and *generating consumer harm*.

2. *Concerns about potential abuse of dominance or monopolisation strategies may be particularly common in digital markets, not just because market power may be more common, but also because of the nature of digital business models and relationships.*

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

The nature of many digital business models can create dynamics in which a range of abuse of dominance or monopolisation theories of harm can apply. First, many digital markets feature some degree of vertical integration. In particular, a digital platform can play the role of both the “gatekeeper” and the user of a platform. This can give rise to complaints about rivals being denied access to a platform or essential input (a refusal to deal theory of harm), or that preferential access is being granted to the vertically-integrated firm’s downstream operations (a margin squeeze, or self-preferencing theory of harm). For example, one concern relates to the ability of platform operators to use their data access and rule-setting function to neutralise rivals through foreclosure.

Second, digital firms are often active in multiple related markets, giving rise to product “ecosystems” and conglomerate business models. A conglomerate firm may seek to employ leveraging strategies to gain market power in new markets, or protect its position in its original markets, namely by offering the products together, or offering a bundle discount (a tying or bundling theory of harm).

Third, digital firms, and especially platform operators, may cross-subsidise different products and offer zero-price products. They may also provide loyalty discounts, impose exclusivity conditions, prevent multi-homing, impose switching costs, or otherwise limit consumers’ use of substitute products. This may give rise to complaints about anticompetitive conduct, particularly if there are indications that this strategy is only profitable because it denies rivals sufficient scale or network effects (suggesting a predatory pricing or exclusive dealing theory of harm).

Fourth, in some jurisdictions, prohibitions on exploitative abuses have been a particular focus in digital markets. This reflects how some concerns in digital markets regarding the conduct of dominant firms may not fit easily within foreclosure or margin squeeze frameworks.

3. *Abuse or monopolisation cases in digital markets may take a different form from those in established sectors.*

Some new theories of harm unique to digital markets have been identified, namely forced free riding, abusive leveraging, and privacy policy tying. However, in many cases these theories can be considered variants of established concepts regarding exclusivity, margin squeeze and bundling. New forms of anticompetitive conduct may well arise as innovative business models develop. However, where new theories depart from established concepts, care may be needed given the need to ground exclusionary concerns in economic analysis.

Another unique feature of abuse of dominance concerns in digital markets is that they may be related to the design of products and their associated business models, rather than simply the strategy used by firms to sell them. This can introduce additional complexity for competition authorities in seeking to tackle these cases, although several experts and delegations also highlighted that significant remedies regarding the business model of firms may only prove necessary in a minority of cases.

4. *Differences in approach to abuse of dominance or monopolisation cases across jurisdictions are often rooted in differences in legislative or historical context.*

Some jurisdictions apply a formalistic approach to abuse of dominance cases, according to which certain forms of conduct are automatically considered infringements if it can be proven that a firm is dominant. Other jurisdictions use an approach focused on the effects of the conduct, and may apply a presumption that the conduct is harmful or not harmful. There are also differences across jurisdictions in terms of the focus of abuse of dominance cases. In particular, some jurisdictions consider harm to the competitive process, which is deemed indirect evidence of consumer harm, whereas others require direct evidence of consumer harm.

The balancing of the risks of over and under-enforcement also varies among jurisdictions. In particular, over-enforcement risks harming consumers by penalising beneficial conduct, whereas under-enforcement means failing to stop harmful conduct from irreversibly damaging competition in a market. Several invited experts raised doubts about whether there is evidence of over-enforcement, or harms to innovation incentives from past enforcement action, to date – particularly in digital markets.

5. *Competition authorities face a range of practical challenges when undertaking abuse of dominance or monopolisation investigations.*

First, the length of abuse of dominance or monopolisation investigations and proceedings can be a significant limitation on their effectiveness. Given the fast-paced evolution of digital markets, and the tendency of at least some to “tip” into monopoly, protracted investigations and legal procedures could delay enforcement action until it is too late. Further, it may be difficult to repair the damage of anticompetitive conduct. The use of interim measures by authorities is one potential strategy, although these may also face significant procedural hurdles.

Second, information gathering, particularly for smaller authorities vis-à-vis larger global firms, can be difficult. In addition, assessing and processing this evidence once it is obtained can be a challenge. As a result, several authorities have established digital units with expertise tailored to digital markets in order to facilitate investigations.

Third, competition authorities face challenges associated with the analytical tools used in abuse of dominance or monopolisation cases. In particular, market definition and the assessment of market power can be more complex relative to traditional markets. However, these processes continue to be guided by the same underlying principles, and should focus on the sources of market power through an assessment of entry barriers and limitations to substitution. Further, a broad range of indicators will be needed, given that traditional market share-type statistics are not likely to be meaningful for multisided or zero-price platforms.

Fourth, once an infringement is found to have occurred, competition authorities face the significant challenge of designing (or evaluating proposals for) remedies to address abuses, which can involve information asymmetries between authorities and the parties. Once again, several experts and delegates emphasised the importance of having sufficient sector expertise in preparing remedies, testing them, evaluating proposals for their implementation by the parties, and monitoring their implementation once a final decision has been reached. In addition, to ensure remedies are effective, authorities must also take into consideration the role that consumer behavioural biases can play in both contributing to, and resolving, competition harms. Authorities may need to consider whether remedies trade-off the short-term (e.g. consumer experience and convenience) for the promotion of competition in the longer-term.

Several delegates indicated that structural remedies may be preferable to addressing underlying incentives, and highlighted the risk that behavioural remedies may in some cases be ineffective. At the same time, representatives of the business community emphasised the importance of remedies that are evidence-based, proportionate, targeted and rooted in a counterfactual.

Going forward, competition authorities seeking to address abuses of dominance in digital markets would benefit from deeper international co-operation, given the international scope of many digital firms. Despite the differences in legislative frameworks and historical context, there remain significant commonalities in terms of the concerns being identified and the economic analysis underpinning them. With respect to this analysis, there remain significant opportunities for the development of new methodologies that help authorities assess the unique circumstances in digital markets (for example, with respect to forced free riding), and identify clearer conditions in which harm will emerge.

6. *Several proposals have been made to strengthen or adapt abuse of dominance frameworks to the digital sector.*

This could include improved guidance on which theories authorities are likely to analyse and how, and using new economic tools to incorporate non-price dimensions of competition. Enforcement powers could also be extended to include the imposition of interim measures (where authorities do not currently have such an ability), as well as legislative changes such as reversing the burden of proof in certain cases. Some jurisdictions have, or are considering, imposing new obligations to be enforced by competition authorities vis-à-vis specific firms. In some instances, these changes involve formalistic prohibitions on certain conduct, while in others an effects-based approach will continue to be taken.

7. *Some concerns arising within digital markets may not be satisfactorily addressed within current abuse of dominance or monopolisation enforcement frameworks*

In particular, some concerns either do not fit the theories of harm or are not likely to be resolved with the corresponding remedies (for instance, if they are too complex and challenging for competition authorities to enforce and monitor). Merger control will remain a key tool for competition authorities to address acquisitions that may entrench a firm's market power.

In addition, competition authorities will need to pursue co-operation with other authorities and regulators, given the overlapping policy concerns that arise in digital markets, such as consumer protection and privacy. Jurisdictions may also wish to explore alternatives to competition enforcement, such as ex ante regulation on the conduct of a specified set of firms, or line of business restrictions. This could enable a broader approach to tackling some of the demand-side problems involved.