

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

Global Forum on Competition

ABUSE OF DOMINANCE IN DIGITAL MARKETS

Summary of Discussion

8 December 2020

This document is a summary of the discussion held during Session II 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/dmkt.

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Summary of Discussion

By the Secretariat

1. Introduction by the Chair

1. The **Chair** noted that abuse of dominance issues in digital markets are receiving more and more academic and expert attention, but the number of cases where digital theories of harm have been extensively tested and litigated before courts is currently limited. The purpose of the roundtable was to discuss the competition issues arising from digital markets, especially dominance, and how they are being addressed in some jurisdictions through enforcement or other means.
2. The roundtable would be divided into three parts:
 - theories of harm relating to abuse of dominance in digital markets, and the similarities and differences with theories in non-digital markets;
 - practical challenges confronting competition authorities when investigating possible abuse of dominance by digital firms; and
 - remedies to address misconduct.
3. The expert panel consisted of:
 - **Cristina Caffarra**, Head of the European Competition Practice at Charles River Associates;
 - **Amelia Fletcher**, Professor of Competition Policy at the University of East Anglia and non-executive director at the UK Competition and Markets Authority;
 - **Pablo Ibáñez Colomo**, Professor of Law at the London School of Economics; and
 - **Lina Khan**, Associate Professor of Law at Columbia Law School and previously counsel to a US congressional investigation into digital markets.

2. Summary of background paper by the Secretariat

4. **The Secretariat** briefly summarised the background paper prepared for the session. The Secretariat explained that digital markets have a range of characteristics that make concerns about dominance likely to arise, in particular: their large size; the presence of multi-sided and vertically integrated business models, which can lead to disputes about access to inputs and platforms, and self-preferencing; conglomerate or multi-product ecosystem business models that can lead to bundling and tying concerns; zero or subsidised pricing, which can raise concerns about predatory pricing (but where the price-cost tests used in some jurisdictions are not valid); network effects, which can amplify the effects of conduct in digital markets and lead to “tipping” of the market towards a dominant provider; the potential for consumer biases to reduce competitive pressure on dominant firms; and finally, pressure on competition authorities to take account of overlapping policy concerns such as consumer protection and privacy.

5. Differences in approach to abuse of dominance cases across jurisdictions are often rooted in differences in legislative or historical context. These differences include whether abuse is analysed according to formalistic or effects-based criteria; how authorities balance the risks of over or under-enforcement; and whether their analysis can focus on harm to the competitive process among firms, or whether it must demonstrate detriment to consumers.
6. The background paper, the Secretariat explained, stresses the importance of an economic approach to establishing dominance, in particular in by identifying any constraints on entry or limited substitutability that might be present. The paper sets out a range of sources of evidence and analytical techniques that can be used to explore theories of harm relating to abuse of dominance in digital markets.
7. The Secretariat listed a number of such theories (with examples from actual cases) and suggested that many cases might ultimately come down to themes of tying-and-bundling and margin squeeze, despite being expressed in an array of new digital-market terminology.
8. Finally, the background paper considers ways of strengthening or adapting 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 on markets to prevent harm from becoming permanent, as well as legislative changes such as reversing the burden of proof in certain cases.
9. The Secretariat ended by suggesting that many concerns arising within digital markets may not be satisfactorily addressed within an abuse of dominance framework, either because they do not fit the theories of harm or because the corresponding remedies are challenging for competition authorities to enforce and monitor. Jurisdictions may therefore wish to explore alternatives to competition enforcement, such as ex ante regulation. This could enable a broader approach to tackling some of the demand-side problems involved.

3. Theories of harm in digital markets

10. **Lina Khan** discussed theories of abuse of dominance in digital markets by reference to the recent report¹ of the Investigation of Competition in the Digital Marketplace by the US House Subcommittee on Antitrust, Commercial and Administrative Law, to which she was counsel.
11. She described how the report sought to document competition problems and potential abuse of market power by Amazon, Apple, Facebook and Google. These companies, while differing in their business models, all function as “gatekeepers”: i.e. they control access to key channels of distribution which gives them power to dictate the terms of commerce. They also show common patterns of abuse of this power that could be thought of as falling into three categories, namely the exploitation, maintenance and extension of dominance.
12. The report found that the companies exploit their gatekeeper power by charging excessive fees, imposing oppressive contractual terms, and extracting valuable data from the individuals and businesses dependent on these platforms. For example, she indicated that after securing a dominant position, Google Maps increased its fees to software

¹ https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

developers for the use of Maps API by over 1400%. The platforms also impose higher “fees” by requiring users and trading partners to render greater amounts of data. For example, Facebook now requires publishers to send data on their readership to Facebook, which leads to concerns that this information could be used in Facebook’s advertising algorithm to compete with the publishers. The platforms have also imposed oppressive contractual terms with no notice, such as forced arbitration clauses and class action waivers that provide the trading partners with fewer procedural rights.

13. Secondly, the report identified ways in which online platforms maintain their market power. By controlling the infrastructure of digital commerce and communications, these firms have surveilled other businesses to identify and neutralise potential rivals by anti-competitive acquisitions or foreclosure. In total, the four platforms have made more than 800 acquisitions over the last two decades. Examples include Facebook’s use of Onavo data to buy up WhatsApp, and Google’s use of Android data through its Lockbox program to inform its app strategy. The report also identified how Google was able to use Gmail to gather data on third-party browsers, which it used to inform its strategy for Chrome and give it a competitive advantage over rival browsers.

14. Finally, the report indicates that online gatekeepers have used their dominance to expand their market position by leveraging their market power in adjacent markets. This phenomenon includes business practices such as self-preferencing, tying, and predatory pricing. The investigation found that predatory pricing was especially common in instances where firms are looking to dominate an ecosystem: for example, Amazon frequently prices its Echo devices below cost because it wants to capture the home ecosystem. Platforms also use their existing dominance (such as online retail in the case of Amazon) as leverage when negotiating with business partners in unrelated markets where they are not yet dominant. The report also identified a practice of “strategic platform mismanagement” in the report whereby platforms fail to address the proliferation of counterfeits or fake business reviews in order to gain additional bargaining power over their trading partners.

15. The recommendations of the report included both ex ante rules such as line of business restrictions and non-discrimination rules, as well as reforms to existing antitrust law, including the introduction of an abuse of dominance standard, which currently does not exist in the US.

16. Dr Khan considered that it was especially important to examine these theories of harm in markets such as voice assistants and cloud computing where the major platforms are currently engaged in a scramble for dominance. Enforcers should act to ensure that these markets do not become dominated in the same way as search and online retail.

17. **Prof. Colomo** spoke briefly about the relationship between abuse of dominance in digital markets and established theories of harm and jurisprudence in the non-digital sector. He said that a major difference between applying abuse provisions in traditional versus digital markets is that the former concerns how products are *sold* while the latter concerns how products are *made*. For example, a traditional tying or exclusive dealing case concerns the conditions under which the sale of a product takes place, and abuse can be addressed by requiring the firm to cease and desist its practice. In digital markets, by contrast, intervention is typically more intrusive and affects the heart of dominant firms’ strategies, i.e. the design of products and business models. For example, competition authorities might be required to decide the number of features that a product should incorporate or the appropriate price for a subscription. This additional complexity should be borne in mind when deciding whether intervention is warranted from a competition standpoint.

18. **Cristina Caffarra** spoke about under and over-enforcement. She began by noting that the basic economics of digital markets, including the features that tend to lead to dominance, are now well understood and were very well summarised in the background paper. Consumers, she said, have become funnelled into three or four online “attention brokers”, contrary to expectations 10-15 years ago that multi-homing and disruptive entry would prevent digital markets from tipping.

19. She felt that competition enforcement in digital markets should be stepped up, for several reasons. First, waiting for some form of exclusion or foreclosure to occur before acting is too late, because the dynamics of network effects and economies of scope in data and other dimensions that lead to dominant positions cannot be undone. Online shopping and Android were clear examples where intervention came too late and was ineffectual.

20. Secondly, the loss function from under- or over-enforcement is highly asymmetric: failure to act against abuses could lead to the decimation of competition in digital markets, whereas any unintended consequences of enforcement are less damaging. Dr. Caffarra was unaware of any evidence that over-enforcement can destroy innovation, as often claimed in the past.

21. Third, Dr. Caffarra felt that theories of harm should be expanded, and not limited to “Microsoft-type” issues of leveraging and tying. The concerns raised by digital markets are not necessarily about discrimination that leads to exclusion, but about the distortion of competition and unequal bargaining power between large platforms and businesses that depend on them. She said that agencies were too reluctant to consider exploitation and extraction because they are associated with the notion of excess pricing. Theories of harm should address not only exploitation of final consumers but also exploitation of businesses that are customers of online platforms. Practices of exploitation and extraction should be dealt with as such, rather than being shoehorned into theories of exclusion and foreclosure that may not be relevant.

22. With regard to remedies, Dr. Caffarra felt the record was poor, as evidenced by the online shopping and Android cases. Cease-and-desist orders leave the dominant firm to design the remedy, but because of asymmetries of information it can circumvent the intention of the order and regulators are unable to verify the effectiveness of the remedy adopted.

23. In Dr. Caffarra’s opinion a more radical approach is required. She did not feel that breakups were necessary, but promising options include decentralised regulation (such as the Australian Competition and Consumer Commission (ACCC) News Media Bargaining Code), line of business restrictions, or equal access to data for customers. Merger control should also prevent platforms from making anti-competitive acquisitions.

24. A delegate from **Korea** presented recent abuse of dominance cases pursued by the Korea Fair Trade Commission (KFTC) against two digital platforms.

25. The first two cases involved Naver, Korea’s leading search engine and online platform operator. The KFTC found that Naver abused its dominance by imposing exclusivity clauses on providers of property listings, thereby excluding a rival real estate information platform from the market and restricting the choices of end users. The KFTC characterised this conduct as a prevention of multi-homing and imposed a corrective order and a fine of about USD 800,000 on Naver.

26. Naver provides an online marketplace and an online shopping comparison service that displays results for products sold on both its own platform and competing marketplaces. The KFTC found that Naver manipulated its search algorithms to favour products sold on its platform. It characterised this conduct as self-preferencing and leveraging of market power, and imposed a corrective order and a fine of about USD 22 million on Naver for abusing its dominant position.

27. The last case concerned the second largest food delivery app in Korea, YogiYo, owned by Delivery Hero Korea. The KFTC found that YogiYo had abused its bargaining power over restaurants by unilaterally implementing a lowest price guarantee policy prohibiting them from selling at lower prices by other channels such as ordering by phone or other delivery apps. It imposed a corrective order along with an administrative fine of about USD 300 000.

28. A delegate from **Turkey** shared some experiences of the Turkish Competition Authority with respect to proactive market study initiatives currently being undertaken, and challenges faced when dealing with abuse of dominance cases.

29. The Authority has recently begun two studies of digital markets in order to inform its approach to abuse of dominance. The first aims to understand and evaluate national and international developments in the digital economy, identify goals to enhance competition policy, and determine an action plan. The other is a sector inquiry into e-market platforms, which are growing in importance (especially due to COVID-19) and becoming a source of many complaints. It looks at: i) the market power stemming from data ownership and network effects that may cause abuse concerns due to firms' simultaneous market roles as both platforms owners and sellers, and ii) the potential for exclusionary and/or abusive conduct through pricing and supply practices.

30. The delegate then discussed some of the challenges the Authority had faced when dealing with abuse cases in digital markets in the past decade. The first of these was information acquisition. Gathering complete and correct information was difficult both because of the huge number of users on both sides of digital platforms, and because in some cases platforms are based abroad, which entails the use of diplomatic channels, causing delays and shortening the time available for analysis.

31. The second challenge was the theoretical question of market definition and the assessment of market power. The agency is working on updating legislation in this area to take account of issues presented by digital markets.

32. The third challenge concerned the balance between over- and under-enforcement. In many cases the abuses resembled consumer protection infringements, but the Authority may be prevented from pursuing them because of the lack of consumer protection provisions in law. An alternative (as Dr. Caffarra had argued previously) would be to formulate misconduct in terms of exploitative abuses, but courts could be reluctant to entertain this. At the same time, the delegate agreed that the risk of over-enforcement through interference with the business model of digital firms should also be considered.

33. A delegate from **Chinese Taipei** described a case brought against Google, as well as other initiatives within the Federal Trade Commission (CTFTC). He said that theories of harm in relation to abuse of dominance could be divided into abuse by obstruction (i.e. eliminating horizontal competition) and abuse by exploitation (i.e. extracting profits above the competitive level).

34. The case he described was brought by the owner of mobile apps that Google had removed from its Google Play store on the grounds of violation of app policy. The complainant alleged that Google had abused its dominant position as the main app platform for Android devices, of which it had a market share of over 90%. The CTFTC found that the conduct did not represent abuse by obstruction since Google and the complainant were neither actual nor potential horizontal competitors. It also found that the conduct did not constitute abuse by exploitation since the removal of apps could not increase the revenue of Google Play or benefit the Android ecosystem.

35. The CTFTC established a digital economy competition policy team in April 2017 to consider issues of market definition, assessment of market power, and potential anti-competitive conduct in digital markets. In 2020 the team was focusing on the big four technology giants, including analysing case investigations in other jurisdictions as well as the conduct of these and other online platforms in Chinese Taipei.

4. Practical challenges in investigating abuse of dominance in digital markets

36. The Chair introduced the second theme of the roundtable by inviting **India** to describe how the Competition Commission of India (CCI) was responding to the rise of the digital sector by adapting its relevant market definition.

37. The delegate explained that several cases have been brought against digital market and e-commerce players. Some were closed as dominance was not found to exist or anti-competitive conduct was not shown, while others are still under investigation. Thus the jurisprudence is still at a nascent stage. The CCI's approach to intervention in digital markets is that it should be targeted and proportionate, preserving innovation incentives while correcting conduct.

38. Under the Indian regulatory framework, the agency first has to define the relevant product and geographical market before identifying potential dominance. From the limited jurisprudence to date, the CCI has shifted from treating online and offline markets as different channels of distribution of the same products, to viewing online channels as a separate relevant market where appropriate.

39. A delegate from **Brazil** described cases investigated by the Administrative Council for Economic Defence (CADE). Brazilian competition law provides for both a form-based and an effects-based approach to the assessment of anti-competitive conduct. CADE assesses unilateral conduct using an effects-based approach, where effects may be potential or actual.

40. In the first case CADE investigated whether Google was preventing multi-homing and restricting competition by enforcing abusive clauses preventing advertisers from transferring data from the Google platform to other search platforms. In September 2019 CADE's tribunal decided to dismiss the case, concluding that there was not enough evidence that Google had prevented competition through the relevant clauses. In arriving at its conclusion CADE analysed the contracts in detail, conducted a wide market test by contacting over 100 advertising agencies and advertisers, and also examined similar cases involving Google AdWords conducted by antitrust authorities in the US and Europe.

41. Even though digital markets pose challenges for competition authorities, the prevailing view in Brazil is that such challenges do not currently require changes to legislation or methodology. CADE analysed Google's conduct through standard methods of assessing unilateral conduct such as defining the relevant market, assessing whether the defendant held a dominant position, and analysing conduct, examining both actual and potential effects and considering the balance of pro-competitive and anti-competitive effects.

42. The delegate also touched on a case brought by a media group alleging that Google abused its dominant position by placing Google Shopping above other price comparison sites in its search results. In dismissing the case and the proposed remedy, CADE noted its concern with interfering with a defendant's products, "second-guessing" its algorithm, and potentially hindering pro-competitive innovation through mistaken intervention.

43. A delegate from **Mexico** representing the Federal Telecommunications Institute (IFT), the country's competition authority in telecommunications and broadcasting, discussed some of the issues in assessing dominance in digital markets and shared two cases, albeit concerning mergers rather than abuse of dominance.

44. The delegate listed some of the features of digital markets that need to be considered when analysing potential abuse of dominance. Where the market has winner-takes-all dynamics, competition is for the market rather than in the market. Data can improve the quality and personalisation of the services, giving the company owning the data advantages over its competitors. Barriers to entry in digital markets can include network effects, lack of interoperability, lack of multi-homing and data portability, and loyalty programs.

45. The IFT analysed two mergers, AT&T-Time Warner in 2016 and Disney-Fox in 2018, involving parties who provide audio-visual content to platforms. In both cases the main concern arose from possible non-horizontal effects of coordination, foreclosure and creation of barriers to entry. The IFT dismissed anti-competitive effects in the relevant digital markets identified, either because market shares were very small or the parties did not participate in the OTT markets, or because no significant barriers to entry were identified. The IFT expects to analyse more competition cases related to digital markets in future years.

46. A delegate from **Russia** discussed how the Federal Antimonopoly Service (FAS) has addressed the question of determining market share in digital markets. Over the past five years the FAS has considered several cases of abuse of a dominant position in digital markets against Google, Apple, Microsoft, Booking.com, Gett Taxi, and digital job search platforms such as Headhunter and Superjob. Conventional quantitative analysis may be inappropriate in cases involving digital platforms or zero-price markets since market size and shares cannot be measured in values. The FAS has therefore started using information on number of apps, users, ads and downloads, and the volume of data collected by market participants.

47. The delegate provided two examples. In a case against Google, the FAS concluded that it was dominant in the market for pre-installed app stores for smartphones using the Android operating system, which has a share of mobile devices of over 50% and rising. Google also bundles its Google Play app store with Android. To assess its market power the FAS looked at official statistics on the number of smartphones with pre-installed Google software sold and used, as well as volume measures related to the download and use of Google Play apps. The FAS determined the Russian Federation as the geographical market in view of the use of Russian in the interface and national regulations governing consumer rights in relation to devices bought on the domestic market.

48. In a case against Apple raised by the Kaspersky Safe Kids mobile application, the FAS found that Apple was dominant in the market for the distribution not just of parental apps but of all apps using Apple's iOS operating system, with a 100% market share.

5. Remedies for abuse of dominance in digital markets

49. The Chair invited **Prof. Amelia Fletcher** to begin the last section of the roundtable. Prof. Fletcher explained that she would focus on the demand side of remedies, and the problem of trying to make remedies work when consumer behaviour is key to their functioning.

50. She emphasised that consumers' choices can be strongly influenced by choice architecture due to consumer biases, for which there is strong evidence from behavioural economics. These include framing bias (being influenced by the way different options are presented), salience bias (focusing on the most prominent choice item), and default bias (accepting the default option). These biases can weaken competition and can also be exploited strategically.

51. Next, Prof. Fletcher outlined how consumer biases are explicitly or implicitly relevant to many previous and ongoing cases involving online platforms. Google Android (EC, 2018) was explicitly concerned with status quo bias (although Prof. Fletcher considered that it was more to do with default bias). Google Shopping (EC, 2017) was implicitly about salience bias, i.e. the prominence of information on the search page. The UK CMA was focusing on choice architecture of privacy options in its work on digital advertising in relation to Google and Facebook. Similar issues are also being considered in connection with app stores and Amazon's Buy Box.

52. Choice architecture can therefore be the source of competition problems and a target of remedies, according to Prof. Fletcher. However, such remedies can be difficult to devise effectively.

53. Prof. Fletcher used the example of Google Shopping to illustrate this point. In 2017 the EC asked Google to open up its shopping site to rival choice comparison services, who were able to bid for space in the shop. However, she indicated that despite tweaks to the remedy, by November 2019 the EC admitted that, although rival comparison sites were appearing in the shopping box, little traffic was flowing to them.

54. Prof. Fletcher described why the auction-based remedy, in which sites bid for default and salient positions, had not worked. She opined that auctions can be exploitative, can favour those who are most likely to gain market power from winning the auction, and can favour vertically integrated services. Initially, Google kept winning the auctions, so was often the only price comparison site that appeared in the box. This issue was corrected, but problems persisted because of consumer biases. To illustrate this, Prof. Fletcher showed a screen grab of shopping results for a toaster taken days before the Forum, which showed images for different products listed by price comparison sites. Clicking the image or an area near to it takes the consumer to the merchant, rather than to the price comparison site. To visit the price comparison site, consumers must either toggle at the top of the box to display sites rather than products, or else click a specific link at the bottom of the product listing. Prof. Fletcher said that consumers are unlikely to do this, and may remain unaware that a price comparison site other than Google was involved. Thus the current design is unlikely to encourage consumers to start discovering and using other comparison sites.

55. Prof. Fletcher drew the following lessons for remedy design. First, there may be a trade-off between the immediate interest of consumers and the longer-term interest of competition, since improving competition may involve slightly harming the consumer experience. In the case of the Google shopping box, for example, consumers may well prefer a direct click-through to a merchant rather than going to a price comparison site.

56. Secondly, it is essential to test and monitor formally how consumers react to choice architecture. The Google Shopping remedy was still ineffective despite several years of tinkering. Because of this need for ongoing design and monitoring, and the large number of current and future cases, ex ante regulation may be a more suitable means of addressing demand-side competition issues than competition policy enforcement.

57. Finally, similar issues are likely to arise in connection with access to data. Although data portability is often highlighted as a potential remedy in such cases, it depends on consumers being sufficiently engaged to port their data. But because of behavioural biases, consumers might not understand the benefit of this engagement. For this reason wholesale data access may be required instead of just small-scale data portability.

58. **Prof. Colomo** gave his second contribution of the roundtable, this time on the relation between remedies and legal tests. In the EU and US systems, the type of complex intervention described by Prof. Fletcher has been confined to exceptional circumstances. EU competition law does not interfere with the choice of business model or, except in exceptional circumstances, with the design of products. Thus the law insulates competition authorities from complex and resource-consuming intervention.

59. A first question therefore is whether jurisdictions might wish to abandon this legal regime so that remedial intervention becomes the norm rather than the exception, and monitoring exercises become routinely used across the whole of the digital ecosystem.

60. The second question, he said, is the weight given to competition law and to regulation. The experience of telecoms has shown that while competition law regimes have a lot to add, they are also limited in several ways.

61. Prof. Colomo agreed with Prof. Fletcher that regulation is in many respects better suited to monitoring exercises that require fine-tuning over time. In his view it may not be appropriate to overwhelm competition law systems with the task of routinely intervening in digital markets in this way.

62. The **Chair** forwarded a question from within EC DG COMP to Prof. Fletcher asking her whether, in view of her scepticism about behavioural remedies in digital antitrust cases and therefore presumably in mergers also, she would recommend prohibiting mergers in digital sectors more frequently than in other industries.

63. **Prof. Fletcher** clarified that she had been talking about remedies that take account of consumer behaviour, rather than behavioural (as opposed to structural) remedies in the competition law sense of the term, which refer to the behaviour of the firm. Nevertheless she considered that consumer behavioural factors should be taken into account in merger decisions and remedies.

64. The delegate from **Germany** commented that there was an enormous difference in the remedy process between merger proceedings and abuse proceedings, since in merger proceedings the parties are seeking to gain something from the competition authority and will propose remedies, whereas in abuse cases they will not. Secondly, Prof. Fletcher's presentation had confirmed his scepticism with regard to the long-term effectiveness of design remedies, whether ex ante or ex post. For example, an agency could go to great effort to define what did and did not constitute self-preference, but the company could then sidestep the remedy by inventing a different system.

65. The contribution from **Germany** discussed the issue of abuse of dominance remedies in digital markets by reference to cases with contrasting characteristics, and described changes currently underway to German competition legislation.

66. The delegate began by noting that remedies must be proportionate, have an impact on the market, and be timely in order to be useful. As an example of timely and successful remedies that are easy to monitor, he cited two Bundeskartellamt cases against Amazon. In 2013 the agency prohibited the price parity clause imposed on Amazon Marketplace sellers. Such clauses by dominant platforms have now been widely eliminated. In 2019 it investigated Amazon's general terms and conditions, which enabled Amazon to terminate contracts without reason and forced them to seek legal redress in Luxembourg. Amazon has now amended its terms of business for sellers on Amazon marketplaces worldwide.

67. The 2019 case against Facebook was very different. It concerned ensuring that Facebook keeps the data it gathers on Facebook, Instagram, WhatsApp, and third-party platforms separate if the user wishes. This was therefore a remedy with a structural impact that concerned breaking up Facebook's data-related dominance. In the delegate's view, remedies of this kind that go to the anti-competitive core of the business have the best chance of real impact on the market.

68. The delegate then explained proposed changes to German competition law designed to ensure timely action to preserve competition in digital markets. The Bundeskartellamt will have the power to designate companies or undertakings of "paramount significance for competition across markets". This concept is different from market power within an existing market and aims to ensure that the competitive process can be preserved in markets that are not yet dominated by the designated company. After designating a company in this way, the Bundeskartellamt can prohibit certain conducts such as self-preferencing, establishing entry barriers related to data, or hindering interoperability. This proactive approach of imposing remedies ex ante rather than waiting until a distortion of competition occurs could be thought of as "competition law plus".

69. The Chair turned back to **Prof. Fletcher** to respond to the German presentation and describe a UK CMA document on a pro-competition regime for digital markets being published on the same day as the roundtable. Prof. Fletcher said she respectfully disagreed that remedies taking account of consumer behaviour were not worth pursuing. Consumer behaviour is a challenging area to incorporate, but so are many other facets of digital markets such as the behaviour of algorithms.

70. She encouraged participants to read the proposals of the CMA-led Digital Markets Taskforce for the regulation of digital firms with "strategic market status", which were being published that day. Although the UK framework is described as regulation, she felt there was a great deal of similarity with the German proposals that were made under the heading of competition policy in that firms would be designated and subject to ex ante rules.

71. The delegate from **Germany** commented that he was not surprised that there were similarities between the two sets of proposals because ultimately there was no such thing as self-executing regulation. Both sets of proposals required case-by-case assessment by an agency, for example in order to define self-preference.

72. The Chair invited **Lina Khan** to share her reactions to the discussion thus far. Dr. Khan was encouraged by the effort being devoted around the globe to the issues and supported ongoing collective learning.

73. She supported the point made earlier by Christina Caffarra that the cost of erroneous non-enforcement in digital markets is high given the speed at which they can tip, the entry barriers, and the difficulty of dislodging dominance once established. The approach to remedies should be based on swift action, especially where dominance has not been cemented. She opined that there was significant under-enforcement of these harms. She felt that it was difficult to find any instance where over-enforcement had actually occurred.

74. She also echoed the call to consider ex ante rules and remedies, and to apply the long tradition of dealing with network monopolies and dominant intermediaries by enforcing principles of non-discrimination and equal access, and interoperability.

75. Finally she observed that legislatures were reasserting themselves in the area of antitrust as a result of the critical role of digital platforms in everyday life, which the pandemic had further increased.

76. The Chair invited the delegation from **Romania** to describe its recent work on online platforms and its conclusions with regard to remedies, which included intervening in business algorithms.

77. The delegate explained that the Romanian Competition Council (RCC) conducted a market study of online platforms in 2017 and subsequently launched an investigation into a vertically integrated online marketplace, which is still ongoing.

78. In considering potential remedies, the RCC is conscious that they should be both suitable, without destroying the business, and capable of being monitored. The remedies being contemplated concern the algorithms used by the platform. First, the business should inform third-party sellers about how the algorithms work, without publishing all the details which are a business secret. Secondly, human intervention in the algorithms should be limited, and there should be a clear procedure for traceability of any manual interventions in their operation. Finally, the RCC may require the platform owner, which is also a seller on the platform, to impose a wall between its own and third-party data.

79. The **European Consumer Organisation (BEUC)** gave a consumer perspective on the topic. The delegate said that, for consumers, effective enforcement means both effective antitrust analysis and effective remedies. The value of bringing an abuse of dominance case is undermined if the harm to the market is not fixed.

80. As already mentioned in the session, past remedies in the EU for abuse of dominance in consumer-facing digital markets, such as Microsoft Windows Media Player and more recently Google Shopping and Google Android, have been criticised, which suggests that they are not yet optimal.

81. BEUC's written contribution lays out several steps that could be taken by competition enforcers to improve the remedy process. These include: having a dedicated, specialist remedies team (like US FTC and more recently DOJ, and the CMA in the UK); considering effective remedy design early on in a case; and systematic inclusion of review clauses and ex post evaluation of remedies.

82. The delegate wished to focus on two points from the paper. The first was the current over-reliance on the infringer in remedy design. Companies on whom remedies are imposed clearly know their business best, so must be involved in the remedy design. However, as the abuse is likely to have been profitable for the infringer, its incentives to make the remedy effective are limited. In BEUC's view it is therefore essential to involve other parties with a detailed and practical knowledge of the industry. Whether remedies are being imposed in a prohibition decision or taken in a commitments or a settlement decision, there should be a more systematic and transparent consultation from an early stage, taking into account the input of all market actors, including consumers and consumer organisations, while respecting business confidentiality.

83. The second point concerned the greater integration of behavioural economics in remedy design, on which BEUC very much shared Prof. Fletcher's views. Dominant digital companies clearly exploit consumer behavioural biases such as status quo bias or saliency bias to influence consumers to use their products and services, for example through pre-installation of products, setting them as defaults, or placing their own products where

consumers will pay the most attention. Consumer-facing remedies must take account of actual consumer behaviour, not abstract and possibly inaccurate rational market theory. Authorities should go beyond the theory and test consumer-facing remedies on consumers using randomised controlled trials and other proven methods.

84. The Chair invited **Business at OECD (BIAC)** to present its views on whether competition authorities had been over-reliant on companies to design remedies. The delegate said that most jurisdictions already have a very robust consultation process for seeking input from the party being investigated, other participants in the markets, bystanders or complainants.

85. With regard to remedies, the delegate indicated that, for a remedy to be effective there should above all be a sound and evidence-based understanding of the harm being remedied. Considerations of the effectiveness of remedies may require re-examination of the harm itself.

86. Secondly, the delegate emphasised that effective remedies must be proportionate and targeted. Remedies that interfere with the business model are intrusive and so should be considered carefully, balancing the positive and negative effects.

87. Thirdly, the delegate stated remedies should consider what would have happened absent the conduct. Analysis of the counterfactual should inform discussion of the remedy as well as the nature of the harm.

88. Fourthly, the delegate opined that remedies are more effective when focused on the competition harms and not on what the delegate termed non-competition harms such as privacy and other issues which are best dealt with by the regimes that govern them.

89. Finally, the delegate suggested that the effectiveness of remedies can be considered in the broader sense, taking account of the impact on the legal certainty, predictability and transparency that allows businesses to thrive.

90. The Chair asked whether BIAC agreed that remedies should be designed to take account of consumer behaviour in the way that Prof. Fletcher and BEUC had described. The delegate replied that tools such as surveys already exist for authorities to engage with consumers. Good remedies should be based on evidence and engagement with markets, including consumers. In the case of intrusive remedies that affected the business model of the company being investigated, the company itself should not be excluded from the discussion, although the delegate acknowledged that this had not been suggested.

91. The Chair invited **Belgium** to discuss its contribution, which suggested there may be complementary approaches to enforcement in tackling dominance in digital markets. The delegate said that stakeholders of all kinds were expressing a desire for greater ex ante guidance. For Belgium, such guidance is most effective if it comes from the European Commission, as it gives the most predictability and legal certainty. However, this would require European competition bodies to be prepared to give guidance before the establishment of case law. Guidance in the past has usually followed case law, but in fast-moving digital markets this is too late.

92. In addition to general guidance, both the Commission and several national authorities are exploring the possibility of greater individual guidance. The idea of resuming “comfort letters” was being discussed. The delegate noted that Germany has a very extensive practice of engaging in discussions with companies.

93. A memorandum published 2019 by the competition authorities of the three Benelux countries sets out proposals for different types of guidance, as well for an ex ante instrument providing for the preventive imposition of remedies without an infringement being established.

94. The **Chair** thanked the participants and summed up the discussion under five key words. The first was *caution*: this was the appeal made by Prof. Colomo with regard to the risk of over-enforcement in a complex and dynamic area. The second was *understanding*, i.e. the challenge of gathering information, and also learning about digital business models both within agencies and by the exchange of learning between them. The third was *innovation*: this was the appeal made by Cristina Caffarra with respect to theories of harm relevant to digital markets. The fourth heading was *adaptation*: as the contribution from Germany discussed, abuse of dominance provisions may not be a sufficient instrument to deal with digital markets. The fifth and final headword was *remedies*: the Chair agreed with Prof. Fletcher and BEUC that remedies should be grounded in how consumers actually behave if they are to be effective.