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REMEDIES AND COMMITMENTS IN ABUSE CASES

Summary of Discussion

2 December 2022

This document is a summary of the discussion held during Session IV of the 21st meeting of the Global Forum on Competition on 1 – 2 December 2022.

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

Please contact Mrs. Lynn Robertson if you have any questions regarding this document [Lynn.Robertson@oecd.org].

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Summary of Discussion

By the Secretariat

1. On 2 December 2022, the OECD Competition Committee concluded the 2022 Global Forum on Competition with the roundtable that discussed the use of remedies and commitments in abuse of dominance cases, a topic which prompted 19 jurisdictions to send their contributions. **Professor Frédéric Jenny** chaired the roundtable, which featured four speakers:

- **Dr. Anna Renata Pisarkiewicz**, Research Fellow at the Centre for a Digital Society, European University Institute who prepared and presented the Secretariat Background Note,
- **Prof. Gwen Grecia De Vera**, a senior lecturer at the University of the Philippines and also the Programme Director of the Competition Law and Policy Programme;
- **Lucía Ojeda Cárdenas**, partner at SAI Derecho & Economia; and
- **Prof. Frank Maier-Rigaud**, the managing director of ABC Economics and a full professor at IESEG School of Business as well as the Lille Catholic University.

2. **The Chairman** encouraged intervening jurisdiction to share their experience with the use of remedies and commitments and whether they have found them to be effective rather than to provide a descriptive overview of the national legal frameworks. The Chair reminded that the OECD had discussed remedies and commitments in the past, but never exclusively in the context of abuse cases. However, the time for dedicating a roundtable specifically to this topic was certainly ripe given the increasing complexity of abuse of dominance cases and of the process of designing effective remedies.

3. The Chairman explained that the roundtable would be divided into three parts, each revolving around a diverse set of questions, and in particular:

1. The variety of legal frameworks across the jurisdictions with respect to commitment and prohibition decisions, and the varied objectives that might be pursued;
2. Challenges and trade-offs that the use of remedies and commitments in abuse of dominance cases involve as well as the respective merits of structural and behavioural remedies and the procedural challenges that competition authorities might face when imposing remedies, and
3. The monitoring and evaluation of the effectiveness of the remedies

4. The Chair asked Dr. Pisarkiewicz to provide a summary of the Secretariat background paper, with a view to setting the scene for the discussion.

5. To explain the relevance of the topic, **Dr. Pisarkiewicz** referred to the quote from the OECD 2006 Background Note: “detecting an abuse of dominance will, on its own do little good for competition and consumers if ensuing remedy or sanction is too lenient, too late, not administrable or otherwise poorly conceived or implemented”. She stressed that since the overarching goal of remedies in abuse cases is to address harm caused by the anti-competitive conduct of a dominant firm, adequate laws and procedures are as important as authorities that implement and oversee them. This means that to design effective remedies, competition authorities need to have adequate tools, expertise and resources.

6. Dr. Pisarkiewicz highlighted the importance of considering different terms used in national laws when comparing experiences across jurisdictions. In principle, remedies are imposed by competition authority, while commitments are voluntarily offered by companies during ongoing investigations. Remedies usually involve a formal finding of a violation, while commitments do not require an admission of guilt. Fines can accompany remedies, but not commitments, although this can vary among jurisdictions. Respective procedures also tend to be different. For example, market testing can be foreseen for commitments, but not for remedies. Both remedies and commitments can involve behavioural or structural measures. For example, in the case of predatory pricing, whether a competition authority imposes a remedy or a firm offers a commitment, what is needed is that the firm raises its price up.

7. Next, Dr. Pisarkiewicz referred to the graph from the Background Note showing the percentage of abuse of dominance cases resolved through settlements or commitments, and noted that no discernible trend exists, except for Asia and Pacific region. She reminded that the number of competition authorities with the power to impose commitments has been growing steadily, suggesting that the graph might look very different 5 to 10 years from now as competition authorities start exercising their newly acquired powers. Also, the average displayed in the graph may hide several relevant information. For example, if in a given region there is a jurisdiction that outperforms the others, it will provide a distortive image of the actual trend.

8. Dr. Pisarkiewicz remarked that while the topic of remedies and commitments had been already discussed by the OECD, two issues require continuous attention: the design of optimal remedies, and the optimal use of commitments in abuse of dominance cases. Undoubtedly, the process of designing remedies, implementing and monitoring them has over time become increasingly complex, which raises the question whether competition authorities today still have the necessary resources and expertise to address these challenges effectively.

9. Whether remedies and commitments are governed by provisions laid down in law or in soft law measures they typically must comply with some fundamental principles, which can often be reduced to just two: effectiveness and proportionality. Effectiveness refers both to the ability of a remedy to put an end to the infringement and to the competition authority's capacity to implement it, which stresses the importance of having adequate resources and expertise. As for proportionality, in most systems it is the core legal principle, which means that even if it is not explicitly mentioned in competition law provisions, it may still be binding. Proportionality applies to different aspects of a remedy: its type, duration, and the monitoring mechanism. Dr. Pisarkiewicz stressed that remedies should not be used to engineer a specific market outcome, i.e. by improving it in comparison to how it functioned before the abuse. Rather, they should simply seek to restore the situation to what it has been prior to the abuse. This concern is particularly relevant in the context of regulated industries. Proportionality also has an implication on the powers of the competition authority as to remain proportionate throughout the period necessary to resolve identified competition concerns, remedies might need to be modified or withdrawn if the competitive conditions have been restored prior to what the authority has expected.

10. With respect to behavioural and structural remedies, the main advantage of the latter is that they remove the ability and incentive of dominant firm to engage in an anti-competitive behaviour in the first place. Hence, one of the relevant questions today is whether competition authorities' hesitation to use structural remedies more frequently is still justified considering increasing complexity of applying behavioural remedies in digital markets. As for behavioural remedies, one of the issues is whether dominant firms take

advantage of their informational, technological, and financial resources when they propose commitments to competition authorities. In cases where it is necessary to prescribe a set of remedies that would consider both the supply and the demand side, remedies that focus on the demand side, known as consumer-facing remedies, will require an extensive use of behavioural economics, which in turn require competition authorities to have a wider set of resources and expertise.

11. Finally, effective enforcement requires competition authorities to devise adequate monitoring mechanisms, commit sufficient resources, and have powers to act in case of non-compliance. If the number of non-compliance decisions is low, one may wonder whether this reflects a high degree of compliance by the firms or rather insufficient and inadequate monitoring mechanism on the part of the competition authority. While ex-post evaluations could help in that regard, in abuse of dominance cases they continue to be rather rare and particularly complex.

12. **The Chairman** thanked Dr. Pisarkiewicz and referring to the use of behavioural and structural remedies remarked that sometimes the law might incentivise competition authority to use one type of the remedy over the other, although it may not always be clear why it does so. Next, the Chairman gave the floor to Prof. Gwen Grecia De Vera.

13. In her intervention, **Prof. De Vera** focused on three key issues. First, the Philippine Competition Act, which introduced competition law in the Philippines, was adopted in 2015. It allows for the use of both behavioural and structural remedies in abuse of dominance cases. Second, the Philippine Competition Authority adopted its first abuse of dominance decision in 2019, in a case concerning property management services, which was ultimately resolved through a settlement agreement. While some argued that a fully litigated outcome would have been preferred, in Prof De Vera's view the resolution of the cases was based on the Commission's earlier experience with commitments in merger cases. The successful resolution of the case has led to increased awareness about the abusive nature of the conduct in question, and subsequent complaints against similar arrangements in other real estate developments.

14. Third, at the time of the first commitment decisions, detailed guidelines on the submission and evaluation of voluntary undertakings were not available, while the burden of monitoring was shifted to a third party at the merging parties' expense. Hence, these first cases functioned as guides for subsequent commitment decisions. In 2020, the Philippine Competition Authority launched a tender for experts to assist with negotiation implementation and monitoring of voluntary commitments in merger cases and with the drafting of a divestiture manual.

15. As her final point **Prof. De Vera** highlighted the lessons learned from the Philippines' initial experience with abuse of dominance cases. First, it is crucial to understand what remedies are available and their appropriateness for developing economies, considering factors such as limited information about market structures and concentration (which the Commission has been addressing by securing various studies), as well as the relevance of SMEs, which are often informal in nature. Second, promoting transparency and regulatory predictability is necessary to foster a competition culture and raise awareness among business and consumers.

16. The **Chairman** thanked Prof. De Vera and asked **Ms. Ojeda Cárdenas** to provide her preliminary remarks.

17. **Ms. Ojeda Cárdenas** provided insights on Mexico's approach to commitments and remedies. In Mexico, firms investigated by the competition authority can submit commitments, but only before the publication of the DPR, (equivalent of the statement of objections in the EU). Proposed commitments must be feasible, appropriate to address investigated conduct, and include time frames and terms for the verification. It is unclear whether the authority can reject compliant commitments. **Ms. Ojeda Cárdenas** added that in her view the placement of the provisions on commitments within the section of Mexican competition law concerning fine reductions raises questions about the possibility to reduce fines without establishing liability. While the law does not explicitly state it, commitments imply the establishment of an infringement. However, in the *Telcel/Axtel* case, a Mexican Tribunal ruled that the competition authority must explicitly state that there was a breach of law to allow victims of the anticompetitive behaviour to pursue damages.

18. Next, Ms. **Ojeda Cárdenas** remarked that in Mexico transparency and market testing of commitments are limited due to confidentiality obligations, hindering monitoring and reporting of deviations by third parties. She also added that in Mexico most cases are settled through commitments, leading to a lack of judicial precedent in abuse of dominant cases.

19. Like in many other jurisdictions, also in Mexico structural remedies are most likely to be adopted in merger cases while behavioural remedies in abuse of dominance. However, the recent application of behavioural remedies in the *Discovery/Warner* merger by the IFT indicates a potential shift. Considering their highly intrusive nature, structural remedies should only be imposed in exceptional cases when behavioural remedies are insufficient.

20. Ms. **Ojeda Cárdenas** stressed the importance of ex-post evaluations for assessing the effectiveness of remedies and of open regulatory dialogue between competition authorities, private sector, sectoral regulators, and international bodies, especially in cases with cross-border effects. She concluded by stating that balancing procedural efficiency and legal efficiency is a goal, and checks are necessary to prevent circumventions and abuses in the use of commitment mechanisms.

21. The **Chairman** thanked Ms. **Ojeda Cardenás** and opened the first part of the roundtable to explore the variety of institutional setups across the jurisdictions. He asked **Hungary** whether it could explain proactive reparation as a goal that was pursued by the competition authority in the *Spar Hungary* case and how the commitment procedure worked in that case.

22. **Hungary** explained that proactive reparation or compensation refers to a situation where the undertaking that violated competition law corrects the negative effect of its behaviour either partially or completely. When a firm voluntarily offers such a reparation, the GVH may consider several facts, such as its directly relationship to the competition issue at hand, benefits to consumers, impact on job creation, market access, and potential contribution to sustainability or environmental protection. Considering these actors, the GVH decides the extent to which proactive reparation can reduce a fine. The gravity of the infringement and the socioeconomic context also play a role in the assessment. In the *Spar Hungary* case, the GVH accepted proactive reparation instead of imposing a fine on the supermarket chain, Spar. The GVH required Spar to comply with obligations that consider the interest of the suppliers who suffered damages due to the company's conduct. The remedy in that cases was aimed at enhancing sales opportunities of small Hungarian producers and suppliers, and creating new jobs. The effectiveness of this remedy is currently being closely monitored and has yet to be evaluated.

23. **Next, the Chairman** turned to Japan and asked whether it could explain the variety of procedural arrangements that are foreseen in its law, the differences between them, and the goals they pursue.

24. **Japan** explained that its Fair Trade Commission has three procedures for handling abuse of dominance cases: cease and desist orders, commitment procedure, or termination of investigations with voluntary measures offered by firms. Cease-and-desist orders are issued when a violation of the anti-monopoly act is found, while commitment procedures are initiated when the JFTC notifies the suspected violator that it may apply for certification of a commitment plan. If the JFTC finds the measures offered by the firm to be sufficient, the commitment plan is approved. In the alternative, the JFTC may terminate an investigation when the suspected violator voluntarily offers remedies while the investigation is still ongoing.

25. The JFTC's basic policy is to enforce the law through legal measures, such as cease and desist orders, which have the advantage of providing clarity on the conditions under which a given conduct is deemed anti-competitive. In case of non-compliance, the JFTC can impose criminal penalties. The JFTC can also file a revocation suit, in which case a court should deliver a judgment clarifying the criteria for determining the existence of the abuse. Japan admitted that commitment and termination procedures offer swifter enforcement and quicker remedies. Compared to cease-and-desist orders, a wider range of remedies is possible as the suspected firm itself proposes them. There is also no requirement for the elimination of violation, which applies to cease-and-desist orders. Furthermore, since investigations may be terminated earlier and there is no possibility of a revocation lawsuit being filed, the JFTC can allocate resources to new cases.

26. The **Chairman** thanked Japan for having explained the differences between its procedures. He also noted that various contributions pointed out that the commitment decisions are more flexible and can result in remedies that the competition authority could not impose in the context of a violation decision. Next, the Chairman asked Latvia why it often concludes cases through settlements, and rarely through commitment procedures.

27. In **Latvia,** a settlement procedure is commonly used when an undertaking proposes a remedy to address a competition law violation. This procedure is not considered a commitment, as defined by OECD, as it requires the undertaking to admit the violation. The Latvian Competition Council follows internal guidelines that outline the legal basis and application of the settlement procedure. A settlement procedure is beneficial for both parties. Firms propose remedies and participating in the settlement procedure results for them in a 10% reduction of fines, while the benefits for the Competition Council are related to efficiency: once a settlement is reached, the case cannot be further appealed on substance. The settlement procedure also allows for timely and cost-effective resolution of the violation.

28. The settlement procedure can only begin after the Competition Council has provided the firm with a letter of facts. The firm can consult with the Council during the drafting of the settlement letter. Participation in settlement meetings does not imply an admission of guilt, and parties can withdraw from the process until the settlement is signed. If the Competition Council does not accept the settlement offer, it must communicate its decision and reasons to the undertaking. There is no right of appeal against the Council decision to reject the settlement offer.

29. Latvia concluded by stating that its Competition Council prefers settlement over prohibition decisions. Settlements ensure a more efficient use of public resources, while firms benefit from shorter investigation periods and significant reductions in administrative fines.

30. The **Chairman** asked Latvia a follow-up question regarding the efficiency benefit of the settlement procedure having noted that in Latvia there is a recognition of the violation before entering into settlement discussion. This means that the competition authority has already incurred administrative costs in investigating and establishing the violation.

Therefore, the Chairman questioned whether there is a significant efficiency benefit for the authority in such cases, compared to situations where settlements can be reached based on a mere suspicion.

31. **Latvia** replied that indeed this is the case, and it is for this reason that it is not possible to further appeal the settlement. This also explains why Competition Council considers settlements to be an efficient way to solve abuse of dominance cases.

32. The **Chairman** remarked that in the case of Latvia, the efficiency benefit might indeed exist, but not necessarily at the level of the primary investigation. He then asked Turkey to present its recently introduced commitment procedure.

33. **Turkey** informed that it had introduced commitment procedure in its Competition Act in 2020, allowing for the termination of investigations without fines. This new tool has been well-received by both competition law experts and firms under investigation. The commitment procedure can be applied in abuse of dominance cases, but not in hardcore horizontal infringements and resale price maintenance practices in vertical relationships.

34. The acceptability of proposed commitments is assessed by the Board considering four conditions: proportionality, ability to quickly eliminate competition concerns, feasibility and efficiency in application. While there are few examples of commitments that were accepted in abuse cases, one notable example is the *Coca-Cola* case. To avoid potential fine, Coca-Cola proposed various commitments, including the signing of different contracts with buyers, removing exclusivity clauses, from new and existing distribution contracts, and opening a percentage of its freezers to competitors' products. Thus far, no structural commitments have been accepted in abuse cases.

35. **The Chairman** next asked the European Union about the criteria that determine its choice to use either the commitment or prohibition decision.

36. In the **European Union**, most investigations start with a prohibition decision, but the Commission can switch to a commitment decision. Prohibition decisions involve a longer process, as they require a finding of an infringement, but they create a more solid legal precedent with detailed reasoning and explanation, and thereby offer more guidance to all market players, and not just the addressee of the decision. They have a stronger deterrent effect and are often challenged in court, allowing for clarification and evolution of the law. On the other hand, with no necessity to find the existence of an infringement, commitment decisions are procedurally more efficient as they can be reached faster and have a quicker impact on the market, especially when commitments are offered early in the investigation. Appeals of commitment decisions are quite rare, which might deprive courts or limit their opportunity to clarify competition rules. Commitment decisions, however, have the advantage of being more forward-looking, as they can go beyond what the Commission could impose in a prohibition decision. They offer more flexibility in design and implementation, and are market tested, allowing for a useful feedback and potentially more effective solutions. In contrast, remedies in prohibition decisions do not undergo a market test, albeit such a possibility exists. They are also more constrained and must be necessary and proportionate, seeking the least onerous remedy to end the infringement. In contrast, the Commission only needs to verify that commitments address the identified concern and that a firm has not offered less onerous commitments that would suffice.

37. **The Chairman** expressed concern regarding the potential misuse of commitment decisions to avoid appeals. Also, while commitment decisions offer the advantage of faster implementation of remedies, there is a risk that an inefficient competition authority could excessively rely on them. The Chairman noted that many countries seem to be favourably inclined towards the use of commitment decision and might even prefer them over prohibition decisions, and next gave the floor to Ecuador, which in its contribution

discusses the importance of setting legal precedents and consequently of using commitment decisions only to a limited extent.

38. **Ecuador** explained that a firm proposes a commitment, it must admit to engaging in the practices under investigation and propose measures to end the violation. The firm must not be a recidivist, and it may need to pay damages, which are usually lower than the potential fine.

39. The competition authority considers two main criteria when deciding whether to accept or reject proposed commitments. First is the seriousness or the gravity of the abuse. For example, if the abuse is committed by a firm with a quasi-monopolistic market share, it is likely that the commitment will not be accepted. The second factor is recidivism. As one of the requirements established by the law is that the firm must not be a recidivist, commitments from such firms would not be accepted. Ecuador stressed that its competition regime is still in relatively early stages of development as its competition law was adopted only 11 years ago while its competition authority was established 10 years ago, in October 2012. It also pointed out that Article 9 of the Competition Act includes 23 non-exhaustive examples of abuse of dominance. Most of these scenarios have not been analysed yet by the competition authority in the context of a specific case. As this results in legal uncertainty for firms, it is more important that the competition authority explains how the law is going to be applied by litigating cases in court.

40. **The Chairman** referred to Ecuador's comment that for younger competition authorities the balancing of the advantages resulting from commitment over prohibition decision may be different as indeed a well-established jurisprudence that could help firm understand how the law works is missing. The Chairman turned to Croatia and asked whether its repeated use of commitment decisions in apparently similar cases could suggest that maybe there is not enough deterrence? Could this be an example of an excessive and inefficient use of commitment decisions?

41. **Croatia** confirmed that it uses commitment decisions frequently, mostly in abuse of dominance cases and vertical agreements. Over the past 10 years, it concluded 13 abuse of dominance cases through such a procedure. It also shares the European Commission's view on the benefits that commitment decisions offer, including procedural efficiency, resource allocation to other pressing cases (an advantage that might be particularly relevant for smaller authorities with limited resources), and the avoidance of fines by firms. The commitment procedure allows for a win-win situation, where firms can learn during the process and have an opportunity to propose commitments themselves. It also ensures faster elimination of negative effects on competition. In case of non-compliance, the Competition Council can reopen the proceedings based on a material change or misleading information provided by the parties. Croatia concluded by stressing that it is not overusing this procedure, and that it could not do that considering that commitments are always proposed by firms.

42. The **Chairman** next gave the floor to **Belgium**, which explained that in addition to infringement and commitment decisions, it can also adopt settlements, which it tends to prefer over commitment decisions for two reasons. First, the admission of guilt by the investigated firm helps the injured parties in follow-on actions more than the commitment decision would do. Second, it also offers superior results in terms of the procedural economy.

43. The **Chairman** moved to the second part of the discussion that aimed to examine the type of remedies that are used commitment and in the prohibition decisions and challenges that they might raise. He stressed that not all jurisdictions can impose structural remedies in abuse of dominance cases, and that in any case their use tends to be limited to exceptional situations. For example, the feasibility of imposing structural remedies in abuse of dominance and legal position on this matter are not settled in Korea. Next, the Chairman

asked Argentina to discuss the use of the structural remedy in the *Prisma* case, and whether it has produced a satisfactory result.

44. **Argentina** first remarked that structural remedies for commitments are not at all frequent in abuse cases and next discussed its experience regarding the use of a structural commitment in the 2017 *Prisma* case. The case was initiated in the aftermath of the CNDC's (National Commission for the Defence of Competition) study report on credit cards, debit cards, and electronic means of payment. Prisma, as the sole authorised processor and acquirer of Visa payments in Argentina, was found to have abused its dominant position by influencing pricing, coordinating with banks, including on consumer financing conditions, degrading the quality of its services, and by applying discriminating between customers without justification. As a commitment, Prisma offered to divest its shareholding banks' stakes in the company and made behavioural commitments related to the provision of electronic payment processing services. This was a unique case as it was the first time an investigation of an alleged abuse of dominance resulted in a divestiture of this significance: it resulted in dismantling Prisma's dominant position and in the increase of competition in the relevant market. Argentina also mentioned that at the end of 2022, the CNDC imposed a structural remedy in a cartel case, involving four nightclubs in the City of Bariloche.

45. The **Chairman** turned to Colombia and asked whether the criteria that for commitment decisions establish preference for structural over behavioural remedies.

46. **Colombia** remarked that it may have a different understanding of structural remedies: sometimes a commitment to change a behaviour can effectively change the market, thereby resulting in its structural change. Colombia provided as an example a case involving airport taxis, in which the authority order to establish a platform, which, although not considered a structural change, had a significant impact on the market structure. It further explained that as structural remedies may not always be practical or may not result in desired behavioural or market changes, feasibility and the potential outcome must be considered. Colombia explained that for these reasons it prefers behavioural remedies that have the potential to bring about positive market changes.

47. **The Chairman** commenting on the Colombian intervention noted **that** the distinction between behavioural and structural might not be as neat as we may think. Next, he gave the floor to Prof. Maier-Rigaud who focused in particular on structural and behavioural remedies.

48. **Prof Maier-Rigaud** emphasized the need to clearly identify the theory of harm when designing remedies for abuse of dominance and other competition cases, whether through a prohibition or commitment decision, and to focus on ending the anti-competitive conduct and its effects. Structural remedies are one of the available options. While proportionality is important, it should not be the starting point but rather a filter when considering remedies.

49. Frank noted that there is a consensus that divestiture is the preferred remedy in merger cases as they inherently involve changes in the acquiring firm's structure. However, the question arises as to whether more frequent use of structural remedies in merger cases in comparison to abuse of dominance cases is justified. Considering that merger control might be seen as preventing dominance, and hence potentially eliminating the risk of possible future abuses at its root, then accepting a priori preference for structural remedies in ex ante merger cases, why would they not be ex-post with proof of a clear abuse. He added that from an economic point of view it seems rather surprising that the suspected substantial lessening of competition, which might not even amount to dominance, is presumably treated more harshly and rigorously than the abuse of an already existing

dominant position. With respect to behavioural remedies the main issue concerns enforcement: in the absence of permanent monitoring, compliance would be at risk. The parallel experience from remedies in merger cases could provide insights whether structural or behavioural remedies are more effective.

50. In digital cases, remedies are expected to play a significant role due to network effects and the risk of tipping, making intervention more urgent. However, remedies in digital cases can quickly become obsolete or problematic, highlighting the importance of interim measures in fast-paced industries. If the abusive conduct concerns the essence of the business model, even large fines may not have the desired effect. The ecosystem nature of digital markets and the challenges in implementing structural remedies, which may not be feasible in platform markets make regulation more important, as demonstrated by the EU's Digital Markets Act (DMA). Also, returning the market to its hypothetical development without the infringement is particularly challenging in digital markets.

51. Next, Prof. Maier-Rigaud mentioned few cases where remedies in his view were implemented wisely. First, in the EU Google Shopping case, the Commission opted for a cease-and-desist order instead of prescribing specific behavioural remedies. This approach allowed for flexibility and the problem of remedies that could soon have become outdated. The current state of Google Shopping appears to be an improvement, although ex-post assessment, which would be useful, is lacking. Another noteworthy approach was seen in the UK Facebook case, where the FCO clearly indicated what should be stopped and requested a roadmap from Facebook on how it intended to achieve it. Given the complexity of the case, the FCO has adopted a rather smart approach to the design of remedies. However, the challenge remains to assess whether the proposed roadmap and measures are good enough.

52. The final example is the French *Google ads* case, which might illustrate the point previously made by Colombia about behavioural remedies that might be less intrusive but as effective as a structural remedy. In this case, Google was operating an ecosystem, bringing together publishers seeking ads and advertisers seeking impressions. The French competition authority found that Google managed to skew the information flow and the auction design in favour of its ecosystem. Google was required to implement fair mechanism in its ecosystem, ensuring informational transparency and a fair auction model. Although the remedy's duration was short, it effectively eliminated the anticompetitive conduct, acted as a quasi-structural remedy and hence was also relatively easy to monitor. Overall, these examples show the importance of carefully designing remedies that address specific competition issues and the dynamics of each case, balancing effectiveness, and proportionality, while considering both regulatory and enforcement aspects.

53. **The Chairman** noted that two questions emerge from Prof. Maier-Rigaud presentation. The first is whether the different approach to remedies in merger and abuse of dominance cases is justified, while the second concerns instances where behavioural remedies can be as effective as structural remedies. The Chairman next observed that while several countries had adopted guidelines for merger remedies, there is a lack of guidelines specifically tailored to abuse of dominance cases. Also, in most cases, the guidelines for merger remedies do not apply to remedies for abuse of dominance cases. However, Brazil stands out as a notable exception as its guidelines for merger remedies also apply to abuse of dominance cases remedies. The Chairman wished to know whether according to Brazil structural and behavioural remedies should be treated equally, and whether there has been instances where the merger remedies guidelines had been explicitly referenced or used in an abuse of dominance case?

54. **Brazil** replied that it had published several guidelines that consolidate its best practices to provide a reference point to the Brazilian competition community. Two guidelines in particular can be applied to abuse of dominance cases, even though they were not originally designed for this purpose. The first one, which concerns cease-and-desist agreement for cartel cases, provides recommendations for settlement negotiations and suggestions for designing, enforcing, and monitoring such agreements. The second one is the guide on antitrust remedies in merger cases. Both documents can be applied to abuse of dominance cases, which indeed occurs in practice, and they include provisions that foresee this possibility. The guidelines on antitrust remedies, launched in 2018, defines remedies as procedures imposed by the Brazilian Administrative Council for Economic Defense (CADE) or negotiated between CADE and the investigated party in merger cases. It emphasizes the importance of effective remedies that fully address competition concerns, and outlines applicable principles, such as proportionality, timeliness, feasibility and verifiability, which are also applicable in abuse of dominance cases.

55. Regarding cease-and-desist agreements, known as TCC agreements in Brazil, they are outlined in competition law as agreements between CADE and the investigated firms or individuals to stop the conduct under investigation and its harmful effects. The timing of entering in a cease-and-desist agreement in unilateral conduct is strategic due to the considerable informational gap that exists between the investigated firm and CADE. In taking such a decision, CADE assesses whether the commitment can sreolve the alleged competitive issue and whether the financial contribution imposed on the investigation firm, if applicable, is sufficient. While there are some differences between negotiating cease-and-desist agreement in cartel cases and in abuse of dominance cases, the guidelines provide valuable tools for managing abuse of dominance cases within a consistent framework of rules.

56. Brazil concluded by remarking that the guidelines on remedies and cease-and-desist agreements contribute to the effecting handling of abuse of dominance cases, offering a structured approach and facilitating the resolution of such cases. Indeed, more than 60 abuse of dominance cases were resolved with the use remedies or commitments.

57. **The Chairman** noted that in the US has a very long tradition of applying structural remedies, and asked whether the United States considers them to be superior in comparison to behavioural remedies. The Chairman also wished to know whether personal liability pursued by the agency in Martin Shkreli case in the pharmaceutical industry is a remedy or sanction.

58. **United States** highlighted its long-standing history of using structural remedies, citing the example of the AT&T case in the 1980s, which involved divestiture. In response to the question about individual liability, United States acknowledged the importance of considering other forms of remedies as well. While the focus of antitrust enforcement is often on preventing future violations, pursuing individual liability aims to deprive wrongdoers of the benefits gained from their unlawful conduct. The United States explained that it had already applied individual liability in at least one case, and is open to using it more often as the opportunities arise and including it in the consumer protection aspect of its mission.

59. **The Chairman** next asked Slovenia whether its approach to the use of remedies in digital and more traditional markets differs.

60. To answer the Chairman's question, Slovenia referred to *Pantone* and *Geoplin* cases. The Pantone case concerned a new electronic data interchange services market, while the Geoplin case involved the well-established gas and hard fuel products market. In the Pantone case, the market was characterised as volatile and innovation-driven. Pantone was suspected

of refusal to supply, and of applying impermissible conditions for providing the service of transferring technical information necessary to set up internetwork connection. The commitments in this case were more service-oriented and complex, such as the inclusion of third parties in the electronic data interchange agreements. On the other hand, the gas and hard fuels market in the Geoplin case was described as well-developed and robust. Geoplin was a firm active on the wholesale level and it was suspected of imposing anti-competitive contractual terms that could result in foreclosure. The remedies imposed in this case were more straightforward and practical, including the commitment to limit the duration of the contract to maximum 36 months. Slovenia concluded by highlighting that the difference in terms of practicality and straightforwardness, of commitments, which reflects the varying levels of market development and industry characteristics, depicts the differences between adopting commitments in more traditional and innovation-driven industries.

61. **The Chair** thanked Slovenia and moved to BEUC, which in its contribution focused on consumer behaviour as another factor that adds complexity to the process of designing remedies. The Chair asked BEUC whether they could discuss main issues raised by consumer-oriented remedies.

62. **BEUC** highlighted two crucial factors for improving consumer-facing remedies: effective design and testing. It emphasised that competition authorities should understand how consumer are likely to react to a remedy if it is considered a part of the solution to a competition problem. Consumer behaviour is influenced by various biases, which should be taken into account. Two examples of biases are saliency (focusing on the most prominent option) and status quo bias (preferring to stick with the current situation). The saliency bias was exploited, for example, in the Google Shopping case. As the EU General Court's explained, saliency had rendered Google's rivals' results virtually invisible to consumers. This means that remedy design must consider the so-called choice architecture, i.e. the way in which the choices are presented to consumers, as even small changes, at the micro level changes, might make a difference.

63. The status quo bias is also relevant as consumers tend to stick with what they have or what is provided to them. Consequently, remedies should address pre-installations or default settings that harm competition by either removing them or by finding proactive ways to prompt users to switch to alternatives. Lessons learnt from the UK telecom, energy and financial markets show that unless switching is made really simple, consumers might not switch despite the cost saving they could make.

64. Next, BEUC stressed the importance of consulting with third parties, including consumers, in the process of designing remedies. Also, testing the remedies before finalisation, can provide valuable insights about consumers' behaviour and optimize the effectiveness of the remedies.

65. **The Chair** ask whether in Mexico commitment remedies did not require market testing.

66. **Mexico** replied that there is no open and transparent market testing and only the claimant can make comments on the proposed remedies. Thus, in the absence of any complaint, there is no market testing at all since the authority has the duty to keep confidential all parts of the investigation.

67. Next, the **Chairman** mentioned that Bulgaria, seems to adopt a rather formalistic approach to remedies by publishing them on its website and inviting comments from interested parties. However, no active market testing is foreseen. The Chairman asked Bulgaria how it would address remedies in markets where consumer behaviour may differ from that in traditional markets.

68. **Bulgaria** remarked that in 2021 it updated its rules for the evaluation and acceptance of commitments to provide clarity and legal certainty for firms. To be approved commitments must be proportionate to the seriousness and duration of the offence. Also, given that transparency of the procedure is vital for gathering all the information necessary to evaluate the case, the Bulgarian competition authority informs all the parties involved, allowing them to submit observations and objection within a specified period not exceeding 30 days. The authority also publishes a summary of the commitment proposal in an electronic register and a press release on its web page and seeks opinions from competitors and, in the case of regulation markets, from sectoral regulators to ensure that proposed commitments are sufficient, adequate and effective. Meeting with the parties, competitors, and trade associations can be organised to discuss the commitment proposals. After examining all opinions received, the authority informs the parties about the result of the consultation, which can lead to the acceptance, rejection, or modification of the commitments.

69. The **Chairman** asked Slovenia whether market testing carried out by the Slovenia competition authority produces satisfactory results and whether the same protocol is followed in both commitment and prohibition decisions?

70. **Slovenia** conducts market testing through its website, which so far has always generated a noticeable response. Interested parties tend to follow closely and actively the case, and their feedback is taken into account when finalising commitments. In the case of prohibition decisions, Slovenian competition authority does not conduct market testing as such decisions are more coercive in nature, and consensus in not sought. Seeking it, according to Slovenia, would be akin to asking investigated firm whether they agree with the level of fine imposed by the authority.

71. Next, the **Chairman** asked Mexico whether strict deadlines established in the Mexican law for the commitment procedure unduly constrain competition authority, thereby making it difficult to adopt commitment decisions in abuse of dominance cases.

72. **Mexico** first explained that to benefit from fine reduction or exception in abuse of dominance cases firms must propose commitments to the COFECE Board of Commission before a statement of objections is issued. The Board may approve commitments only if they are legally and economically feasible and adequate address the competition concerns. The guidelines for the commitment procedure, issued in 2020, have set short timeframes.

73. The investigative authority has only five days to review the proposed commitments and if necessary, request additional information. Withing the next five days it must determine the viability and suitability of the proposed commitments and issue a statement to the Board within 10 days. The Board then has 20 days to decide whether to accept the proposed commitments. Despite strict deadlines, the procedure is clear and in the last few years several cases have been resolved through commitment. However, a challenge arises from limited information available to firms and the Board, as the law prohibits the disclosure of certain investigative details. To mitigate this challenge, the investigative authority provides guidance to firms in the process of designing commitments and explains the commitments to the Board before their decision.

74. The **Chair** next asked whether **BIAC** could discuss the main challenges raised by international cooperation in the process of designing remedies.

75. **BIAC** stressed that international cooperation in competition law should reduce burdens on business and consumers. Crafting remedies in abuse cases is challenging, as there may be no consensus on the appropriate remedy, as was the case with the EU Microsoft decision. International cooperation should take place on a case-by-case basis due

to the detailed factual analysis required. Imposing a structural remedy requires a deep understanding of the sector and firm's business model.

76. BIAC stated that conflicts can arise when different jurisdictions order conflicting remedies, whether structural or behavioural. For example, a conflict involving a structural remedy might arise when in the process of reviewing a merger, one jurisdiction orders the divestiture of a business, including all its patents and IP rights whereas another jurisdiction orders the licensing of the same IP rights. Next, BIAC reminded that market testing remedies is important to assess their impact on consumers, firms, and other jurisdictions. Comity is also essential, as remedies in one jurisdiction can adversely affect other jurisdictions. Next, there is a question of whether competition authorities should seek alignment on remedies in cases where multiple jurisdictions investigate the same conduct, which may be particularly relevant in the context of digital markets. However, caution is needed to avoid the alignment based on the least common denominator outcome which could harm companies and consumers.

77. **The Chairman** commented that the adoption by competition authorities in different countries of different remedies does not necessarily create conflict. Rather, a conflict may arise if remedies adopted in one country would reduce competition in another country. Next, the Chair returned to BIAC with the question whether conflicts in abuse of dominance cases occur often.

78. **BIAC** explained that there had not been many cases where multiple jurisdictions investigated the same companies for the same conduct in abuse of dominance investigations. When such cases do occur, they are often resolved with jurisdiction-specific behavioural remedies. According to BIAC structural remedies may have a broader impact beyond a single jurisdiction, in particular when a company relies on certain assets to serve multiple jurisdictions, and hence be more prone to creating conflicts.

79. The **Chairman** moved the roundtable to the final part on compliance monitoring and ex-post evaluation of remedies and opened it with the question of how to determine the effectiveness and cost implementing remedies. He remarked that in its contribution Chinese Taipei shared its experience with the Microsoft case, highlighting that it had established a dedicated task force for monitoring of rather detailed commitments. While this approach indicates a high level of monitoring, it also raises concerns about the costs incurred by the competition authority. Hence, the Chairman asked whether Chinese Taipei could prove more specific information about this case and elaborate on the challenges and benefits of setting a dedicated task force.

80. **Chinese Taipei** remarked that its Competition Act foresees the use commitment as a tool to address alleged competition violations. In one of its recent merger cases, the merging party committed to abandon its most favoured nation clauses with the upstream supplier to address our concerns regarding the abuse of buyer power post-merger. Next, the delegate discussed the Microsfot case, which began in 2002 and involved abuse of monopoly power in the domestic software market in the form of several unfair practises that included tying and the setting of unreasonable prices. After six months of the investigation, Microsoft submitted to the CFTC an offer for administrative settlement, which was approved by the Commissioner. The settlement included six major obligations, such as setting reasonable prices for consumers, promoting consumer benefits, enhancing intra-brand competition, improving after-sales services, and sharing their software code in Chinese Taipei.

81. To monitor Microsoft's compliance, the authority established a task force that requested over 50 written reports from Microsoft, which it reviewed thoroughly to ensure compliance with settlement conditions. Moreover, a representative from Microsoft

provided periodic briefings on the progress and implementation of the settlement. Microsoft also committed to presenting a progress report to the CTFTC each year starting, even after the settlement agreement expired in 2008. Chinese Taipei acknowledged that significant human resources and time were dedicated to monitoring the commitments. Overall, the experience in the *Microsoft* case demonstrated that competition authorities should avoid engineering remedies that would result in a specific market structure. Still, commitments offer certain flexibility that competition authorities might leverage to obtain desired outcomes. For example, in the *Microsoft* case, commitments were used to demand reasonable prices that could have been highly contentious if imposed as a sanction by a competition authority in a prohibition decision.

82. The **Chairman** then brought attention to Korea highlighting its decision to strengthen their monitoring system out of t concern that remedies imposed by the KFTC may had not been effectively followed. With this in mind, the Chairman requested Korea to provide insights on the role played by the Korea Fair Trade Mediation Agency in the monitoring process.

83. **Korea** shared details of its newly implemented compliance monitoring system, set to be used in a specific case that was scheduled for December 2022. The Korea Fair Trade Mediation Agency (KFTMA), a separate organisation affiliated with the KFTC has been empowered by law to monitor compliance, but only of remedies adopted in consent decisions. Prior to the adoption of the new law, the KFTC was responsible for monitoring compliance but it faced criticism for lacking thoroughness due to KFTC's limited resources and focus on new cases. Discussion on improving the monitoring system began in 2018, with the initial proposal to adopt a system similar to the EU by designating a monitoring trustee. However, in 2020 it was ultimately decided to entrust monitoring to the KFTMA, as it had more expertise and resources compared to private monitoring trustees and was deemed more accountable as its expenditures are scrutinised, its performance measured annually and audited by other responsible authorities. Also, entrusting the KFTMA would also prevent potential biases and ensure consistency and objectivity in compliance monitoring. Korea explained that private monitoring trustees, which would normally be private firms or practitioners might seek to earn reputation as being benign to firms. Korea concluded by admitting that this new approach might present unique challenges but that it will also contribute to enriching the process of monitoring compliance.

84. **The Chair** thanked Korea, and next asked Costa Rica to explain its use of financial guarantees, and whether this instrument had so far proven to be successful.

85. **Costa Rica** reformed its competition law in 2012, introducing the early termination procedure, and the option to request a financial guarantee from firms under investigation. The guarantee should not exceed the maximum fine for the behaviour in question. It next referred to a case from 2014 involving a suspected price fixing agreement among hotels, in which the competition authority, COPROCOM, requested a financial guarantee, which it returned after having verified that involved companies complied with the commitments. Costa Rica added that failure to comply with approved commitments is considered a severe offence, punishable by fines up to 10% of the firm's total turnover. If a firm does not comply with the commitments, the financial guarantee may be used to cover the fine. Costa Rica also referred to COPROCOM's negative experience where non-compliance occurred due to improper implementation of commitments, and in particular the way in which the official statements were published, both in a nationwide newspaper and on the company's website, ignoring COPROCOM's requirements. As no financial guarantees were requested from the onset of the investigation, the firm had no incentives to comply with the agreed commitments. This experience led COPROCOM to conclude that commitments should be clear and leave no room for firm's discretion. The use of financial guarantees, although

optional for the authority, is seen as an appropriate measure to ensure compliance and it should be requested in all cases. In 2019, the power to apply the early termination procedure was also granted to the Superintendency of Telecommunications, but only in abuse of competition cases.

86. **The Chairman** then directed the discussion towards the topic of ex-post evaluations and inquired about the European Union's experience in conducting them. Additionally, the Chairman asked whether the recently published tender on ex post evaluations is an indication that the Commission would like to do conduct more of them in the future.

87. **The European Union** admitted that in the past it had not regularly carried out ex-post evaluations, and when it had done so it focused mainly on merger cases. However, recognising the importance of such evaluations, the Commission has recently launched a call for tenders to study and improve the decision-making process and enforcement practices related to antitrust remedies. The tender aims to review and assess all antitrust remedies imposed since 2004, covering both Article 101 and 102 cases. It will also map and statistically assess all remedies and commitments, including a targeted ex-post evaluation of a representative sample of 12 to 16 most significant decisions, which will have to be identified based on criteria included in the tender. To ensure that the sample is not skewed, it will cover different sectors and different types of decisions. The ex-post evaluation of these selected cases will involve a detailed analysis of the decisions, surveys, interviews with stakeholders (including the addressees of the decision, competitors, and customers), and potentially also their economic assessment. The ultimate objective is to determine whether the imposed remedies have been effectively implemented and have had the intended impact on competition. The study also aimed to identify common trends, themes, and provide recommendations for the Commission on how to improve its remedy practice and policies.

88. **The Chairman** turned to Brazil and referring to the report on CADE'S decisions issued between 2014-2019 and various reports on regulated industries, asked whether CADE systematically conducts ex-post evaluation, and if not, what can be inferred about the effectiveness of the remedies from these reports.

89. **Brazil** explained that although it does not conduct systematic ex-post evaluations, it had relevant drawn valuable lessons from the evaluations conducted so far. Notably, abuse of dominance in regulated sectors serves as an interesting example as it involves interactions between the competition authority and 12 sectoral regulators. The country's general law on regulatory agencies includes a section on institutional cooperation between the antitrust authority and sectoral regulators to promote competition in regulated markets. While the presence of a sectoral regulation does not prevent CADE from imposing remedies in regulated sectors, it must cooperate with the competent regulator. Brazil has also conducted analytical studies on several regulated markets to gain a better understanding of their dynamics and to to design more effective remedies. Brazil concluded by stating that the key lesson learned is that interaction with regulatory agencies is essential when designing remedies in regulated sectors. This interaction helps align expectations, provide legal certainty, promotes collaboration, and ensures more effective measures against anticompetitive behaviour.

90. After the last contribution from the members of the GFC, the Chair asked whether the experts wished to provide their finals remarks.

91. **Ms. Ojeda Cardenás** stressed the importance of basing the analysis of abuse and the design of remedies and commitments on the theory of harm. To facilitate international cooperation, it is crucial to address limitations associated with cross-border information sharing among national competition authorities. Two other key issues required further consideration are how to measure the deterrent effect when adopting commitments and the impact of commitments on the right to claims damages. These aspects warrant deeper reflection and examination in the context of competition law.

92. **Prof. De Vera** mentioned that in their jurisdiction abuse of dominance cases are often decided in a short period of time, raising questions about the efficiency of settlements or commitments as alternative options. She also admitted that market testing foreseen in the Philippines is rather limited and cited an abuse of dominance case where the proposed joint settlement agreement was open for public commitment only for 15 days before the final decision was issued. In light of the discussion that took place, Prof. De Vera appreciated the importance of examining the incentives created by commitments for firms, competition authorities, and consumers as well as the importance of developing legal precedents and consistency, which can be challenging given the frequency of accepting commitments. Prof. De Vera also took note of innovations from other jurisdictions, such as the referral of cases to private third parties at the cost of the entities. She also highlighted the need to consider whether there should be a preference for structural remedies over behavioral remedies in abuse of dominance cases.

93. **Prof. Maier-Rigaud** noted that Article 9 of Regulation 1/2003 was originally expected to enable the European Commission to make commitments binding, but that it had resulted in a higher number of Article 9 decisions than anticipated. He cautioned against the notion that commitments involve no risk simply because they are proposed by firms. The pressure to avoid longer prohibition decisions can be a strong motivator for firms, but it should not lead competition authorities to blindly accepting commitments offered by firms. Prof. Maier-Rigaud also emphasized the importance of having a solid theory of harm in abuse of dominance case as it should serve as a strong foundation for imposing remedies, even if they are robust and complex. From an economic perspective, there is no inherent reason to prefer behavioural remedies over structural remedies without considering the specific circumstances of the case.

94. **The Chairman** reminded participants that the OECD is already actively involved in exploring how digital technologies can assist competition authorities in their work. He referred to the roundtable on blockchain which had revealed its potential to monitor some remedies at low cost but with high precision and stressed that leveraging modern technology could aid competition authorities in assessing the effectiveness of remedies. The area that might still warrant more attention is the design and market testing of consumer-driven remedies, and evaluation of the past decisions, which could offer valuable insights in that regard. The Chairman reminded that in 2023 the OECD would discuss new approaches for accessing and gathering information by competition authorities as well as the design of a competition authority of the future, in particular with regard to its optimal composition in terms of specialists. Finally, the Chairman invited the speakers to share their concluding remarks if they wished to do so.

95. Dr. Pisarkiewicz emphasized that procedural efficiency in commitment decisions should not be taken for granted: instead of focusing only on the primary investigation, it is important to look at the whole procedure that also involves the monitoring phase. This raises the question of who bears the cost of monitoring, which can be shared among different authorities, as shown by the approached taken in Korea and Costa Rica. She then stressed the importance of legal certainty and asked whether it still can be achieved in the absence of prohibitions decisions and legal precedents, for example through indications that are included in soft law measures and non-binding guidelines. Although not the ideal approach, it could offer a viable alternative in the medium term. She also emphasized the value of learning through practical experience that unavoidably is not error-free and acknowledged that competition authorities should be held accountable while being transparent about the assumptions they make in their investigations. This in turn requires trust, which should be fostered as competition authorities should not feel under attack by the government. Dr. Pisarkiewicz concluded by highlighting the role of data and the opportunities they might offer to competition authorities as leveraging data can help alleviate resources and burden and streamline the process, making it swifter and more effective.

96. The Chairman concurred with Prof Rigaud's observation that competition authorities appear to be more proactive in employing remedies compared to 10-15 years ago. This shift in attitude seems to be influenced by the perception that theories of harm are more well-founded, providing support for the use of remedies and commitments. As for the trade-off between commitment and prohibition decisions, it might vary depending on the level of maturity of competition law in a given jurisdiction as well as on type of the sector involved, in particular distinguishing between digital and non-digital markets.

97. The Chairman thanked the speakers, all the participants and the OECD Secretariat team and concluded the session.