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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from BIAC

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

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Abuse of dominance in digital markets

- Contribution from BIAC* –

1. Introduction

1. *Business at OECD* is pleased to have the opportunity to comment on the issues raised by the application of abuse of dominance laws in digital markets. The creation and expansion of digital markets has significantly changed the global economy. Within a few decades, digital goods and services have become an integral part of the economy.[1] The term "digital markets" is extremely broad and does not necessarily align with traditional antitrust notions of relevant product markets. It is clear that the rise of the digital economy has created both new opportunities and challenges for businesses, consumers and competition authorities.

2. *Business at OECD* appreciates that competition authorities may have a high degree of interest in reviewing business practices in digital markets. Legal certainty and predictability of investigation and enforcement of abuse of dominance prohibitions should apply in the same way as for enforcement activity in non-digital markets. Where there are legitimate competition concerns, enforcement action should be taken in a manner that is proportionate and effectively addresses that failure or those concerns but does not necessarily chill innovation or hinder investment. As in non-digital markets, this requires a solid understanding of the unique characteristics of and business incentives in digital markets. This can be achieved, for example, by conducting market studies to understand digital markets and solicit feedback from market participants prior to advancing novel theories of harm. Competition authorities should only take enforcement and/or remedial action where a firm has abused its dominance and any such actions should be based on sound economic and factual underpinnings that justify intervention.

3. These comments build on the previous contributions of *Business at OECD* on related subjects, including Consumer Data Rights and Impact of Competition,[2] Personalised Pricing in the Digital Era,[3] and Quality Considerations in Digital Zero-Price Markets.[4] The remainder of these comments are organized as follows: Section II outlines the benefits of the digital markets, examines policy challenges associated with regulating digital markets, and highlights the consequences of over-enforcement; Section III analyzes the abuse of dominance framework in digital markets; and Section IV concludes.

* This contribution was prepared by the Business at OECD for the OECD Global Forum on Competition.

[1] UNCTAD, DIGITAL ECONOMY REPORT 2019: VALUE CREATION AND CAPTURE: IMPLICATIONS FOR DEVELOPING COUNTRIES (2019), *available at* https://unctad.org/en/PublicationsLibrary/der2019_en.pdf?user=46.

[2] OECD, Consumer Data Rights and Competition—Note by BIAC, DAF/COMP/WD(2020)46 (May 28, 2020), *available at* https://one.oecd.org/document/DAF/COMP/WD(2020)46/en/pdf.

[3] OECD, Personalised Pricing in the Digital Era—Note by BIAC, DAF/COMP/WD(2018)123 (Nov. 21, 2018), *available at* https://one.oecd.org/document/DAF/COMP/WD(2018)123/en/pdf.

[4] OECD, Quality Considerations in the Zero-Price Economy—Note by BIAC, DAF/COMP/WD(2018)151 (Nov. 23, 2018), *available at* https://one.oecd.org/document/DAF/COMP/WD(2018)151/en/pdf.

2. Unique Benefits and Challenges of Digital Markets

4. There is no universally accepted definition of the "digital economy," "digital sector," or "digital markets." Digital markets can be defined narrowly (e.g., as online platforms and those activities that exist as a result of such platforms) or broadly (e.g., all activities that use digitized data or are provided over the internet).[5] Digital markets, even broadly defined, may not operate in isolation from non-digital equivalents. Accordingly, competition authorities should consider whether properly defined, digital markets include only digital substitutes, or whether reasonable "bricks and mortar" substitutes should be considered.

5. Digital markets have created significant benefits for businesses and consumers. The 2019 Report of the United Kingdom's Digital Competition Expert Panel identifies some of these benefits, including: creating entirely new categories of products and services, which are often of high-quality with low (or zero) prices;[6] and lowering start-up costs and scaling costs through cloud computing, access to platforms and digital comparison tools.[7] These benefits have facilitated competition in certain areas thereby enabling the entry of additional businesses, growth of existing businesses and facilitating multi-homing and digital comparison tools that allow consumers to make better-informed choices.[8] Digital markets can also create broader societal benefits, including bringing individuals and communities together to share information, ideas, products and services, as well as providing economic opportunities that can counteract unemployment, inequality and poverty.[9]

6. At the same time, some digital markets may be inclined to certain characteristics, including direct and indirect network effects,[10] economies of scale and scope, data accumulation that may impede contestability, tendencies to "tip" towards one provider,[11]

[5] INT'L MONETARY FUND, MEASURING THE DIGITAL ECONOMY (Feb. 28, 2018), *available at* https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/03/022818-measuring-the-digital-economy.

[6] DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION 3 (Mar. 2019), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[7] *Id.*

[8] *Id.*

[9] South Africa Competition Comm'n, Competition in the Digital Economy: For Public Comments (Sept. 7, 2020), *available at* http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf.

[10] Network effects refer to a good or service that has increasing benefits if there are more users. For example, platforms that benefit from network effects become "more valuable to their users as they grow, which in turn makes them a more attractive proposition to future prospective users." DIGITAL COMPETITION EXPERT PANEL, *supra* note 6, ¶ 1.81. In some instances, network effects may heighten concentration in a relevant digital market and may act as a barrier to entry (i.e., "[o]nce many buyers and sellers are using a marketplace, it becomes harder for a rival to lure them away"). Andrei Hagiu & Simon Rothman, *Network Effects Aren't Enough*, HARVARD BUS. REV. (Apr. 2016), *available at* https://hbr.org/2016/04/network-effects-arent-enough. For further information, *see Digital Economy, Innovation and Competition*, OECD, *available at* https://www.oecd.org/innovation/digital-economy-innovation-and-competition.htm; David S. Evans & Richard Schmalensee, Network Effects: March to the Evidence: Not to the Slogans (Aug. 27, 2017) *available at* https://mitsloan.mit.edu/shared/ods/documents/?PublicationDocumentID=4243; Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade?*, ANTITRUST, Spring 2018, *available at* http://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf.

[11] Some digital markets may be subject to "tipping", where a "winner" will take most of a market. While there are no general rules, tipping may occur where (1) a firm reaches a certain scale, driven by a combination of economies of scale and scope, (2) network externalities exist (on either the consumer or seller side), (3) products, services and

and barriers to entry that may exacerbate adverse effects on competition and innovation. However, there is also significant diversity across digital markets and is important, particularly in the context of enforcement, that actual or potential competitive harm is identified.[12] There is therefore some danger in extrapolating general principles from one digital market or digital player and seeking to apply these principles across digital markets in general. The rapid pace of change and innovation that can be the source of benefits and opportunities in digital markets may also present distinct challenges to enforcement of competition laws, including dissecting technologies and understanding related business practices and incentives. It is vital that such dynamics are well understood, especially in advance of enforcement.

7. Competition authorities are unlikely to have perfect insight into the technology a firm is using in a digital market, including how it works, why it works, how one digital service relates to a firm's overall business model, and how changes to one aspect of a service might impact the incentives of the company and the users of the digital service. While significant progress has been made in the last few years, competition authorities should—as is the case with enforcement in any sector—focus on understanding these markets, including the products and services offered, general consumer preferences, the business models deployed (e.g., multi-sided, interlinked, zero price, etc.), patterns of exit and entry and the fundamental competitive dynamics between firms.[13]

8. One way competition agencies have sought to overcome informational asymmetry is through market studies. Market studies can be an opportunity for competition authorities to holistically examine an industry or sector, and to engage with market participants and stakeholders. Such studies can provide additional information that competition authorities may use to determine whether a firm is actually dominant, whether a firm is engaging in exclusionary anti-competitive conduct, whether there is, or is likely to be, consumer harm, and, ultimately, whether there is, or is likely to be, a market failure that requires intervention.

9. *Business at OECD* recommends that competition authorities focus on the possibility of "type 1" and "type 2" errors of enforcement decisions taken in respect of digital markets. A type 1 error occurs when one rejects a null hypothesis when it is, in fact, true,[14] and in the competition law context reflects over-enforcement,[15] whereas a type 2

hardware are integrated, (4) behavioural limitations exist for consumers, for whom defaults and prominence are very important, (5) it is difficult to raise capital, and (6) brands are important. For further information, *see* DIGITAL COMPETITION EXPERT PANEL, *supra* note 6, at 4.

[12] CANADIAN COMPETITION BUREAU, BIG DATA AND INNOVATION: KEY THEMES FOR COMPETITION POLICY IN CANADA (Feb. 19, 2018) *available at* https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/$file/CB-Report-BigData-Eng.pdf.

[13] Given the scope of the required analysis, it is not surprising that abuse of dominance investigations are resource-intensive, and often include significant and continuous financial costs, sophisticated technology, and human resources (within the competition authority and external economics firms). Prior to initiating a review, or taking other enforcement action in digital markets, *Business at OECD* recommends that competition authorities ensure that they have access to the significant resources required to complete a quality review in a timely and efficient manner.

[14] Morten Hviid, Introduction to the Competition Law Framework and Reminder of Key Economic Concepts 3 (Feb. 10, 2017), *available at* http://competitionpolicy.ac.uk/documents/8158338/21648435/Session+1+-+Overview++Morten+Hviid.pdf/05b3acd2-5feb-4f3c-a293-5e2ea8fc0852.

[15] *European Union Competition Law: Error Types*, NEW YORK LAW SCHOOL, *available at* https://www.eucomplaw.com/error-types/.

error occurs when one accepts a null hypothesis when it is, in fact, false,[16] and in the competition law context reflects under-enforcement.[17] While competition authorities should strive to avoid both type 1 and type 2 errors, a careful balancing is required to achieve effective enforcement with meaningful remedies, and, at the same time, avoid the risks associated with a type 1 error in digital markets which can include chilling innovation and investment in technology. Such an error may actually harm the very consumers that it was meant to protect.

3. Applying the Abuse of Dominance Framework to Digital Markets

3.1. General

10. Competition policy has long recognized the idea that "big" is not inherently "bad." A firm may have a large market share as a result of aggressive competition (e.g., innovation, efficiency, quality products or services, or a novel business model). In the context of certain digital markets, where "winning" firms can seemingly "take all," creating market "losers," competition authorities must remain vigilant to protect competition and not competitors (in other words, avoid conflating success with abuse).

11. Competition law has established an abuse of dominance framework to assess whether dominant firms are engaged in abusive conduct. Although this framework and its associated enforcement tools were established in the context of traditional markets, *Business at OECD* believes that, in general, both may be appropriately applied to digital markets, but—as is the case with enforcement in any sector—may be adapted to reflect the unique characteristics of digital markets.

12. Enforcement actions may be necessary to stem competitive abuses but should focus on identifying situations where there is demonstrable competitive harm and be based on economically sound theories of harm. Once competition authorities establish that a firm has abused its dominance, they should identify a clear path to remedies that are proportionate to the scope of the abuse and will enhance competition and minimize negative effects on consumers. Existing tools are sufficient to do this when applied in a way that enhances competition and consumer welfare.

13. Competition authorities may also need to work cooperatively with their international counterparts when initiating a review or otherwise taking enforcement action against abuse of dominance in digital markets. This is because digital markets often extend beyond national borders, and abusive conduct within an impugned market is likely to have supranational effects. A competition authority that is assessing allegedly abusive conduct within its specific local competitive context must determine whether supranational anti-competitive effects are likely. Engagement with relevant jurisdictions is key as unilateral conduct laws are not uniform, and where remedies are imposed, care should be had to minimize the extraterritorial effect of enforcement.[18] Where supranational anti-competitive effects are likely, the relevant competition authorities must embrace applicable common theories of harm in digital markets and enforce those theories mindful of impacts in other jurisdictions. Failure to do so will increase costs on firms and create significant operational

[16] Hviid, *supra* note 14, at 3.

[17] *European Union Competition Law: Error Types*, *supra* note 15.

[18] OECD, Roundtable on the Extraterritorial Reach of Competition Remedies—Issues Paper by the Secretariat, DAF/COMP/WP3(2017)4, ¶ 46 (Nov. 24, 2017), *available at* https://one.oecd.org/document/DAF/COMP/WP3(2017)4/en/pdf.

challenges and may cause unintended competitive harm because of inconsistent and either excessive or ineffective enforcement.

3.2. Identifying Dominance

14. The first step to enforcing abuse of dominance restrictions is to identify whether a firm is dominant in the impugned market. This can be challenging where market definition and substitutability require a detailed factual and economic analysis. In digital markets, identifying dominant firms may require competition authorities to carefully consider complex economic evidence, and often reflects a sophisticated analysis dealing with multiple related and/or connected markets or complete ecosystems at once.

15. The dynamic nature of digital markets can also mean that traditional and static criterion of dominance, such as market shares or other traditional measures of contestability such as high profitability, rapid growth, or exiting rivals may not be accurate measures of whether a firm is dominant.[19] Instead, a robust assessment of actual competitive dynamics is necessary in understanding potential dominance in what may be rapidly changing markets. For example, in an impugned market where a product is provided at a zero-price, a market power analysis may require competition authorities to consider quality and innovation and take into account the other sides of the impugned market that do have prices.

16. A criterion sometimes applied for dominance is the control of an essential facility or allegedly "indispensable" input. However, different jurisdictions often have very different requirements that must be met to prove that a facility is essential. Moreover, what may be essential or indispensable in order to compete in a digital market may be far from obvious. For example, although data is sometimes asserted to be essential or indispensable, this may not always be true and should be analysed on a case-by-case basis. The volume of data a firm has access to does not necessarily result in success or raise competition issues in and of itself. Rather, the value of the data is often derived by how the data is used (e.g., the quality of the algorithm that processes data).[20] It is also important to remember that consumer data is neither finite,[21] nor difficult to collect,[22] and many successful digital firms' business models were to enter the market and then collect and analyse user data (e.g., Google, Facebook, Yelp, etc.).[23]

[19] *See, e.g.*, Koren W. Wong-Ervin, *Assessing Monopoly Power or Dominance in Platform Markets*, ECON. COMM. NEWSLETTER (ABA Antitrust Law Section), Spring 2020, at 1, *available at* https://www.axinn.com/assets/htmldocuments/ABA%20Economics%20Committee%20Newsletter-Spring%202020.pdf.

[20] The success of start-up firms lacking consumer data casts further doubt on suggestion that consumer data is an essential *input* (e.g., Google, Facebook, Twitter, Yelp and Pinterest).

[21] Consumer data can be gathered directly by a firm from its consumers, provided only that the firm supplies a product or service that consumers find useful.

[22] For example, firms may collect it themselves or acquire it from data brokers, data aggregators, and other suppliers that commonly supply telecom, media, entertainment and service providers.

[23] Wong-Ervin, *supra* note 19, at 9.

17. Digital markets can also be multi-sided. Apparent dominance on one-side of a two-sided market may not equate to dominance on the other. The competitive set on one side may also be different to the competitive set on the other side. For example, ad-supported platforms may appear to offer consumers entirely distinct services but may compete head to head for advertising revenues. Scholars have argued that competition authorities need to devote greater attention to competition for the attention of consumers ("attention markets") when assessing the market and to increase the dynamism of market definition conceptualization.[24]

18. A related point is whether competition is "like for like." *Business at OECD* recommends that competition authorities focus on the commercialized side of multi-sided markets. For example, where a platform operates in the user-facing social media market and the business-facing advertising market, a competition authority's market definition should focus on the commercialized market (i.e., advertising) rather than the non-commercialized user market (i.e., social media platform). Market definition is increasingly difficult in digital markets. In defining a relevant market, it has been suggested that competition authorities should take into account the characteristics of the digital sector, including the possible existence of ecosystems of products, the convergence of products, the increased personalization of offers, the substitutability of digital services with traditional ones (e.g., taxies for ride-sharing services), and its global nature.[25]

19. To the extent appropriate, there should not be inconsistency between the market definition principles used in both the merger and abuse of dominance contexts, which should nevertheless be applied on a case-by-case basis. The European Commission has historically identified markets narrowly, for example, in *Microsoft/LinkedIn*, where the European Commission assessed the market for professional social networks, to assess the narrowest putative product market.[26] Furthermore, the European Commission considers both product functionality and quantitative pricing tests as being central to the market definition analysis.[27] These techniques may prove challenging in the context of digital markets due to the pervasiveness of multi-sided platforms and services offered at zero price.[28] The hypothetical monopolist test fails to consider the pricing interdependencies that exist in multi-sided markets or the importance of other elements of competition, such as quality.[29] While the European Commission has considered multi-sided technology platforms previously (e.g., *Google/DoubleClick*; *Microsoft/Yahoo!*; *Microsoft/Skype*; *Facebook/WhatsApp*; and *Verizon/Yahoo*), they have most frequently left the exact definition of the relevant market open. In short, multi-sided platforms, which are common in digital markets, pose a number of additional market definition questions for competition authorities that must be grappled with.

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[24] David S. Evans, Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies (Aug. 23, 2017), *available at* https://ssrn.com/abstract=3009438.

[25] Marc Bourreau & Alexandre de Streel, Digital Conglomerates and EU Competition Policy 23 (Mar. 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512.

[26] Case M.8124—Microsoft/LinkedIn, Comm'n Decision, ¶¶ 74-83 (Dec. 6, 2016), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.

[27] Catriona Hatton, David Gabathuler, & Alexandre Lichy, *Digital Markets and Merger Control in the EU: Evolution, not Revolution?*, ANTITRUST CHRON. (Feb. 2018), at 4, *available at* https://www.competitionpolicyinternational.com/digital-markets-and-merger-control-in-the-eu-evolution-not-revolution/.

[28] *Id*. at 4.

[29] *Id*. at 5.

3.3. Anticompetitive Conduct

20. While competition laws prohibiting abuse of dominance vary across jurisdictions, they generally require that a dominant firm is or has engaged in anti-competitive conduct. Years of international experience have established certain practices as abuses. While these do not form a closed list, the economic analysis and standards of proof that underlies them guides the application of abuse of dominance more broadly.[30] *Business at OECD* views the current abuse of dominance standard as appropriate for prohibiting unilateral conduct of businesses participating in digital markets.

21. Competition laws and doctrine, including abuse of dominance, are not inadequate when dealing with the digital economy.[31] Competition authorities have made use of traditional anti-competitive acts to apply to digital business practices. For example, in Europe, Article 102(d) of Treaty on the Functioning of the European Union (TFEU) may deem tying and bundling an abuse of market power when a dominant firm makes "the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[32] While the concept of tying and bundling was originally developed for the combined sale of more than one product, it has since been expanded to apply to business practices in digital markets, including the integration of software into a computer operating system,[33] and the prioritized display of a firm's own service in a search engine ranking.[34]

22. To the extent that competition authorities pursue novel abuses or theories of harm, *Business at OECD* recommends that they be grounded in a robust understanding of the facts and market dynamics and supported by economic analysis. In addition, competition authorities should carefully consider the counterfactual of any case; the competitive dynamics of an impugned digital market may well have existed in the absence of the alleged abusive conduct. Since both digital products and services, and business models may be new and disruptive, the risk of type 1 (over-enforcement) errors and their associated negative consequences, can be significant and should be adequately weighed against the alleged harm of type 2 errors (under-enforcement).

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[30] Competition laws do not typically proscribe what an anti-competitive act is, though some offer examples of anti-competitive acts such as discriminatory pricing (i.e., applying dissimilar conditions to equivalent transactions with other trading parties), excessive pricing (i.e., directly or indirectly imposing unfair purchase or selling prices), unilaterally imposing other unfair trading conditions, unfair margin squeezing, and using fighting brands to eliminate a competitor. *See, e.g.*, Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), 2012 O.J. (C 326) 47, art. 102; and Competition Act, R.S.C., 1985, c C-34, s 78-79 (Can.).

[31] Stefan Holzweber, *Tying and Banding in the Digital Era*, 14 EUR. COMPETITION J. 342 (2018), *available at* https://www.tandfonline.com/doi/full/10.1080/17441056.2018.1533360.

[32] TFEU, *supra* note 30, art 102(d).

[33] Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-03601, *available at* http://curia.europa.eu/juris/liste.jsf?num=T-201/04. In 2004, the EU Commission fined Microsoft €497 million for abusing its dominant position in the operating systems market by tying its Windows Media Player to its desktop computer operating system and ordered Microsoft to produce a version of Microsoft Windows without Windows Media Player. The EU Commission also found that Microsoft had abused its dominant position by refusing to supply interoperability information and to allow use of that information to rivals in the work group server operating system market.

[34] Case AT.39740—Google Search (Shopping), Comm'n Decision (June 27, 2017), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf. In 2017, the EU Commission fined Google €2.42 billion for abusing its dominant position in the general search market by favouring its own vertical comparison shopping services in its search page.

23. Given the significant uncertainty around both digital markets and novel abuses and theories of harm, competition authorities may find it useful—and more efficient—to provide public guidance to the business community about their competition concerns before taking enforcement action. Without clear guidance, it may be unclear that firms' business practices conflict with competition laws and abuse of dominance doctrine where traditional theories of anti-competitive acts are not readily applicable. Public guidance gives firms the opportunity to conduct a self-assessment as to whether the firm is engaged in the allegedly anti-competitive act.

24. Accordingly, *Business at OECD* recommends that competition authorities endeavour to provide clear public guidance on novel abuses and theories of harm specific to the digital economy. As discussed above, competition authorities may find it useful to conduct a market study to deepen their understanding of an impugned market.

25. Whether alleging an established or novel anti-competitive act, firms require predictability and transparency in competition authorities' actions to flourish. It is well established that certainty and predictability of enforcement are vital to firms and the global economy; any intervention by competition authorities must be supported by both a strong factual record and solid economic analysis. Firms should not face unwarranted scrutiny or be subject to over-enforcement as both may create unintended harm to the consumer welfare benefits created by digital markets. Moreover, given the rapid pace of evolution in digital markets, competition authorities should endeavour to conduct efficient investigations and, where appropriate, take timely enforcement action.

4. Consideration of Effects and Remedies

26. Determining appropriate remedies for abuse of dominance, particularly with firms operating in digital markets, is challenging.[35] When evaluating potential remedies, *Business at OECD* recommends competition authorities focus—even at the outset of an investigation—on the anti-competitive effects of impugned conduct to ensure that remedial actions are proportionate to the scope of the abuse, will be successful and will benefit competition in the impugned market as a whole. Remedies should not be designed to or have the effect of merely propping up competitors but should ensure exclusionary abuses are prevented or remedied in the relevant market. Moreover, given that digital markets generate significant benefits for consumers, its important to consider the net impact of a remedy on these benefits. It may not be a "win" if restoring or establishing competitive conditions in an impugned market requires sacrificing the long-term consumer benefits created by a dominant firm.

27. Remedies in abuse of dominance cases can be either positive or negative in nature. Positive remedies require the allegedly dominant firm to take some action (e.g., licensing consumer data to a rival on regulated terms and conditions), whereas negative remedies require the allegedly dominant firm to stop taking an action (e.g., prohibiting a firm from integrating its communications platform into its operating system software). Before intervening, competition authorities should carefully consider the likelihood that a remedy will be successful and also, in the case of a positive remedy, the resources required for monitoring. Competition authorities should strive to design proportionate remedies to restore or establish competitive conditions to a relevant market (and to comply with the

[35] Marco Botta & Klaus Wiedemann, *Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision*, 10(8) J. EUR. COMPETITION L. & PRACTICE 465, 466-68 (2019), *available at* https://doi.org/10.1093/jeclap/lpz064. For example, designing a remedy may be challenging where the effects of certain types of abuse of dominance in a digital market are "ambiguous" on consumer welfare. *Id.* at 468.

laws of the jurisdiction in-question). The authority should also consider how the imposition of remedies can be expected to impact a firm's incentives to invest and innovate, as well as other firms and consumers that participate in the dominant firm's ecosystem.

28. While over-inclusive remedies should always be avoided, they raise particular risks in digital markets (e.g., imposing changes to business models that impact the other sides of a multi-sided market).[36] Positive remedies require significant resources for monitoring,[37] and create challenges in respect of design, implementation, and the likelihood of success.[38] For example, if a competition authority imposes the positive remedy to license consumer data to a rival firm, it is then necessary to, at the very least, determine an appropriate royalty, determine the scope of data to be shared and with whom,[39] consider consent and data protection obligations, and set up an on-going compliance program.[40] It is equally important to ensure that the remedy, while opening the market to competition, does not hamstring the dominant firm and prevent it from competing in beneficial ways.

29. *Business at OECD* urges competition authorities to be cautious in their remedial approach when competitive effects have arisen from the denial of essential facilities. Remedies in the context of essential facilities are likely to have far-reaching implications, especially where the remedy requires a firm to share consumer data with its rivals on regulated terms and conditions.[41] A remedy requiring a firm to share consumer data with its rivals, for example, may reduce a firm's incentives to further invest in collecting consumer data and innovate to collect more consumer data in new ways. Such a remedy may also reduce or eliminate efficiencies and/or consumer benefits generated by the combination and processing of diverse data on a single AI platform, for example. In addition, consumer data sharing raises significant consumer privacy issues, including with respect to consumer consent and data protection, which are typically beyond the scope of competition authorities' regulatory authority. Thus, any data access remedy must be carefully designed to address the identified competition concerns.

[36] *Id.* at 472.

[37] Pablo Ibáñez Colomo, *Indispensability and Abuse of Dominance: from Commercial Solvents to Slovak Telekom and Google Shopping*, 10(9) J. EUR. COMPETITION L. & PRACTICE 532 (2019), *available at* https://doi.org/10.1093/jeclap/lpz077.

[38] *Id*.

[39] Giuseppe Colangelo & Mariateresa Maggiolino, *Big Data as Misleading Facilities*, 13 EUR. COMPETITION J. 249, 274 (2017), *available at* https://www.tandfonline.com/doi/abs/10.1080/17441056.2017.1382262.

[40] *Id*.

[41] Competition authorities should always be circumspect when considering data sharing remedies. It is rare that data in and of itself will be the significant competitive input. Rather, a firm's ability to extract and deploy the useful information from a data set is what typically enables it to compete. Accordingly, data sharing may not be sufficient to restore competitive conditions in a relevant market if rivals do not have equally sophisticated technology. *See, e.g.*, Botta & Wiedemann, *supra* note 35, at 473.

5. Conclusion

30. *Business at OECD* appreciates the high degree of interest of competition authorities in reviewing business practices in digital markets. Competition authorities should only take enforcement and/or remedial action where a firm has abused its dominance and such actions should align with the scope of the abuse. Competition authorities must balance the impetus to intervene against the interest in legal certainty and predictability of enforcement, which are vital to realizing economic and consumer benefits of new technologies. Competition authorities may benefit from conducting market studies (including soliciting feedback from market participants) to better understand digital markets, especially before advancing novel abuses or theories of harm. Where appropriate, remedial actions should be taken in a timely manner to address anticompetitive abuses.

31. *Business at OECD* recommends that competition authorities take enforcement action where there is anti-competitive conduct that has resulted in a market failure or raised legitimate competition concerns regarding a market. To the extent intervention is required, *Business at OECD* urges competition authorities to strive to design proportionate remedies to restore or establish competitive conditions to the impugned market. Where competition authorities take enforcement action, *Business at OECD* recommends that such action be based on sound factual and economic underpinnings that justify intervention.