Organisation for Economic Co-operation and Development

DAF/COMP/M(2021)2/ANN3/FINAL

Unclassified

English - Or. English

11 October 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Summary of Discussion of the Roundtable on Ex Ante Regulation and Competition in Digital Markets

Annex to the Summary Record of the 136th meeting of the Competition Committee

9 June 2021

This document prepared by the OECD Secretariat is a detailed summary of the discussion of Roundtable on Ex Ante Regulation and Competition in Digital Markets, held by the Competition Committee on 2 December 2021.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm

Please contact Mr Antonio CAPOBIANCO if you have questions about this document.
Email: Antonio.CAPOBIANCO@oecd.org

JT03504682

Summary of the Discussion of the Roundtable on Ex Ante Regulation and Competition in Digital Markets

The **Chair** noted that many jurisdictions have enacted or proposed ex ante regulations of the largest digital firms in response to a widespread perception that traditional competition law enforcement has proved inadequate to the challenges posed by digital markets. The roundtable was an opportunity for competition authorities to reflect on the rationale, scope and implementation challenges of these regulations.

The keynote speaker for the roundtable was **Lina Khan,** Chair of the United States Federal Trade Commission (US FTC). The other invited speaker was **Amelia Fletcher,** Professor of Competition Policy at the University of East Anglia. Video contributions had been received from Australia, Germany, the UK, the US and the EU. A background paper by Secretariat staff had also been prepared.

Summary of video contributions

The Chair invited jurisdictions that had supplied video contributions to summarise them very briefly.

Australia said that the digital sector was the dominant topic in competition law at the moment. The key question is whether ex post enforcement tools are adequate. The speaker felt they were not, since enforcement cases take too long to resolve and often fail to solve the overarching problem. Australia has been methodically studying the markets concerned and will decide in the course of 2022 what rules to put in place. It aims to align with international learning and practice as far as possible.

Germany described its competition law reforms focussed on platform markets. The new law clarifies terms such as ‘network effects’ and ‘intermediation power’ and introduces provisions on anti-competitive tipping and on data and interfaces. Most importantly, it provides for the designation of gatekeeper firms with an overarching cross-market leveraging power (“undertakings of paramount significance for competition across markets”), based on qualitative criteria, and introduces per se rules. Companies still have the possibility of objective justification, but the burden of proof is now reversed and falls upon them. The EC Digital Markets Act will provide a further tool for dealing with digital markets. Germany has opened four proceedings against Google, Apple, Facebook and Amazon with a view to designating these companies as gatekeepers and imposing obligations on their conduct.

The **United Kingdom** reported that its government launched a consultation on a new pro-competition regime for digital markets in 2021, building on advice by the Digital Markets Task Force of the Competition and Markets Authority (CMA). The UK proposal is focussed on firms deemed to have “strategic market status” following an evidence-based assessment of their market power and whether it gives them a “strategic position”. Such firms would be subject to a regime with three strands: a code of conduct focussed on managing the effects of the firm’s market power and preventing it from taking advantage of its powerful position; pro-competitive interventions addressing the sources of market power, such as interoperability or data access remedies; and procedural and substantive reforms to merger rules. The government has committed to bringing forward legislation as soon as possible. The CMA has established a Digital Markets Unit in preparation for the new regime.

The **United States** said that the US Congress is considering several bills designed to address competition concerns in digital markets. They can be characterised either as "tech-targeted" or as general antitrust reforms.

The tech-targeted proposals are focussed mainly on the most economically significant platforms possessing gatekeeper power. One is aimed at protecting competition on "covered" digital platforms and includes general rules prohibiting self-preferencing and discriminatory conduct that would harm competition, subject to affirmative defences. A second proposal would prohibit mergers and acquisitions unless the platform can prove that the transaction would not eliminate an actual or potential competitor, thus reversing the traditional burden of proof. A third would impose structural separation if integration is creating a deep conflict of interest for the platform owner. There is also a bill to establish basic data interoperability and portability requirements.

The US video contribution also covers two bills aimed at strengthening antitrust law and its enforcement. One is the proposed Competition and Antitrust Law Enforcement Reform Act, which would strengthen prohibitions on anti-competitive mergers and conduct, empower the antitrust agencies to seek large civil fines, and increase their resources. Another bill contains a more comprehensive set of antitrust reforms.

The activity in Congress on these issues reflected the new challenges posed by dominant intermediaries and digital markets. It is not clear which if any of the bills will make law. In addition, President Biden signed an Executive Order in 2021 encouraging agencies to promote competition through rulemaking and other existing tools.

The US referred to the term "ex ante enforcement" that was being used to describe some of the new competition rules being debated in the US and elsewhere in response to changes in the modern economy.

The **European Union** described the Digital Markets Act that was proposed in December 2020 as a new tool that complements, and does not substitute for, competition law enforcement. It is focussed only on the largest platforms that act as gateways between EU business users and EU final consumers, and only on the most problematic behaviour. It has a slightly broader objective than competition rules in that it is concerned with considerations of fairness as well as the competitive process and contestability of digital markets. The problematic conduct it seeks to address includes specific forms tying, self-preferencing and use of data.

Under the DMA the European Commission as central enforcer would designate firms which hold a gatekeeper position for specific "core platform services". The designation would be based on quantitative criteria creating a very strong presumption of gatekeeper status, as well as qualitative criteria that can allow the Commission to make a designation based on a more detailed market investigation. A set of "dos and don'ts" would automatically apply to designated gatekeepers, with scope for regulatory dialogue on how to comply. The European Commission would be empowered to impose fines for non-compliance of up to 10% of worldwide turnover (there are proposals to increase this). It could also impose behavioural and even structural remedies in the case of repeat offences.

Genesis and rationale of ex ante regulation of digital markets

Lina Khan made a keynote presentation on the first topic of the roundtable. She said that the number of countries now considering ex ante regulation in digital markets, which might have seemed implausible a few years ago, reflects key challenges raised by dominant firms that increasingly seem unchecked by, or perhaps even beyond, competition. This dominance is the result of network externalities, the reinforcing advantages of data, and

other economies of scale and scope, but also of a somewhat hands-off approach to enforcement that has generally chosen to weigh the costs of false positives much more heavily than the costs of false negatives.

Alluding to the US's earlier point, Ms Khan said that often ex post enforcement of competition laws is contrasted with ex ante regulation, and discussion of the merits of the two are driven by substantive rather than institutional considerations. She felt that in certain cases, including with regard to digital markets, there may be good institutional reasons in the United States for considering ex ante rules alongside ex post enforcement. The FTC's power of competition rulemaking was an underappreciated tool that could be used more fully.

Currently in the US, most cases are analysed under the rule of reason, requiring a broad inquiry into the overall competitive effects of particular conduct. Generalist judges have struggled to identify and apply complex economic criteria in consistent ways, and they themselves have criticised antitrust standards for being difficult to administer. Competition rulemaking would enable the FTC to issue clear rules, giving market participants sufficient notice about the law and ample opportunity for the public to participate in the rulemaking process. Such rules could help deliver consistent enforcement and predictable results, reducing ambiguity about the law, and enabling market participants to channel their resources more productively and market entrants to compete on a more level playing field.

Secondly, antitrust adjudication in the US is currently extremely costly and protracted. It can take a decade to bring a case to full judgment, by which time market circumstances may have moved on from the original conduct. The cost of economic experts constrains the number of cases that the antitrust agencies can bring and the types of market participant that can afford to pursue litigation. Research has suggested that these facts may be contributing to reduced government enforcement efforts over time, especially relative to the expansion of the US economy. Ex ante rules could help relieve these costs by obviating the need to establish the same outcome case by case through ex post assessment exclusively.

Third, case-by-case adjudication can deprive market participants and the public of any real opportunity to participate in the creation of substantive antitrust rules. Nascent firms are especially likely to be left out, despite their vital role in the competition ecosystem, because they do not make up a significant portion of the parties represented in litigated matters. Competition rulemaking could enable the FTC to establish rules through a transparent and participatory process, granting the rules greater legitimacy. Unlike judges, who are confined to the trial record when developing precedent-setting rules and standards, the FTC can put forth rules after drawing on its ability to collect and aggregate information and to study market trends and industry practices over the long term, outside of the context of litigation. This could help antitrust enforcement and policymaking better reflect empirical realities.

Ms Khan closed by saying that ensuring digital markets are free and fair is one of the main current priorities of the FTC. Congress created the FTC to play a complementary role to the DoJ Antitrust Division with a slightly distinct set of tools, including competition rulemaking. In order to deliver fully for consumers, the FTC should be mindful of what is not working and take advantage of the full set of such tools.

The OECD Secretariat explained that the background paper compares and contrasts some of the main existing regulatory proposals and rules, many of which had already been touched on in the session. She highlighted several questions which flowed from this review. These were: what should be the nature of the relationship between regulation and competition enforcement in digital markets; whether ex ante regulation and ex post

enforcement are complementary or antagonistic; what general principles and goals should underpin these new rules (such as fairness, contestability, innovation and transparency), and how they should be articulated; what should be the prohibitions and obligations within the regulations, including resolving the tension between stimulating competition in the market and competition for the market; and whether new institutional capabilities are needed, as well as inter-institutional cooperation between regulators, both domestically and internationally. The background note also raises the question of consumer protection and the consumer welfare standard, as well as issues such as data privacy protection.

Korea described two areas in which the Korea Fair Trade Commission (KFTC) is turning to ex ante regulation of digital markets to pursue outcomes that it has found difficult to achieve by traditional competition law enforcement alone.

The first area is transparency of trade. In 2020 the KFTC imposed remedies in a case concerning self-preferencing in online search. However, the remedies only address the specific misconduct – the search-ranking algorithm remains opaque to business users and consumers. To prevent platform operators from arbitrarily changing their algorithm in their own favour, the KFTC has proposed an Act on Fairness in Online Platform Intermediary Transactions that will require them to state the format and order of exposure of products and services in their contracts.

The second area is consumer protection. Ex post enforcement relieves consumer harm only after clarifying responsibility between the business user and the platform, which can be a lengthy and costly process compared to the relatively small amount of damage in individual cases. The KFTC is proposing an overhaul of e-commerce law to include ex ante regulations obliging platforms to provide sufficient information to consumers, including the factors that determine their search and exposure ranking, and how user reviews are collected and processed.

Austria confirmed to the Chair that changes to its competition law in September 2021 allow the Cartel Court to declare companies active in multi-sided digital markets as dominant, which is intended to speed up any subsequent ex post competition enforcement by allowing the competition authority to proceed more rapidly to substantive assessment of the alleged abuse. The speaker also pointed out that the designation could function as a kind of warning signal to firms. There is no practical experience or case law with the new provisions as yet. The speaker felt that the Austrian legislator was "testing the water" and did not rule out further-reaching legislation, possibly depending on the final form of the EU Digital Markets Act.

The Chair referred to a statement in the written contribution from **Germany** that one of the substantive goals of its Competition Act amendment was to modernise abuse control. He asked what gaps the amendment addresses in this regard and whether they exist only in the digital sector.

Germany pointed out that it requested that the European Commission consider instruments beyond existing competition law as early as 2014, but that the view had prevailed until 2019 that existing abuse of dominance of provisions were sufficient. The speaker said that the amendment addressed two gaps that had also been touched on by other participants. First, the existing substantive rules on abuse of dominance for super dominant platforms were considered inadequate. Second, the time taken to decide individual abuse of dominance cases and to establish a body of case law for super-dominant platforms was judged too long. In response, Germany chose to move from competition standards to presumptions and per se rules that are designed to be as self-executing as possible, and to speed up the legal process. The speaker disagreed, however, that ex ante regulation will

necessarily be less costly, in view of the unparalleled resources available to dominant digital firms.

The Bundeskartellamt said that the digital sector is distinct from other sectors in that dominance reflects economies of scale from network effects on the demand side rather than economies of scale on the supply side. It is conceivable that in future new sectors might arise where similar additional regulation is required.

The Chair turned to **Brazil**, whose contribution by contrast states that ex ante competition rules for the digital sector are not being discussed, and also discusses the preventive role of competition advocacy. The speaker explained that ex ante regulation in Brazil has historically been the responsibility of regulatory agencies, while the Administrative Council for Economic Defence (CADE) intervenes where requested, either in reviewing measures or sanctioning abusive behaviours. Therefore CADE to date has addressed digital markets case by case using its powers to apply broad competition remedies and settle cases involving abusive conduct relatively rapidly. CADE also assists regulatory agencies and other government bodies through competition advocacy and cooperation agreements. For example, in conjunction with the data protection and consumer protection agencies, it secured commitments from WhatsApp regarding privacy policy over the issue of the sharing of users' account information with Facebook.

Nevertheless CADE is closely watching the development of initiatives for ex ante regulation of digital markets in other countries and could potentially consider recommending similar policies in Brazil.

Mexico reported that regulation of digital platforms is being discussed within the Federal Telecommunications Institute (IFT), but thus far there have been no designations of substantial market power. The IFT is both the sector regulator and competition authority of the telecommunications and broadcasting sectors in Mexico. When it is unclear whether a case falls within the enforcement remit of the IFT or the Federal Economic Competition Commission (COFECE), both institutions appear before the judiciary. The digital economy has been a grey area since both institutions were founded in 2013.

As described in its written submission, the IFT has analysed three recent regulatory proposals from the Mexican Congress, including one that would grant the IFT the power to declare "preponderant agents" in the digital sector, a concept first introduced in Mexican legislation in 2013 for the regulation of telecoms and broadcasting sectors where there were high levels of concentration and national competition policy was considered insufficient. The IFT argued against applying the concept in digital markets, and recommended that Congress focus on clarifying the economic content of the proposed powers and ensuring their compatibility with the rest of the legal framework.

The Chair called on the **European Consumer Organisation (BEUC)**, whose contribution argues that ex ante regulation is not only needed but should go beyond the practices targeted by competition law in digital markets. BEUC explained that it believes the purpose of ex ante regulation to be to express societal values in relation to a particular subject matter or sector, which may involve weighing up and balancing different values. Often the purpose will be purely economic, optimising the function of a particular market for the benefit of competition, innovation and ultimately consumers. However in other cases it should be to pursue more fairness-oriented goals such as imposing universal service obligations on market players, or other goals such as, in the case of the EU, harmonising rules across the Single Market.

With respect to digital markets, which are vital to social and commercial interaction and are directly consumer-facing, BEUC agrees with the need to introduce ex ante regulation since competition law enforcement alone is not adequate to deal with anticompetitive

harms. This is illustrated by the European Commission's Google Shopping abuse of dominance case, which has taken 11 years but which does not solve alleged similar conduct by Google in other vertical markets. However, ex ante regulation should not take preventing anticompetitive harm as its end point but should extend to other objectives such as consumer protection, data protection, privacy and other fairness values in a coherent whole.

The Hellenic Competition Commission (HCC) commented on the dilemma between ex ante regulation and ex post competition enforcement with reference to **Greece**. It noted that Greece already has a form of ex ante regulation similar to market investigation references in the UK, which have been used for several traditional markets and could potentially be applied to the digital sector. However, this possibility is likely to be pre-empted by the Digital Markets Act, which will harmonise ex ante regulation of digital markets at the European level.

There has been much discussion within the HCC about the potential need for a new provision on ex post enforcement with respect to abuse of a position of power in an ecosystem of structural importance to competition, which could complete Article 102 TFEU and the national equivalent. A suggestion for such a provision has been made to government, identifying a position of power not in the context of a relevant market but in the context of an ecosystem, defined as a nexus of activities or as a platform. The speaker was unsure whether the suggestion would be adopted and expected the government would wait to see the outcome of the Digital Markets Act initiative, but said that it represented an alternative to existing proposals that competition authorities might wish to examine.

Design of ex ante regulation

Amelia Fletcher briefly summarised her video contribution, which identifies the main trade-offs involved in designing ex ante regulation.

She stated three rationales for ex ante regulation as a complement to antitrust. First, competition law enforcement is too slow to prevent market positions becoming entrenched and leveraged into new markets. Second, antitrust cases are necessarily narrow and do not set wider upfront "rules of the game". The resulting legal uncertainty in particular can deter third-party firms contemplating investments in innovation. Third, some of the root causes of competition problems are intrinsic (such as economies of scale and scope, network effects, and data feedback loops) rather than reflecting fault. Therefore, regulation should not only address harmful strategic conduct such as self-preferencing, but also facilitate the proactive opening-up of markets, for example through requirements relating to interoperability or access to data.

She then described three tensions in designing such regulation. The first is the balance between speed and timeliness on one hand and getting the right solution on the other. Prof. Fletcher felt that weight should be given to promptness of action, while minimising mistakes as far as possible. The second and third types of tension are between effectiveness and proportionality, and between specificity (or a more rules-based or self-executing approach) and flexibility (or a more principles-based approach). She referred to her discussion in her video in which she considers the US and EU proposals to be more rules-based with a focus on effectiveness, whereas the UK and possibly the German proposals are more principles-based and focussed on proportionality.

Prof. Fletcher's video discusses the risks that could be posed by an incoherent regulatory framework across jurisdictions. On the other hand, pursuing absolute consistency is undesirable in view of legal, political and cultural differences, and some degree of diversity could yield valuable lessons.

Prof. Fletcher noted that her video was prepared before the European Parliament's and EU Council's positions on the EU Digital Markets Act, which she had since reviewed. She was pleased that many of the changes recommended in the co-authored paper had been reflected and that there was greater convergence with the US proposals. In particular, she welcomed the potential participation of third parties in the process for the specification of measures; the extension of scope to include browsers and virtual assistants; more expansive rules regarding self-preferencing; more extensive interoperability requirements; and somewhat strengthened powers to employ structural remedies.

She concluded with two points in response to the questions posed by the Secretariat earlier. First, while she was broadly comfortable with a consumer welfare standard, regulation of digital platforms should consider the indirect effects on consumer welfare of phenomena such as high charges to business users and harms to competition amongst them. Secondly, a crucial goal of regulation (even if expressed in terms of direct objectives of fairness and contestability) should be to deliver a market framework most likely to promote innovation for the benefit of future consumers.

The Chair turned to Australia, the EU, the US DoJ, and the UK to comment on the process each had adopted to arrive at regulatory proposals.

Australia would be basing its rulemaking on three years of market studies by the Australian Competition and Consumer Commission (ACCC) aiming to understand harms in the digital sector and their causes. These began with a digital platforms inquiry in 2018/19, followed by inquiries or market studies into online messaging apps, ad tech, search, and online marketplaces. These are well-resourced studies involving ACCC economists, lawyers and data analysts, and discussion with platforms, competitors and consumer groups. They draw mainly on the ACCC's competition policy skills but also on its role as consumer policy enforcer and infrastructure regulator, particularly in telecoms.

The **European Union** agreed with a comment by the Chair that, by contrast, its approach to drawing up the Digital Markets Act (DMA) was heavily informed by enforcement case experience. The speaker said that enforcement experience had helped shape the obligations and prohibitions laid down in the act, but also that experience of the difficulties of competition enforcement had inspired the decision to move from a case-by-case approach to rulemaking. The proposal also drew on a high-level expert report and on information gathered in other departments of the Commission. Since it is a legislative initiative, it is ultimately the EU democratic legislative process that will set the rules, taking account not only the protection of the competitive process but a broader set of societal values, which the DMA proposal builds in.

The Chair asked the **United States** about the interaction of the agencies and Congress in the elaboration of the US proposals. The US replied that it is the US legislature that has responsibility for writing laws, while the FTC has rule-making authority and the DoJ focuses on law enforcement. The legislature therefore writes the law as it sees fit, taking account of technical assistance and input from stakeholders. They added that they found the distinction between ex ante regulation and ex post enforcement potentially unhelpful, since prohibition of certain conduct is not regulation in the traditional sense. Rules and enforcement priorities should be forward-looking and should protect against anti-competitive conduct and permit innovation to occur.

The **United Kingdom** replied to a question from the Chair about the role of its Digital Markets Taskforce in elaborating proposals for a competition regime for digital markets. The Competition and Markets Authority (CMA) created the taskforce following a government-commissioned report in 2019, the Furman Review, which set out an outline for such a regime. Its purpose was to provide more detailed advice on questions such as the

definition of "strategic market status" and the code of conduct for designated firms. It worked closely with the communications regulator Ofcom and the data and privacy enforcer the Information Commissioner's Office (ICO). This had two benefits. First, the taskforce could draw on experience with regimes and remedies in other areas, such as the significant market power framework in telecoms and the Open Banking data-sharing initiative. Second, it helped the taskforce propose a regime that is coherent and complementary with other regulations to which digital firms are subject.

The Chair turned to the question of which actors and activities in digital markets should be covered by ex ante rules. He asked the **European Union** why the proposed Digital Markets Act (DMA) chose to define a closed list of activities and largely quantitative criteria for designating gatekeeper firms.

The speaker replied that the DMA deliberately takes a very focussed approach, addressing known problems with the largest platforms active in the EU. The "core platform services" listed in the act have in common the fact that they serve as gateways for business users to reach end consumers. The quantitative criteria creating a strong presumption of gatekeeper status are threefold and relate to size, relevance, and durability of position.

The size criterion is intended to cover only the largest firms with a European scope of activity. As currently proposed, it involves an annual turnover in the EEA of 6.5 billion euros or a market capitalisation of 65 billion euros, and provision of core platform services in at least three member states. The relevance criterion addresses firms with significant numbers of customers on both sides of the gateway, and involves a threshold of 45 million active end users and 10 000 business users. The criterion of an entrenched and durable position is expressed by the fact that these figures must be met for at least the past three years.

However, while the quantitative criteria for designation are likely to be most important in the early years of operation of the DMA, the act also empowers the Commission to designate firms as gatekeepers on the basis of a more qualitative assessment of their market position, taking account of other listed criteria. This could extend to emerging gatekeepers who do not yet fulfil the quantitative tests, allowing for intervention before a market tips.

The Chair asked two follow-up questions: first, whether competition issues identified from past cases might be biased by the fact that parties might have feared bringing cases against powerful platforms; and second, whether the criterion regarding the number of end users might overlook gatekeeper positions held by, for example, makers of connected cars.

The speaker replied that the DMA takes a deliberately conservative approach in identifying areas of demonstrated competition problems warranting ex ante rules. It will not be the only tool for acting against anticompetitive conduct by digital players; regular competition law will continue to apply.

Italy described the state of debate about the regulation of digital markets in its jurisdiction. As part of a competition advocacy report to government, the Italian Competition Authority (ICA) proposed that it should be given powers of designating dominant digital platforms similar to those adopted in Germany. This proposal was not accepted, but a proposal to introduce a presumption of dependence when one of the parties is a digital platform was included in draft legislation. Abuse of economic dependence has been prohibited in Italian law since 1998. Also accepted was a proposal to permit the review of mergers below the current very high thresholds; this proposal is not specific to digital markets but could be relevant to acquisitions of digital start-ups. The draft legislation is currently before parliament. Italy is closely following developments regarding the DMA, which will affect the framing of its national legislation.

The speaker added that the ICA argued in its advocacy report that any ex ante rules should be embedded in competition law and enforced by the competition authority rather than by regulators.

The Chair referred to the dilemma mentioned by Amelia Fletcher between specificity and flexibility, or rules-based and principles-based regulation, and asked **Germany** to expand on the following statement from its written contribution: "Section 19a(2) GWB requires an individual decision. This can result in a certain delay but at the same time ensures proportionality more reliably than the more uniform approach taken by the DMA."

Germany replied that the Bundeskartellamt originally considered quantitative criteria for designation similarly to the DMA but, when experimenting with thresholds, found that they produced false positives and false negatives with regard to the firms that it felt should and should not be covered. The speaker said that the designation process under the German act and the DMA nevertheless might not be very different in practice, since the DMA designation is rebuttable, which could require the Commission to engage in a case-by-case assessment if companies contest their designation. The same is true of the imposition of rules and prohibitions: in the German law they will be at the decision of the Bundeskartellamt, while in the DMA they are intended to be self-executing, but in practice the Commission may need to make case-by-case assessments of whether conduct by heterogeneous firms is indeed compliant with the rules, and take enforcement proceedings where necessary. The speaker said it would be necessary for national competition agencies to back the efforts of the Commission to enforce the DMA ex post in order to achieve the desired outcomes. An example of a truly ex ante regime might be an institution to scrutinise algorithms and a requirement for approval in order to change an algorithm, but this type of regime is not yet on the horizon.

The Chair asked **France** about the recommendations of its competition authority for ex ante competition rules and whether these would be case-specific or would involve self-executing prohibitions. The delegate explained that in 2020 the Autorité de la Concurrence published its contribution to the competition policy debate about digital markets, which is continuing. It argued that consideration should be given to extending the concept of market dominance and introducing a new legal framework at national or European level to address the conduct of "structuring digital platforms". The regime it recommended was not dissimilar to the one adopted in Germany in 2021: certain platforms would be designated as "structuring" on the basis of qualitative and quantitative criteria, and the Autorité would then impose specific rules on their conduct. The rules would be based on three principles: definition of problematic practices guided by a non-exhaustive list of conducts that raise competition concerns; case-by-case inquiries into the existence of such practices, with options for prohibition or remedies; and a procedure for objective justification with a reversed burden of proof.

The Chair asked the **European Union** to respond to Germany's suggestion that the DMA may not be as self-executing, as ex ante or as proportional as believed. The speaker reiterated that the DMA has a highly focussed scope and said it contains safeguards to ensure proportionality, such as a closed list of core platform services, a designation process with quite high thresholds, and obligations and prohibitions that are in some cases highly specific. It also provides for regulatory dialogue to fine-tune the modalities for compliance, which Germany correctly pointed out would be case-specific. The DMA also contains provisions requiring designated firms to justify their compliance, and to involve third parties in the specification of measures. The DMA is therefore less different from the German and UK approaches than is sometimes portrayed. The key difference is that the obligations and prohibitions are set out in the law and apply as an automatic consequence of the designation. Therefore the burden is on gatekeepers to demonstrate their effective

compliance rather than on enforcers to design a remedy and to show proportionality in each case.

The **United Kingdom** said that its approach is like that of Germany in being explicitly grounded in competition law. The strategic market status test is an evidence-based assessment of a firm's market power that is more qualitative than quantitative and could perhaps be described as intermediate between the German and EU approaches. The proposed power of the Digital Markets Unit (DMU) to impose a code of conduct emphasises proportionality, i.e. the requirements will be tailored to specific potential conducts and harms on the part of the firm concerned. This also provides flexibility and discretion to impose additional requirements or remove unnecessary ones. With regard to whether the approach is rules-based or principles-based, the DMU will have discretion over whether to prescribe rules of conduct or to set an overarching objective and allow the firm to decide how to comply. An important element of the UK approach will therefore be dialogue between the DMU and designated firms, of the kind already being seen in the Google Privacy Sandbox case in which the CMA is seeking ex ante commitments with regard to the proposed removal of third-party cookies.

Australia disagreed with a suggestion by the Chair that it was taking a narrower sector-specific regulatory approach. The recent News Media and Digital Platforms Mandatory Bargaining Code was a specific legislative response to a severe market failure threatening news journalism. Activity in 2022 would be towards designing a solution to a broader set of issues that would permit rules to address specific problems such as the dominance of Apple Pay, Google's control of the ad tech ecosystem, and the scale of payments for being the default search engine. The speaker suspected that the Australian solution would be closer to the UK than the EU.

The Chair asked the US what are the advantages or disadvantages of the range of proposals being scrutinised by the **United States** Congress, some of which are of broad scope while others focus on very specific areas such as app stores or journalism competition. The US repeated their earlier point that the DoJ's role is to enforce rather than create rules. They felt that Congress was grappling with whether to revise or merely clarify competition laws and policy with respect to specific practices.

The relationship between regulation and competition law

For reasons of time, the Chair limited the discussion of the next topic to a comment from **Business at OECD (BIAC)** about the *ne bis in idem* principle. Since ex ante regulation has wider objectives than competition law, BIAC is concerned that companies could be exposed to double prosecution under both sets of rules for the same facts. It suggests that agencies should consider this issue in deciding on their approach to enforcement actions, and that regulators and legislators should consider safeguards against double jeopardy. The speaker referred participants to BIAC's written contribution, which discusses this and other issues concerning ex ante regulation of digital markets, noting that there are diverse views among BIAC members regarding the desirability of such regulation and the design of specific rules.

International cooperation and coordination on regulatory issues

The Chair raised the question of whether international coordination was necessary in order to avoid different ex ante rules being applied in different jurisdictions to "aterritorial" digital platforms, with negative consequences for innovation.

The **United States** suggested that even if the rules were not the same everywhere, agencies in different countries could work together to provide a common understanding of the issues internationally, including the impact of conduct in one jurisdiction on others. They also warned of possible regulatory and enforcement arbitrage by digital firms seeking to exploit differences in regulation between countries.

Amelia Fletcher mentioned several potential negative consequences of internationally incoherent regulation. Digital firms providing global services, as well as their competitors, suffer costs if they have to operate differently in different countries, which could reduce quality, raise prices, and dampen innovation. International incoherence would create confusion for business users and rivals. Intervention in one country could be seen as disproportionate if other countries do not take similar measures. Finally, some rules could be viewed as protectionist, since the five biggest tech firms are from the US. Prof. Fletcher surmised that the EU was casting the net more widely in terms of designated firms in order to avoid this impression. For all these reasons, she felt it would be beneficial for agencies to present a unified perspective.

The Chair commented that the roundtable had shown there was considerable commonality among the approaches being taken, despite apparent differences. He thanked the participants and closed the roundtable.