Organisation for Economic Co-operation and Development

DAF/COMP/M(2021)2/ANN4/FINAL

Unclassified

English - Or. English

11 October 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Executive Summary of the Hearing on Ex ante regulation and competition in digital markets

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

2 December 2021

This Executive Summary by the OECD Secretariat contains the key findings from the Hearing 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

JT03504683

Executive Summary of the Hearing on Ex ante regulation and competition in digital markets

By the Secretariat[*]

On 2 December 2021, the Competition Committee held a hearing on *Ex ante regulation and competition in digital markets*. Considering the Secretariat background note, the submitted video recordings, the written contributions, as well as the discussion by delegates and the expert panellist in the Competition Committee, the following key points emerged:

1. The characteristics of digital markets have revealed the need for some form of regulation to supplement traditional competition enforcement tools.

The past decade has seen an exponential development of digital platform markets. These are markets are very important as they are central to almost all online transactions, whether commercial or social. As economic and social interactions have moved online, a small number of major digital platform firms have grown in importance and have acquired global market power. The reliance on the incumbent platforms which often enjoy a monopoly or near-monopoly power exposes businesses and civil society to the risk of abusive conduct while innovation and competition are being stifled. Competition authorities face strong pressure to intervene quickly against anti-competitive practices by digital firms. Despite several antitrust cases brought against the largest digital firms in recent years, there is a sense that traditional competition law enforcement has been insufficient in dealing with the largest digital firms.

Certain features of digital markets pose particular challenges for authorities, such as the speed of change or extreme network effects, which is further exacerbated by structural barriers to entry, such as the use of big data and artificial intelligence. These characteristics of digital platform markets include:

- the presence of strong economies of scale with low or zero marginal costs;
- extreme direct and indirect network effects that make it easier for a platform with a large number of established users to attract more users;
- a data-driven feedback loop which further strengthens the network effects;
- remarkable economies of scope due the role of data as a critical input; and
- conglomerate effects.

The latter are reinforced by consumers' behavioural biases and single-homing tendency. These in turn are encouraged by the platforms, a reason which may lead to the entrenchment of existing market power. Together, these features generate a winner-takes-all/winner-takes-most dynamics where markets are prone to tipping and become highly concentrated around a single or a few dominant platforms.

Competition law enforcement is perceived by some as insufficient to tackle effectively and timely the challenges arising in digital markets. Cases may take several years to reach finality and often with unsatisfactory results given the speed at which market realities

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

change. Some argue that the economic structure of the digital markets is beyond the full reach of competition law enforcement tools; others find faults with the way that competition law works in digital markets. A number of competition authorities have experienced difficulty in using conventional competition tools based on prices (including defining relevant markets) and in relying in a narrowly defined consumer welfare standard to handle competition issues in digital markets.

As a result, there has been a growing consensus among practitioners and policy makers that some form of regulation of digital markets is needed, either to complement competition law with ex ante rules, or to provide competition agencies with new tools as part of existing competition law. Some have called for an adjustment of existing competition tools to make them better at assessing certain characteristics of multisided platforms such as market shares, concentration ratios or price-cost comparisons. Other have argued that ex ante direct regulation of the largest digital firms would provide a better way to address structural barriers to entry and conglomerate effects.

Consequently, a number jurisdictions have enacted or proposed ex ante regulations specifically aimed at digital platforms or some aspects of digital markets, including Australia, the EU, France, Germany, Italy, Japan, the United Kingdom and the United States. Several other jurisdictions have also enacted new rules for digital markets, for instance Korea and Mexico.

2. The rationale for the new regulatory initiatives reflects a desire to both tackle the economic nature of digital markets and bolster competition law, but jurisdictions differ over the best approach.

Many enacted or proposed ex ante regulations have competition principles embedded, though they pursue broader objectives than competition, such as fairness, transparency or contestability.

National competition authorities as well as jurisdictions still differ in what they see as the best approach: whether they want separate sector-type ex ante regulation; new competition law instruments or simply an adaptation of existing competition law. The risk that ex-post remedies may be ineffective and not sufficiently timely, speaks in favour of *ex ante* regulation to protect market openness and contestability.

Some jurisdictions state that regulations should complement ex post enforcement when it cannot effectively discipline the market power of existing digital giants. Some proposals seem to be intended as a complement to existing competition law and to counterbalance the risk of under-enforcement in digital markets, in particular in relation to the merger regime proposals in some jurisdictions.

The case law on digital platform markets has informed some of the proposed regulations, as visible in rules on self-preferencing and on access to data, while other jurisdicitons have launched regulatory reforms following a digital platform inquiry.

Apart from timeliness and effectiveness of competition enforcement, the measures sometimes aim to address structural features of digital markets that may prevent entry and expansion by new players, i.e. both supporting competition *in* the market and competition *for* the market. Because of the structural barriers to entry and winner-takes-most dynamics, digital platform firms tend to compete for the market. However, some of the measures discussed aim to allow competition in the market as well, for example by granting access to large firms' datasets, or by ensuring transparency to enable consumers to make informed choices.

A common factor is the desire that *ex ante* regulations should minimise concerns of undermining dynamism and innovation while effectively responding to the anti-

competitive conduct by the large platforms. On the other hand, a few countries continue to use ex-post enforcement to deal with digital markets, and there has been no great urge to complement the existing competition law with new tools. Finally, some jurisdictions and interest groups argue in favour of regulation for the digital sector going beyond the protection of consumer welfare to fulfil also broader societal goals, such as fairness or equal access to services.

3. The design, scope and type of regulations proposed reflect the diversity of legal systems as well as national preferences for sector regulation over competition law and vice versa.

In general, the regulation seek to address multiple goals which leads to a number of tensions, such as the need for speed versus achieving the 'right' result; or effectiveness of enforcement versus proportionality in decisions.

The process of designing the content of regulations has varied significantly across jurisdictions, as well as the scope of the regulations, leading in some cases to a risk of over- or under-enforcement. A variety of approaches have been used in the design of the new rules. A number of jurisdictions highlighted the need to base regulations on fact-findings from market investigations or sector inquiries. By contrast, other jurisdictions have based their proposals for a large part on past competition decisions and general reports to design a system of rule-based regulation. In other jurisdictions, finally, much of the rule-making is taking place through parliamentary hearings.

Many regulations aim to limit the application of the new rules to a limited set of large digital firms. Despite the communality of the objective, the terms differ across jurisdictions:

- Gatekeepers
- Undertakings of paramount significant for competition across markets
- Firms with strategic market status
- Structuring firms
- Firms with primary importance for competition in several markets
- Covered platform operators.

This raises the question of how to identify the firms subject to the new rules. Furthermore, there is a risk that criteria may be well adapted to some very large platforms, but do not cover markets where different operators each serve as an important gateway for business users.

The rules also differ in whether they favour a principles-based or rules-based ex ante regulation, and whether sector-specific regulations should be preferred, as opposed to horizontal regulations targeting digital markets independently of their respective business models or sector. The advantage of a principles-based framework is a high degree of flexibility for firms in meeting the requirements, whereas the rules-based regulatory approach offers the advantage of providing more legal certainty for firms. Some of the tension could be resolved through a case-by-case approach: commitments offered by the firm, objective justifications, defence based efficiency gains. This could have the advantage of being proportionate and adaptable, thereby avoiding some of the pitfalls that may result from general, permanent regulations being defined ex ante, although this is more resource demanding.

4. The relationship between ex ante regulation of digital platforms and competition law, as well as implementation of the new rules, is still under debate in many jurisdictions

Most countries contemplating the need to regulate digital platforms have amended their competition law to give regulatory powers to the competition authority. However, some countries have chosen to keep the regulation separate from competition law (for instance, Japan and the EU). Other jurisdictions have established a regime of inter-agency co-operation, such as the UK, which has set up the Digital Regulation Co-operation Forum, which includes the Competition and Markets Authority (CMA) but also the Information Commissioner's Office (ICO), the Office of Communications (Ofcom), and the Financial Conduct Authority (FCA). This is to encourage the regulators to consider the wider regulatory ecosystem, rather than just focussing on their own, narrower, duties, when dealing with digital ecosystems.

The existence of new complementary regimes may entail a risk of double jeopardy (***ne bis in idem***) when applied alongside traditional competition law, if firms can be prosecuted under both ex ante rules and ex post competition law. This risk needs to be taken into account by both legislators and enforcers.

5. International co-operation and inter-agency co-operation will be needed in order to tackle the digital platforms which operate globally

Despite the different and diverse legal approaches among the OECD Competition constituency, a remarkable convergence on the main issues emerged. While there will be a degree of regulatory fragmentation across jurisdictions, this is mainly a result of differing legal systems. However, this risks making enforcement more difficult across borders, for example when remedies need to be designed and co-ordinated on a global scale. Greater coherence should make regulation more effective, more proportionate, and better able to limit any negative consequences, and there is now an opportunity to enhance co-operation in a more systematic way. Identifying best practices in international co-operation for the implementation of ex ante regulation of digital markets would support a more coherent outcome.

Promoting coherence in the design of ex ante regulations may therefore be of increasing importance for the competition policy community. The Hearing stressed the usefulness and the importance of having a coherent framework that allows jurisdictions to develop consistent solutions to problems which are articulated globally, while also avoiding excessive costs on firms a and creating confusion for business users and new entrants. At the same time, pursuing absolute consistency is undesirable in view of legal, political and cultural differences, and some degree of diversity could yield valuable lessons.

In their concluding statements, delegates agreed that the competition community should carry a message to the outside world that they are trying to pursue consistent solutions to the similar problems, and expressed a wish that the work on bringing more convergence would continue throughout the OECD and in the competition community.