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Summary of Discussion of the Roundtable on Market Power in the Digital Economy

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This document prepared by the OECD Secretariat is a detailed summary of the Roundtable on Market Power in the Digital Economy, held by the Competition Committee on 22 June 2022.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm

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Summary of Discussion of the Roundtable on Market Power in the Digital Economy

1. Introduction by the Chair

On 22 June 2022, the OECD Competition Committee held a roundtable on the evolving concept of market power in the digital economy chaired by Professor Frédéric Jenny.

The Chair introduced the topic and stressed that the roundtable aimed to explore whether the traditional definition of market power remains useful for digital markets. For this purpose, the discussion would consider concepts like network effects, multi-homing and non-price competition. The Chair introduced the five expert speakers who took part in the discussion, either online or in the room:

- **Herbert Hovenkamp,** Professor at the University of Pennsylvania's Carey Law School;
- **Masako Wakui,** Professor at Kyoto University;
- **Orla Lynskey**, Associate Professor at the London School of Economics and Visiting Professor at the College of Europe;
- **Alexandre de Streel,** Professor at the University of Namur and Academic Director of the Centre on Regulation in Europe;
- **John Newman,** Deputy Director at the Federal Trade Commission's Bureau of Competition.

The Chair thanked delegations for the great number of contributions received. He also explained that the discussion would be structured in three parts:

- The assessment of market power in digital markets;
- New or adapted concepts of market power, and regulatory proposals;
- New regulatory frameworks and their relevance for enforcement.

2. Background paper by the Secretariat

The Chair then thanked the Secretariat for its background paper and asked the Secretariat to present its main findings.

The Secretariat explained that the paper's aim is to demystify the link between market power and competitive concerns in the digital economy. The paper starts with a study of how competition authorities are assessing market power in the digital economy. Authorities have analysed contributors to market power that have a special impact on competition in the digital economy, such as network effects or the collection of data. The paper looks at the circumstances where these factors really have an impact on competition, and the conclusion is they do not always necessarily contribute to market power in digital markets; for example, the quality of data would determine its value as a contributor to market power. This first section of the background note finishes with a series of conceptual questions:

- Is there enough competition between different ecosystems in digital markets? Moreover, is that competition sufficient to prevent market power?

- Do lock-in effects make it more difficult for competition to discipline market power?
- Is there enough dynamic competition as well as enough potential for research, innovation, and new entries to the market, so that observed market power may in fact be temporary?

The Secretariat also aimed to clarify the new terminology that has been developed to describe dynamics in digital markets. It concludes that all new designations (e.g., platform power, intermediation power and bottleneck power) are functionally equivalent to the market power of a digital platform. For this reason, they do not require a special treatment. The paper also stresses that new legislative concepts are not economic but rather attempts to translate into legal terms core concepts that have a close relationship to market power.

Finally, the Secretariat explored the challenges forward, such as the relation between existing competition assessment frameworks and new regulatory proposals, since both have market power at their core. The paper studied divergent definitions across regulatory designations, focusing on whether they may impact the effectiveness of enforcement frameworks and how they could be all connected through a common preoccupation for market power.

3. Assessing market power in digital markets

The Chair briefly discussed the two sets of issues that need to be addressed when discussing market power: how is market power defined, and how are markets defined in the first place. This definition becomes particularly challenging in the digital sector, since platforms often offer complementary services and switching across those services may be easy. The Chair then asked **Professor Herbert Hovenkamp** to present his views on market power in the digital sector.

Professor Hovenkamp stressed that his intervention would aim to present alternatives for approaching market power in multi-product digital platforms.

Large digital platforms offer several non-competing services, which means that their output does not match the traditional definition of relevant market. Furthermore, user-switching costs vary greatly, starting from practically zero in the case of services like search engines. In this context, the standard models of natural monopoly do not apply and, in general, large digital platforms are not winner-takes-all markets, although in some cases they might be. The main factor restraining winner-takes-all dynamics is product differentiation. When differentiation is not viable, such as in the case of search engines, the risk of a winner-takes-all is much higher, which, according to Professor Hovenkamp, might partly explain why Google's search engine manages to retain such a large market share.

Professor Hovenkamp then moved on to comment on the U.S. Supreme Court's AMEX decision, which he viewed as not conducive to a rational assessment of market power of large digital platforms, for a series of reasons. First, this decision limited its definition of platforms to those that facilitate one-to-one simultaneous transaction between the parties. This consideration excludes most two-sided markets, such as search engines, and therefore Professor Hovenkamp pointed out to a mis-definition by the Supreme Court. Second, the decision focused solely on market shares to measure market power and left out direct measurement, which however may be well suited for digital markets. Third, the Court ruled that the relevant market had to include both sides, which does not make sense. Last, it stated that two-sided platforms compete only with other two-sided platforms, while, for example, two-sided ride-hailing apps compete with taxi drivers.

Professor Hovenkamp expanded on the grouping of non-competing products and services into the same relevant market. The relevant terminology in the United States is cluster markets. A cluster market is an aggregation of non-competing products that can rationally be put into the same relevant market under defined circumstances. There are different grounds for defining a cluster market. First, there is "the Facebook rationale", meaning that users want multiple products to be grouped together but they use them differently (e.g., messaging and posting of visual content). Second, a cluster market is one where there is some joint cost or economy in joint production. This the case of Amazon, which sells goods that are not necessarily competing and complementary but still come with centralized billing and delivery logistics. Third, network effects lead to economies of scale or scope in consumption rather than production. Finally, he mentioned a factor that needs to be present for the grouping of products and services into a cluster market: duplication has to be difficult, since the clustering of different products loses its rationale if it can be replicated quickly and in a cost-effective manner.

Professor Hovenkamp ended his intervention with a statement in favour of direct measurement, which he believes can cut across clustering by taking a firm's output as given. He supported the U.S. Federal trade Commission's ("FTC") approach of taking quality changes as a surrogate for price changes: if a provider is able to materially change the quality of its product without losing significant demand, then that would be a sign of a market power.

The Chair stressed that services that might be related but not directly substitutable can be aggregated, in order to define relevant markets and assess market power. He then asked John Newman, Deputy Director at the FTC's Bureau of Competition, to present the option for flexible market definitions in the digital sector.

John Newman addressed sources of digital market power, giving the examples of switching costs, differentiation and network effects. He explained that competition in digital markets is not always "just a click away", and that this is true for any service that requires an account or sign up, where switching costs exist. Another potential factor relevant to market power in a given digital market is differentiation. Here, John Newman stressed that even if two different products have the same technological architecture or user interface and are therefore identical products at the beginning, they would not necessarily stay that way for long and may become differentiated based on user content or user participation. John Newman finally argued that network effects could lead to "sticky trading partners" for one of the sides of the platform, meaning that platforms are not always fragile and even zero prices could become a source of market power.

The question of defining digital market power is an important one. The marginal cost test (whether a firm has the ability to price above its own marginal cost) has been traditionally used for assessing market power. However, its application to digital markets might be misleading and provide false positives. This is because in the digital context of relatively low marginal costs and relatively high fixed costs, every successful platform can charge a price above its marginal cost. Furthermore, a platform could be charging a long run price of zero and still hold monopoly power, such as in the case of Facebook, which means that the marginal cost test could also lead to false negatives when applied in digital markets. An alternative is the restriction of output test. However, Mr Newman emphasised that this test could also lead to false negatives in digital markets; higher output can be consistent with, and even the result of, market power.

For this reason, Mr Newman proposed a more flexible approach to digital markets, moving beyond price or output. He advocated for the power to control test, i.e. whether a firm of firms have the power to control a significant aspect of competition. This test would often require direct evidence, although it would not necessarily supplant the use of market shares.

All aspects of exchange could be relevant, so any example of the firm or firms in question extracting additional surplus (either giving less or taking more from a group of trading partners) would be assessed. Also, non-price discrimination can be probative of market power, for instance the different treatment of users on a social media platform, such as different content moderation or other differentiated treatment.

The Chair then asked Professor Hovenkamp to react to John Newman's remarks.

Herbert Hovenkamp agreed that traditional measures of power do not apply in digital markets, and that marginal cost measures fail to capture the power of platforms in two-sided markets.

The Chair explained that there are two options for the definition of digital market power: first, a new flexible definition adapted to the dynamics of the digital economy, and, second, the presence of factors like network effects to infer the existence of market power. The Chair then asked Spain to share its experience with merger control cases, which follows the latter approach, i.e. the traditional assessment of market power was complemented with features typical of digital markets.

Spain explained that its merger control decisions in digital markets questioned whether market shares were a good indicator of market power and concluded that these need to be complemented with other factors. For instance, sometimes the revenue of a party in the market is not relevant but the power that it is accumulating through data is; thus, when a big firm with a big user base acquires a small company that holds data, this is relevant for the assessment of market power. Furthermore, sometimes the two sides of the platform need to be assessed together. The Spanish competition authority has considered both the innovation of ecosystems and potential competition in its merger decisions in digital markets.

The Chair raised the question of how to detect the threshold in which network effects become barriers to entry and therefore confer market power. **Spain** answered that, in its experience, the impact of network effects as initial barriers to entry can be offset through innovation, and then the innovative entrant could benefit from network effects to tip the market to its advantage.

Herbert Hovenkamp responded that product differentiation and network effects are two economic factors that pull against each other in the assessment of platforms' market power. Network effects typically yield a monopoly in the absence of differentiation. However, when product differentiation is possible, network effects do not restrict competition in digital markets. For example, TikTok, Twitter, Facebook, Instagram offer different experiences and users switch back and forth; there is thus competition in social networking markets.

Israel presented a market study on payment apps that provide peer-to-peer (P2P) money transfer services. This digital market is characterised by strong competition for the market, although once an incumbent establishes its position, it tends to converge towards a "winner takes all" market with strong network effects and high barriers to entry. In this context, entrance to the market becomes extremely challenging, even when offering preferential services. Therefore, the only way to reduce barriers to entry (and subsequently, the incumbent's power) is to ensure both interoperability and data portability, so that consumers are able to multi-home. However, high multi-homing rates *per se* might not be an indicator of competition, as registration to different platforms might be due to differentiation and not be a consequence of high consumer willingness to use more than one platform for performing the same transaction. The delegate concluded that mandated interoperability encourages multi-homing and weakens both barriers to entry and network effects.

Mexico gave an example of a blocked merger between a digital platform (Cornershop, a platform that offered, through their website and a mobile app, logistics services for the purchase and delivery of products offered by retailers) and a non-digital retailer, Walmart. COFECE considered a series of factors that would have granted the resulting entity excessive market power, and blocked the merger. COFECE considered that the merged entity's access to data and potential for strategic use of the information on the platform would constitute a particular source of competitive advantage for Walmart, and induce the exit of Walmart competitors from Cornershop's platform. COFECE also found switching costs for users and deterrence of mobility towards other platforms through the use of memberships and loyalty programmes. In addition, COFECE found indirect network effects (consisting in the combination of quick on-line shopping and immediate delivery offered by Walmart self-service stores) and high fixed costs to develop a platform similar to Cornershop.

Austria discussed the Facebook/Giphy merger case. The delegate explained that Giphy was considered a two-sided platform. As more GIFs in the library increase the value of using Giphy's GIF library, indirect network effects run from creators (such as branded companies, artists as well as other users of GIF accounts) to users, and from users to creators. The Austrian authority found that indirect network effects sustained the platform's potential monetisation of users, and that the merger would strengthen the market power of the resulting entity, protecting it from future competitors in the GIFs market. Newcomers would have difficulties to attract users and build a sufficiently large user base to become a serious competitor of GIPHY. The indirect network effects stemmed principally from indirect users of Giphy's library (i.e. users via integrated interfaces in third-party services such as Facebook, Twitter, TikTok or others). Austria stressed the fact that, had the authority only considered direct users (i.e. users of Giphy's platform), Giphy's activities would have been deemed insignificant.

India described the approach that its competition authority (CCI) is taking in ongoing investigations into digital markets. The delegate explained that, in the Indian experience, network effects, lack of interoperability and behavioural barriers to switching can reinforce each other, leading to strong consumer dependence and insulating the market power of incumbents. When a lack of interoperability and network effects combine, users of a platform fall victim to lock-in effects, as switching to another app would be meaningless until all or most of their contacts switch to the same other platform. Thus, the mere existence of other functionally similar platforms does not mean that competition is "a click away" or able to discipline market power. Also, behavioural biases to switch caused by pre-installation disincentivize consumers to multi-home or switch between apps. These matters are all under investigation by the CCI.

Chinese Taipei presented an investigation in the digital market of online food delivery. The platform Foodpanda was found to have abused its market power, by imposing restrictive requirements on its partner restaurants. To assess the platform's market power, the authority looked beyond market shares (based on the number of orders, transaction value and user base) and measured barriers to entry. The delegate explained that strong indirect network effects mean that new delivery platforms needed to attract users on both sides of the market (restaurants and consumers), since the more partner restaurants join the platform, the more consumers are likely to join too, and order food from the restaurants on the platform, and vice versa. Foodpanda leveraged its market power to impose exclusive dealing agreements on its business users (i.e., restaurants), meaning that they would be restricted from multi-homing between platforms. The authority concluded that this imposition constituted an anticompetitive barrier to entry, which helped Foodpanda to consolidate substantial market power.

As a conclusion to the first part of the discussion, the **United Kingdom** analysed its approach to market definition and market power assessment in digital markets and expressed the view that it may not be necessary to define a market to assess market power. The Competition and Markets Authority (CMA) defines markets in dominance and merger cases, but does not have a legal obligation to formally define markets in market studies. The delegate stressed that market definition can be difficult in dynamic and rapidly changing multi-sided digital markets. The CMA is taking a holistic approach to the assessment of digital market power, looking beyond prices and outputs and assessing, in addition, the ability of platforms to impose competitive constraints and influence innovation, as well as available alternatives for customers.

4. New or adapted concepts of market power, and regulatory proposals

The Chair opened the second part of the discussion, which aimed at exploring new concepts of market power in digital sectors, like bottleneck power, platform power, economic dependence etc., which are used in many jurisdictions.

Professor Orla Lynskey discussed the notion of market power in digital markets from a data privacy perspective. There is an interdependence between competition and data privacy, due to two factors. First, the existence of competition in a market influences the extent and effectiveness of data privacy rights. A lack of competition will render the application of privacy frameworks ineffective; for example, in the European Union's General Data Protection Regulation ("GDPR") user consent in the context of a monopoly does not constitute freely given consent. Second, different levels of data protection can confer competitive advantage or disadvantage on firms: while an ineffective privacy framework might entrench market power, a strong regulation could challenge it through allowing data sharing and data access.

Professor Lynskey then presented a series of questions that arise when considering the interdependence between competition and data privacy in the assessment of digital market power. She addressed the need for calculating market shares through proxies that pick up on the dynamics of digital markets, and suggested replacing the average number of monthly users by the average time spent online. There is empirical evidence to suggest that the more time users spend online on a given platform or service, the more data are generated. Thus, time spent online is not only more relevant for data privacy implications but also a better proxy to reflect platforms' ability to monetize user data. Furthermore, Professor Lynskey explained the relevance of different privacy policies, as these can be a sign of differentiation and thus be relevant for the calculation of market power. She also stressed the point presented by the Israeli delegation that multi-homing *per se* might not be a manifestation of competitive markets.

Professor Lynskey pointed out that market power assessments tend to overestimate the extent to which individuals can exercise a competitive constraint on digital firms. For instance, the right to data portability or GDPR have had limited usage. She then discussed how quality issues become significant in zero-priced markets, and, in particular, how changes in privacy policies can be considered to assess substitutability. Co-operation with other regulators would be needed to assess the impact of a decrease in the quality of the privacy policy. She queried whether the notion of market power is capable of taking into account non-economic factors when it comes to data privacy. She concluded that the concept of informational power (the superior ability of firms to process data and control data flows) that exists in data protection literature is not reflected in the concept of market power. This renders market power an insufficient proxy to assess the full range of implications that arise in digital mergers in which informational power is present.

The Chair pointed out that privacy is a qualitative dimension of a platform and a good candidate to have a wider notion of power which goes beyond economic power.

Professor Masako Wakui then took the floor to present her paper on the need to supplement the traditional notion of market power with the concept of economic dependence. Digital platforms can intermediate between multiple user groups. Professor Wakui provided the example of restaurant review and reservation platforms in Japan, which shows how platforms gain bargaining power once they are able to build large user bases on both sides of the market. This creates a power relation vis-à-vis business users, which can be abused by the platform to impose profitable and restrictive practices. This bargaining power and the subsequent dependency of users do not require the previous existence of strong market power. For this reason, Professor Wakui advocates for supplementing market power with economic dependence, which is a lesser power concept that would allow for a lower intervention threshold and thus an early response to the abuse of economic dependence by platforms.

The Chair then turned to Professor Hovenkamp for his comments on the presentations by Professors Orla Lynskey and Masako Wakui.

Herbert Hovenkamp stressed the need to distinguish between antitrust law and tort law, in the sense that antitrust considerations should focus on harms to the market and markets' ability to deliver goods of competitive quality at competitive terms. He showed concern over a possible shift of this market focus to injury to particular competitors.

The Chair responded by asking under which circumstances harm to a specific competitor could affect the competitive process on an upstream level, thus becoming a competition issue that goes beyond contractual breaches.

Herbert Hovenkamp stated that injuries suffered by a competitor are not enough on their own to be considered an antitrust matter, since harm to market competitiveness needs to be proved.

The **CMA** then presented the legislative proposal to regulate the behaviour of the most powerful technology firms with strategic market status (SMS). The delegate explained that the digital economy does not require a new concept of market power. For this reason, the SMS is conceived as a notion that incorporates, to some extent, market power elements, but does not replace the traditional market power assessment. The SMS is granted to platforms following an evidence-based economic analysis, which looks into whether the firm has substantial entrenched (i.e. likely to persist) market power in at least one digital activity giving it a strategic position.

The SMS assessment applies to activities (a specific set of products and services which can be reasonably ascribed as having a similar function) and not markets, which allows the CMA to overcome the difficulties of traditional market definition. The SMS applies to all platforms, not only intermediaries between user groups.

Australia noted that it is currently considering a reform to its merger regulation in order to tackle the challenges posed by digital platforms, as part of an overall merger reform process. Namely, the Australian competition authority (ACCC) proposed that there should be a tailored merger regime for digital platforms and is considering whether notification requirements need to be lower for digital mergers, and whether other changes, such as reversing the burden of proof, or changing the probability test, would be appropriate. The merger reform is likely to take place in stages.

Brazil explained that its current legislation and enforcement guidelines do not require modifications in order to face the challenges posed by digital market power assessments. Brazilian provisions on market power are flexible and broad, and allow the competition

authority to adapt its assessment tools to digital sectors, using direct evidence in the analysis of the effects in a digital market and econometric models like the hypothetical monopolist test.

BIAC closed the second part of the discussion stressing that there is no 'one size fits all' concept of market power that is directly applicable to the digital economy, as there is no universally defined or definable "digital market". BIAC stressed that new concepts and designations should not ignore traditional market power concepts that have already proven useful. Typical features of digital markets, such as zero prices or multi-sidedness, are already present in traditional markets (e.g., broadcast radio is zero-priced and newspapers are multi-sided markets) alongside the tools to measure them (like substitutability and costumer switching). Likewise, the European Union's ("EU") Digital Markets Act ("DMA") is premised on gatekeeper status that makes use of market power concepts such as entry barriers, scale effects and lock-in, all of which are already developed in traditional market power cases. Similarly, bottleneck power can be evidenced by well-known concepts, such as high switching costs, switching barriers and asymmetric bargaining power. BIAC stressed that the new definitions of market power should observe legal clarity and predictability and that the burden of proof should remain within enforcement agencies. For this purpose, new definitions should follow existing guidance and economic analysis on market power.

5. New regulatory frameworks and their relevance for enforcement

The **European Commission** opened the third part of the roundtable by presenting the DMA and its notion of gatekeeper. The DMA constitutes an ex ante regulation that applies to only specific services of the digital sector, defined as "core platform services". These are digital services in which systemic issues of fairness and contestability are most prominent, such as search engines, social networks and online intermediation. The DMA is an asymmetric regulation, meaning that not all providers of core platform services are subject to its obligations, only those designated as gatekeepers. This designation is based on three cumulative conditions: (i) a significant impact on the internal market; (ii) the fact that the core platform service constitutes a gateway between business and end users; and (iii) an entrenched and durable position.

The verification of these conditions relies on a qualitative assessment that refers to market power characteristics like network effects, economies of scale and scope, the presence of an ecosystem and the role of data, among others. Thus, the assessment of gatekeeper status is related to market power, although the two do not fully overlap. A company that has not been found to be dominant in a competition case can meet the threshold of the DMA and qualify as a gatekeeper. The gatekeeper status does not intend to replace the traditional concept of market power. Rather, the DMA addresses certain practices with established issues of concern relating to fairness and contestability and regulates them ex ante, like ex ante regulation, in telecoms, financial markets and energy markets, does.

The Chair asked the Commission to explain the similarities and differences between the concepts of gatekeeper and the UK's strategic market status.

The **Commission** responded that the EU and UK regulatory approaches are similar, as both seek to identify those players in the digital sector that have an important status and raise issues of concern. However, the UK responds to those issues with the imposition of tailored remedies, while the EU regime establishes a series of ex ante rules. The DMA recognizes exceptions to its application related to public order and security, but does not take into

account economic analysis that could allow designated entities to escape obligations based on efficiency defences.

The Chair asked the European delegation to expand on the differences in terms of scope between the DMA and the UK regulation.

The **Commission** explained that the SMS is more holistic, in the sense that it looks at an overall activity, while the gatekeeper designation focuses on specific digital services. The delegate stressed that the gatekeeper status does not require market definition; it is enough to verify that the platform provides one of the core services listed in the DMA.

Professor Alexandre de Streel presented his views on the gatekeeper designation. Gatekeepers can be defined in either narrow economic terms or following a broader approach that covers non-economic factors. Competition authorities typically resort to the former economic definition, based on the existence of controllable access to a product or service that cannot be bypassed. Professor de Streel explained that the DMA's gatekeeper status relates to another two concepts: bottleneck power and business economic dependency. The three notions are related but not exactly the same: if a company meets the narrowest of them, bottleneck power, this would give it gatekeeper power and lead to a relationship of economic dependency. However, gatekeepers do not necessarily control a bottleneck, and not all situations of economic dependency are due to the existence of a gatekeeper. An alternative broader approach to the definition of gatekeepers would be to consider control over the flow and accessibility of information. Professor de Streel explained that the DMA is an economic regulation that does not follow this broad approach. Other instruments address non-economic harm and it is important, like Orla Lynksey mentioned, to ensure coordination between those instruments and their respective regulators.

The concept of gatekeeper is not new to European law. The Commission had applied it in the 1990s for the assessment of mergers in paid television markets, and imposed access obligations. However, the DMA is the first European regulation to explicitly and extensively define the notion of gatekeeper, and is justified by the fact that existing competition provisions proved ineffective to tackle the unfair conduct of specific platforms. Professor de Streel stressed that the DMA is part of a broader trend of EU law to regulate business-to-business economic dependency.

The DMA's three cumulative criteria used for the assessment of gatekeeper status are built upon structural presumptions. However, the DMA's definition of gatekeeper does not only focus on size (as opposed to the Digital Services Act, which defines very large online platforms only based on their size). Despite not requiring a previous market definition or a dominance assessment, the DMA's gatekeeper concept still relates to market power, because it uses economic criteria relevant for the assessment of market power. Professor de Streel highlighted that, in spite of the fact that dominance and gatekeeper status are separate theoretical notions, most gatekeepers enjoy a dominant position.

Germany presented its notion of "paramount significance for competition across markets". Since 2017, German competition laws have been adapted to tackle the challenges of the digital economy. New provisions clarified that markets can exist even in a context of zero prices, and factors like multi-sidedness and network effects were introduced for market power assessments. In January 2021, a new regulation came into force, empowering the Bundeskartellamt to designate companies as being of paramount significance for competition across markets. This notion aims to capture positions of economic power that are not sufficiently controlled by traditional competition provisions. Once designated, the enforcer can prohibit companies from engaging into certain types of conduct.

Dominance in one or more markets can be one of the factors to consider to find "paramount significance for competition across markets". Other factors include intermediation power, vertical integration, financial strength, access to data or the relevance of the company's activities for third-party access to supply and sales markets. The German delegate stressed that the designation requires a holistic assessment of business activities, since focusing on separate markets does not cover the significance of a company for competition. The Bundeskartellamt already determined the paramount significance for competition across markets of Alphabet/Google and Meta/Facebook and the designations of Amazon and Apple were on-going at the time of the roundtable.

Romania closed this section of the roundtable, presenting its new digital task force. The competition authority identified the need for a specialised digital unit after a case of abuse of dominance by Romania's biggest market place platform. The creation of the unit required finding and training digital experts across the authority's departments. The unit has started supporting the implementation of EU digital regulations and the assessment of digital mergers, and started four preliminary examinations in the most challenging digital markets that were affected by the pandemic in the last year, including food intermediation platforms, online travel and accommodation services, and digital advertising.

6. Conclusion

The Chair asked the experts for their final comments.

Herbert Hovenkamp opined that unpredictable market power assessments and theories of harm would cause uncertainty and may disincentivize business investment. He concluded that current approaches to digital market power are not sufficiently consistent or predictable.

John Newman agreed with the importance of predictable digital market power regulations. However, he stressed that no single regulatory approach can achieve perfection. For instance, product differentiation can lead to either new entry or the entrenchment of market power. In this ambiguous context, regulatory proposals can be criticised, but regulatory experimentation should still be encouraged. **Masako Wakui** also supported innovative regulatory approaches, such as those of Germany, the UK and the EU.

The Chair noted that all new regulations or proposals foresee ex ante regimes that, even if not perfect, should reduce uncertainty for digital firms. He pointed to a fair amount of unanimity across jurisdictions on the contributors to digital market power, including interoperability, switching costs and network effects, among others. Difficulties emerge when applying those factors to the traditional notion of abuse of dominance, hence the need to find other concepts that would be probably wider than the narrow definition of abuse of dominance, and include qualitative dimensions of market power, in addition to the quantitative ones. Jurisdictions adopted such new concepts through different legal approaches, which aim for predictability and constitute a first step in the right direction for the regulation of digital market power. The Chair concluded the discussion by thanking experts and delegations for their contributions.