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Executive Summary of the Roundtable on the Evolving Concept of Market Power in the Digital Economy

Annex to the Summary Record of the 138th Meeting of the Competition Committee held on 22-24 June 2022

This Executive Summary by the OECD Secretariat contains the key findings from the discussion of the roundtable on Evolving Concept of Market Power in the Digital Economy, held during the 138th meeting of the Competition Committee on 22-24 June 2022.

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

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Executive Summary of the Roundtable on the Evolving Concept of Market Power in the Digital Economy

By the Secretariat*

On 22 June 2022, the OECD Competition Committee held a meeting to discuss the evolving concept of market power in the digital economy. Considering the background note prepared by the OECD Secretariat, the written contributions and the discussion, the following key points emerged:

1. The assessment of market power in the digital economy can be challenging due to the particular features of digital markets, and traditional tests used by competition authorities to measure market power may prove not sufficient in digital markets

Market power, the ability of a firm to maintain prices above, or quality below, a competitive level, has become a particular concern in digital markets, where evidence such as growing mark-ups suggest that market power is on the rise, and potentially becoming more durable.

When competition authorities assess market power in digital markets, they are often confronted with a set of specific circumstances: services are offered at the price of zero, or in multisided market contexts, with strong economies of scope and scale, strong network effects, and data loos which make no single metric sufficient capture the market dynamics. Competition authorities are increasingly more confronted with the need to assess competition in digital ecosystems rather than in traditional market, and this raised the question of whether these structures prevent market power from arising or make such power temporary.

Traditional tests for assessing market power do not always fit well with the characteristics of digital markets. The marginal cost test (i.e., whether a firm can charge a price above its marginal cost) may provide false positives or false negatives when applied to digital markets. On the one hand, a successful digital platform may be able to charge a price above its marginal cost without having market power, as platforms have relatively high fixed costs but relatively low marginal costs. On the other, a digital platform could be charging a price of zero and still hold monopoly power. Marginal cost tests fail to capture the power of platforms in two-sided markets.

One way of assessing market power in non-price markets is to use quality changes as a surrogate for price changes: if a provider can materially change the quality of its product without losing significant demand, that could be a sign of a market power.

* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion, the delegates’ written submissions, and the panellists’ presentations.

Looking at restrictions of output to assess market power in digital markets can also lead to false negatives, as higher output can be consistent with, and even the result of, market power. Therefore, a more flexible approach to digital markets, beyond price or output, could allow assessing whether a firm or firms have the power to control a significant aspect of competition and impose competitive constraints. This test would require evidence of the firm in question extracting additional surplus (either giving less or taking more) from trading partners.

Other advocated for supplementing the concept of market power with that of economic dependence, comprising bargaining power of platforms and dependency of users. Using the concept of economic dependence would allow a lower intervention threshold and thus an earlier response to abuses of economic dependence by platforms.

2. Competition enforcers use existing market power tests, adapting them to the features of digital markets.

Competition authorities assess market power in digital markets, looking not only at market shares but also at other factors. Data may be a source of power; thus, the acquisition by a big firm with a large user base of a small company holding large data sets is relevant for the assessment of market power. Network effects can become barriers to entry in a more dynamic way than in the context of physical infrastructure, and may confer market power in the absence of product differentiation.

Switching costs for users and deterrence of mobility towards other platforms through memberships and loyalty programmes can also help entrench market power. Also, behavioural biases to switch caused by the pre-installation of apps disincentivise consumers to multi-home or switch. Thus, the mere existence of other functionally similar platforms does not necessarily mean that competition is able to discipline market power.

Competition authorities have found that interoperability and data portability are ways to reduce barriers to entry and, thereby, curb market power in digital markets. Mandating interoperability encourages multi-homing and weakens barriers to entry and network effects.

3. New regulations introducing measures to address and regulate market power ex ante include legal concepts which related to the notion of market power but are distinct from it.

New regulations address forms of market power held by digital platforms and, in some cases, impose specific obligations. These regulations introduce terms and concepts that are not economic but legal in nature and describe potential sources of market power in the digital economy.

The European Union's Digital Markets Act ("DMA") applies to "gatekeepers" which are firm providing specific services in the digital sector, defined as "core platform services". These are digital services in which issues of fairness and contestability are most prominent, such as search engines, social networks and online intermediation. Some providers of core platform services are designated as gatekeepers and become subject to the DMA's obligations. Gatekeepers are providers that: (i) have a significant impact on the internal market; (ii) their core platform service is a gateway between a large number of businesses and end users; and (iii) have or can have an entrenched and durable position. The assessment of gatekeeper status is related to market power, but the two concepts do not replace each other: a company that has not been found to be dominant in a competition case can qualify as a gatekeeper under the DMA. Also, 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.

In the UK is pending a legislative proposal to regulate the behaviour of technology firms with strategic market status ("SMS"). The SMS concept incorporates market power elements but does not replace the traditional market power assessment. It is a notion that applies to platforms with substantial entrenched market power in at least one digital activity giving it a strategic position. The SMS test applies to activities (sets of products and services which can be reasonably ascribed as having a similar function), not markets, and examines whether the effects of entrenched market power are likely to be significant or widespread.

Germany adopted the concept of "paramount significance for competition across markets", which aims to capture positions of economic power that are not sufficiently controlled by traditional competition provisions. Dominance in one or more markets can be considered, as well as intermediation power, vertical integration, financial strength, access to data or relevance for third-party access to supply and sales markets. Once a company has been designated as of paramount significance for competition across markets, the competition authority can prohibit it from engaging into certain types of conduct.

Australia has put forward a legislative proposal for a tailored merger regime for digital platforms and is considering whether merger notification requirements should be lower for digital mergers, to give the authority the opportunity to assess possible competitive harm.

4. Legal predictability remains important

There is a conceptual link between market power and new concepts or regulatory measures addressing digital competition concerns. There are challenges associated with the interaction between the new rules and competition law, and in particular, whether new market power-related regulatory designations will have a bearing on market power assessments in competition enforcement.

Unpredictable market power assessments and theories of harm can cause uncertainty and may disincentivise business investment; therefore, legal clarity and predictability are essential. However, while predictable digital market power regulations remain important there is no single perfect regulatory approach. In all events, ex ante regulation reduces uncertainty for businesses.

New concepts and designations of market power should not ignore traditional market power concepts and should follow existing guidance and economic analysis on market power.