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Summary of Discussion of the Hearing on Line of Business Restrictions

Annex to the Summary Record of the 69th meeting of Working Party 2 on 8 June 2020

8 June 2020

This document is the summary of discussion of the hearing on line of business restrictions, held by Working Party 2 on 8 June 2020.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/line-of-business-restrictions-as-a-solution-to-competitionconcerns.htm.

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Summary of Discussion of the Hearing "Line of business restrictions as a solution to competition concerns"

On 8 June 2020, Working Party no. 2 held a roundtable on line of business restrictions as a solution to competition concerns, chaired by Prof. Alberto Heimler.

The Chair opened the hearing introducing the topic of line of business restrictions, and in particular why line of business restrictions are used and who should impose them. The Chair also highlighted how imposing such restrictions in the context of the digital economy can be challenging, therefore it should be considered if alternatives could be better suited for this particular sector.

The Chair then welcomed the distinguished expert panellists who would contribute to the hearing: **Darryl Biggar**, Special Economic Adviser at the Australian Competition and Consumer Commission (ACCC); **Cristina Caffarra**, Vice President at Charles River Associates; **Pablo Ibáñez Colomo**, Professor of competition law at the London School of Economics and Political Science; **Damien Geradin**, partner at Geradin Partners; and **Justus Haucap,** Director at the Düsseldorf Institute for Competition Economics.

The Chair explained that the session would first deal with utilities sectors and later cover line of business restrictions in the digital economy. He opened the first part of the session and gave the floor to the United States.

The **United States** pointed out that the infrastructure sectors could provide useful insights on the use of line of business restrictions. In these sectors, line of business restrictions are typically based on structural separation. The United States remarked that although complete vertical separation supported by a prohibition of re-entry in the upstream market may be necessary to create effective upstream competition, this could also sacrifice significant economies of scope and scale. Moreover, under some circumstances rivalry among vertically integrated firms may be effective in creating competition, without sacrificing economies of scale or scope. The United States concluded by stressing that getting the right policy outcome in a particular situation would require an analysis of the magnitude of the above-mentioned factors, as well as a significant effort in terms of enforcement.

The Chair then turned to **New Zealand** whose intervention would focus on the electricity and telecommunications sectors, where both access regulation and line of business restrictions were enforced. New Zealand provided an overview of the developments of the two sectors in the past decades.

A few points emerged from their sectorial experience. Firstly, New Zealand sees access regulation as a good start, as politically it is not difficult to implement, it is pro-competitive and it does not limit the rights of the incumbent too drastically. Secondly, implementing access regulation provides policy makers and regulators with useful insights about the business and how the industry works, which can be used for policy analysis and development down the line. Thirdly, access regulation gives the incumbent a valuable opportunity to help achieve the policy objective, particularly considering that there could be a more severe option, such as a line of business restriction, to achieve that policy objective.

New Zealand then pointed out that line of business restrictions are more structural and definite than access regulation. In the electricity sector, they have been weakened over time,

to allow distributors to invest in generation while still being able to sell output at the retail level. This loosening of restrictions has not happened in the case of fibre networks.

The Chair then welcomed the President of the Greek competition authority, who was also the academic co-ordinator of the BRICS competition project, which led to the Digital Era Competition BRICS Report on the digital economy.

The representative of **Greece** noted that, prior to any discussion about imposing specific lines of business restrictions in digital markets, one should consider the connection between remedies and the extra territorial application of competition law. In particular, he emphasised that currently competition law issues often stem from entities that are not on the specific territory of the countries where the effects might be felt. This could lead to under or over-enforcement. It is therefore important to recognise the limits of imposing specific lines of business restrictions to companies not situated in one's own territory.

Greece pointed out some of the main characteristics of digital markets that could lead to competition issues, stressing that the main problem in this context is not just horizontal competition, which might be difficult to promote in some cases, but also vertical competition, which becomes extremely important with the development of business ecosystems. Greece highlighted that different dimensions of power emerge, including what Greece called architectural power, i.e. the advantage obtained from being in a position to influence the way the industry ecosystem is organised and structured, which might emerge from a firm's central positioning in networks and from informational asymmetries. Although there are various theories of power and metrics used to assess horizontal market power, the same is not true for vertical market power.

The representative from Greece then underlined that applying utility-style regulation in digital markets can be difficult, as these markets evolve rapidly. Soft regulation via codes of conduct, as suggested in the Furman report or in Japan, could be an option, although these codes aim at preserving vertical competition rather than at dealing with horizontal competition. Alternatives include thinking of broader institutional reforms, e.g. to create the missing data markets that will take into account the commodification of attention, or redesigning competition in order to take into account the complexity of private and public interests involved – the interest being not only to promote competition but also to address privacy and data protection.

The Chair then turned to the EU to present the Google shopping case, as well as the Android case and the two recent public consultations launched by the European Commission.

The **European Union** representative, speaking in his personal capacity, summarised the Google Shopping case and the finding that Google was giving a more favourable treatment to its own comparison shopping services as compared to the rivals', when presenting Google general search results.

Moreover, he elaborated on how this conduct manifested itself, on the European Commission's findings and on the remedies to address anticompetitive self-preferencing. In particular, the European Commission's decision required Google to bring the infringement to an end and refrain from any measure with an equivalent effect, setting the principle that Google should ensure that it treats competing comparison shopping services no less favourably than its own comparison shopping services within the general search results. For instance, Google should subject the Google comparison shopping service to the same underlying processes and methods for the positioning and display in Google's general search results as those for competing comparison shopping services.

In order to implement the remedy, Google created a business entity unit called Google Shopping Europe, with separate accounts to ensure that there was no cross-subsidisation

between Google's different activities. The EU representative noted that this could be called a functional separation, since Google's unit was competing equally with the competing comparison shopping services, selected based on a second price auction, which included both pricing and quality criteria applied in the same way to Google and to its competitors. However, he also reported that some market actors claimed that the market situation was not the same as before the infringement. This led to a debate about the possibility to introduce provisions on remedies that would restore competition in markets that had already tipped.

The EU representative then moved on to the Android case and the remedies that were used. In this case, the European Commission found that Google was tying its Google search and Google Chrome products to the Play Store, which was a must-have product. Therefore, if manufacturers wanted to install the Play Store they also had to pre-install Google search and Google Chrome. The remedy provided that Google would have to license Google search and Google Chrome separately from the Play Store so that equipment manufacturers would have the opportunity to combine different products from different companies. Moreover, when setting up an Android mobile device, users would face a choice screen allowing them to select the default search engine on the device widget and on the Google Chrome browser. The choices of search engine provided to users would be Google and three other alternatives, selected through an auction among a set of eligible rivals.

Finally, the EU representative noted that although the European Commission wants to continue to enforce vigorously its antitrust rules, it was also considering launching a new competition tool. In particular, the European Commission was considering adopting a framework of ex ante rules to ensure that digital markets remained fair and contestable for new companies and consumers. The aim of the new competition tool would be to address certain structural competition issues, about to emerge or already affecting the market, that current rules cannot tackle effectively. Several alternatives were being considered at the time. In terms of scope, the European Commission was considering whether the new competition tool would deal with structural competition problems across all sectors of the economy or whether it would be limited to the most problematic sectors, like digital markets. Another question was whether the new competition tool would tackle structural competition problems deriving only from dominant companies or all identifiable competition problems in any market.

With this tool, the European Commission would like to ensure that behavioural or structural remedies could be imposed to solve competition issues emerging from market investigations. Moreover, the European Commission was also considering including in the scope of the new competition tool the possibility to recommend legislative action to improve the functioning of the market concerned.

The EU representative then underlined that in the context of the Digital Service Act a new ex ante regulatory framework was being considered to be applied to industries with significant network effects and companies that act as gatekeepers. Two policy options were under discussion. One was to establish clear obligations and prohibited practices for the so-called gatekeepers, to ensure open and fair trading on online platforms. The second one, which could be complementary, was a framework to impose tailor-made remedies covering specific issues, to be applied on a case-by-case basis following prior assessment. Such remedies could include, for example, non-personal data access obligations, or specific requirements regarding personal data portability or interoperability.

To conclude, the representative touched upon the issue of reducing the time needed for decisions and stated that the new tools could be part of the solution. For instance, ex ante rules for digital markets could be a way to prevent competition issues before markets

become monopolised, or to have more immediate actions when markets have already tipped.

The Chair then gave the floor to the **UK**. The delegate from the UK noted that a first interim report on online platforms and digital advertising was published in December 2019. The interim report set out a wide range of potential interventions to address concerns on the role of online platforms funded by digital advertising, and in particular Google and Facebook. The delegate outlined the reasons behind the launch of this study, such as the number of calls from public authorities, parliamentary committees and independent reviews to look at digital advertising, and more in general the increasing concerns about the role of online platforms. The study had two high-level objectives: 1) to look at the substance of the concerns and develop remedies if needed, and 2) to inform both the UK Government and, more generally, global thinking, on how to approach the regulation of online platforms. The UK specified the study's areas of focus. First, to what extent online platforms have market power, in search and social media, and the sources of that market power. Second, whether consumers have adequate control over the data they provide to platforms. Third, the concerns within the digital advertising markets, in particular in relation to lack of transparency and leveraging of market power.

The UK provided a high-level snapshot of the different types of digital advertising, such as search advertising, display advertising, classified advertising, and underlined a number of concerns that were identified. In relation to search advertising the study identified a number of barriers to entry and expansion that could insulate Google from competitive pressure, such as economies of scale and users' data, indispensable for training the algorithms of a search engine.

The analysis of social media and display advertising also led to the identification of various barriers to entry. These include, for instance, network effects and the extent to which Facebook is able to control interoperability with its platform, potentially restricting access to rivals who compete directly with it, and its access to vast amounts of data. He then addressed the open display advertising market, in which many different sellers of inventory, typically newspapers or other content providers, compete in real time to sell that inventory to advertisers. Finally, the UK highlighted the issue of consumer control over data, and the fact that data and consumer attention are the two vital inputs into digital advertising. On this, the study found that most consumers would like to have sufficient control over their data, as the current level of control is limited.

The UK noted that the proposed interventions, subject to consultation, ranged from transparency measures to behavioural interventions, including structural separation. One type of intervention is an enforceable code of conduct to govern the behaviour of platforms that have significant market power, or as in the Furman review, significant strategic market status. This tool could provide for a more rapid intervention than traditional antitrust to address concerns before competition is irrevocably harmed. The delegate also stressed that for this tool to work it would be important to have a regulatory body to enforce it, as this would be a mandatory rather than voluntary type of regulation. A second category includes various forms of interventions to address the sources of market power, such as interventions in search, social media and digital advertising, data related and structural interventions.

The UK remarked that their proposal for a code of conduct was based on three principles, namely fair trading, open choices, and trust and transparency. Fair trading is about trying to guard against the potential for exploitative behaviour. Open choices is about trying to guard against exclusionary behaviour - whether that takes the form of contractual restrictions or restrictions on interoperability, while trust and transparency is about trying to ensure that users of the platform have adequate information to make informed decisions, helping to both promote effective competition and increase trust in the market. The

delegate concluded by sharing the view that antitrust alone, given the fact that it takes a long time to prosecute and that often there are very few cases on the go at one time, is not going to be adequate.

The UK provided a summary of some of the other proposed interventions. On the search side, it was suggested to require Google to provide access to click and query data to third-party search engines, to allow them to train their algorithms to compete more effectively, as well as to restrict Google's ability to enter into default agreements with devices' manufacturers and browser operators. In relation to social media the focus was mainly on mandating increased interoperability between Facebook and other social media platforms over particular forms of functionality.

With regard to open display advertising two main categories of interventions were highlighted. The first calls for increased transparency over what is called ad verification, both in relation to prices and in relation to whether the ad in question is served to the relevant consumers. The second category of potential interventions aims at addressing the conflicts that can arise as a result of vertical integration. One suggestion is the potential separation of demand-side platforms and supply-side platforms in order to deal with the potential conflict of interest in representing both advertisers and publishers. The UK concluded by noting that the interim report identified structural line of business restrictions, that could take a variety of forms from operational separation to full divestiture.

The Chair turned to BIAC. **BIAC** shared the view that the nature of any alleged market failure arising from the dual role of digital platform owners (as platform operators and traders) needs to be examined thoroughly and understood before any potential remedies can be implemented. BIAC noted that digital platforms and their business models are not all the same, and the issues needing addressing may thus be equally diverse. Moreover, BIAC stressed that careful consideration of possible economic justifications is needed before considering imposing remedies on allegedly dominant platforms, whether through structural separation or line of business restrictions. BIAC mentioned a number of elements that should be considered in digital markets, such as the relevance and effects of self-preferencing, whether market power is entrenched, whether network effects may be replicated, understanding the scope of what is part of a digital platform in a clear way, understanding the relationships between digital platforms and various categories of traders using them, assessing whether key assets are intangible and global, assessing the economies of digital platform operations which may be highly interdependent, and the evolution of dynamic digital platform markets.

These considerations need framing in the context of other broader issues related to the operation of platforms such as data ownership issues. Furthermore, experience has shown that structural separation has proved successful in some instances but not others, and line of business restrictions would disqualify some business operators from full participation in the free market economy.

To sum up, BIAC remarked that consideration needs to be given to ensuring that the applicable abuse of dominance regimes are flexible enough to cope with problems which may arise in evolving innovation-based markets. Firstly, enforcement of abuse of dominance provisions by competition authorities already developed and adapted should be the first order measure in dealing with abuse. Secondly, regulatory sandboxes could be used by regulators at the request of the industry. Thirdly, if structural separation or line of business restrictions are to be imposed ex ante through a legislative or regulatory act, the pros and cons of such a measure should be publicly analysed due to the complexity of such markets and how distinct they can be from natural monopolies. Finally, BIAC mentioned that some jurisdictions have adopted or are considering legislation that provides greater powers to impose structural divestitures or line of business restrictions, which often use

vague notions bypassing the rigor of standard competition assessments. In BIAC's view, structural separation and business restriction remedies should be used as a last resort, based on objective and transparent standards.

The Chair thanked BIAC and gave the floor to **Pablo Ibáñez Colomo,** asking whether in his opinion antitrust is sufficient to discipline dominant digital companies with respect to possible abuses.

Professor Ibáñez Colomo started by noting that when it comes to the effectiveness of competition law there are two separate questions to discuss: whether competition law gets us the outcomes we want and whether competition law can effectively handle the sort of intervention that is desired in these markets. On this point, it is important to assess the ability of competition law to handle "proactive remedies", such as access obligations, divestitures, the redesign of a product, or the alteration of a business model, which is very complex. Thus, if we advocate an increase in the use of this type of intervention, the limitations of competition law in this regard should be clear. In particular, competition law can fail in several respects when it comes to the design, the implementation and the monitoring of remedies.

Professor Ibáñez Colomo then stressed that in the past competition law has been used for this type of interventions only in exceptional circumstances, since the system was aware of its limitations when it comes to remedies. This is a key factor to bear in mind whenever the divide between ex ante sector specific intervention or competition law intervention is being considered. He also noted that this is even more so the case when certain types of interventions are considered, such as restorative remedies, aimed at restoring conditions of competition to a theoretical previous state, which is incredibly complex. To conclude, Professor Ibáñez Colomo remarked that the interventions discussed in this hearing are very difficult and competition authorities are not necessarily well suited for these interventions.

The Chair then turned to **Justus Haucap** to inquire about the amendment to the German antitrust act, and in particular whether these new rules would make the detection and the repression of non-price discrimination easier.

Professor Haucap said that the new German rules may be a sort of regulatory experiment in some sense, although having special rules for specific sectors is not new, as it was for example the case in traditional network industries.

Considering the importance of network effects and multi-homing, one of the rules is to shift the burden of proof if a company or platform is engaging in a practice that makes multi-homing more difficult, even below the threshold of dominance. Professor Haucap underlined how in a sense this means introducing some more nuances when distinguishing between dominant and non-dominant platforms, using the concept of relative market power or "degree of dependency".

In comparison to the old network industries, in digital markets there is an additional problem, as the Google shopping case highlights, which is that consumers may not even know what they are not getting. For example, with self-preferencing rivals might be demoted to the point that they are not visible anymore. This is an example of a non-price tactic that makes it more difficult to secure competition in these types of markets. In Germany, in order to prevent this, the competition agency may declare some of the platforms as platforms of overarching importance for competition, which have to comply with a list of blacklisted practices. Professor Haucap concluded by hoping that this new approach will work.

The Chair moved on to **Darryl Biggar** and asked him if in his opinion the sunk investment hypothesis can bridge some gaps, and make antitrust enforcement more effective in addressing abusive practices.

Dr. Biggar noted that neither the total welfare approach nor the consumer welfare approach capture what competition authorities actually do, and this is why in his video he set out an alternative approach, which the Chair called sunk investment hypothesis. According to this framework, in a supply chain with a bottleneck or dominant firm, sunk relationship-specific investments of firms upstream or downstream of the bottleneck are subject to the threat of hold-up and these firms might be reluctant to invest. Competition law can play a role in helping to protect investment upstream or downstream. This approach, also called transaction cost approach, can apply well in the context of line of business restrictions, and could indeed help antitrust enforcement to be more effective in addressing abusive practices. Further, it could help bridge the gap between what economists are recommending and what competition authorities do. Finally, the transaction cost approach, which focuses on the implications for investment upstream or downstream and provides a solid foundation for competition authorities to become more effective at addressing these, has direct relevance for digital platforms.

The Chair then asked **Damien Geradin** his views on the possibility to reduce the length of anti-trust proceedings and on why they are so long in the EU.

On the first point, Professor Geradin noted that it would certainly be possible to increase investigations' efficiency and improve some procedural points. However, competition investigations will always take time, for good reasons, such as due process and the fact that competition authorities have the burden of proof and they increasingly rely on economic analysis. Moreover, he underlined that when there is a need for intervention no competition authority can give immediate relief, especially in digital markets. Professor Geradin stressed that it is for this reason that he is a strong supporter of the EC proposal for ex ante regulation. Indeed, in his opinion it makes a lot of sense to have rules that would ban certain types of behavior in advance, without the need for an infringement to have already taken place, as this would avoid several problems. Then, having the ability to adopt some specific remedies on a case by case basis could also be helpful. Professor Geradin concluded by underlining that any regulation needs to be carefully considered and well calibrated, as sometimes regulations can make things worse, but ex post interventions, even interim measures, will always take months and digital markets can tip fairly quickly.

The Chair finally turned to **Cristina Caffarra** and asked about differences between the US and the EU.

Dr. Caffarra started by underlining that much of the evolution of the current approach emerged from a sentiment that is widely felt, that at least in Europe antitrust enforcement in digital markets has failed, and therefore that there is a need for regulation. Moreover, in relation to the remedies imposed in the Google Shopping case, she stated that a widely held view is that they have not been successful in terms of reinstating competition in the market. This is due in part to the "cease and desist" approach that has been used, in a situation where the incentive and the ability of platforms to circumvent remedies, as well as the difficulties of overcoming consumers' behavioural biases, are enormous.

Dr. Caffarra then added that she personally thinks that much of the reason why these remedies have failed in these cases has to do with regulator insecurity, timidity, uncertainty over imposing something, which has more teeth. She noted that there is indeed a role for regulation, as antitrust cannot cover everything. However, economists need to do more to understand how new business models affect incentives. Moreover, it has to be the right regulation, able to address the specific issues of different platforms. To conclude, she

stressed the need to be more courageous in the way we think about remedies and other ideas.

The Chair thanked everyone and closed the session.