Organisation for Economic Co-operation and Development

DAF/COMP/WP2/M(2021)1/ANN1/FINAL

Unclassified

English - Or. English

14 March 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 2 on Competition and Regulation

Summary of Discussion of the Roundtable on Competition Enforcement and Regulatory Alternatives

Annex to the Summary Record of the 71st meeting of Working Party No 2

7 June 2021

This document is the summary of discussion of the Roundtable on Competition Enforcement and Regulatory Alternatives, held by Working Party 2 on 7 June 2021.

More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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JT03491200

Summary of Discussion of the Roundtable on Competition Enforcement and Regulatory Alternatives

1. Introduction

The OECD Competition Committee's Working Party 2 explored how competition enforcement interacts with possible regulatory alternatives in its Roundtable on Competition Enforcement and Regulatory Alternatives, hosted on 7 June 2021.

The **Chair** explained that the roundtable was originally intended to discuss the so-called 'plus factor', i.e. what must be proven in addition to a violation of a regulation to conclude that this violation also amounts to an infringement of antitrust rules. Most of the country contributions however discussed the relationship between regulatory authorities and antitrust enforcers, investigating the circumstances when a firm subject to some sort of regulation is also liable to an antitrust scrutiny. This aspect of the discussion was taken up for discussion in the second section of the roundtable. The third part of the roundtable covered the need of regulatory intervention in circumstances where antitrust enforcement is considered insufficient. The Chair highlighted this discussion to be of high relevance in ongoing debates, given that many jurisdictions have developed proposals to introduce some sort of regulation for disciplining the behavior of large digital platforms.

The Chair noted that the topic attracted 19 contributions (Australia, Belgium, Canada, Colombia, Greece, Hungary, Lithuania, Mexico, Norway, Spain, United Kingdom, United States, EU, Brazil, India, Russian Federation, South Africa, Chinese Taipei and BIAC). He then introduced the experts and thanked them for their recorded interventions, which were posted on the roundtable webpage in advance: Professor **Niamh Dunne** from the London School of Economics in the UK, Professor **Giorgio Monti** from Tilburg University in the Netherlands and Professor **Howard Shelanski** from Georgetown University in the US.

2. The Plus Factor

The Chair then gave the floor to **Germany** on the *Bundeskartellamt's* Facebook case. The key reasoning behind the Facebook case was that data is a key element for digital platforms to become dominant. Given this, competition authorities need to consider how data is collected and processed. This assessment requires an evaluation parameter, which can be borrowed from a number of sources – among which are existing regulations, such as the General Data Protection Regulation (GDPR). The 2019 decision found that Facebook was not complying with the GDPR and, as a dominant company, compelled its users to consent to the limitless use of their personal data as a condition to use Facebook's social platform. If users do not agree to share their data, they do not have the choice of an alternative application to use. The decision is now pending before the appeal courts in Germany, which have sent a preliminary reference to the European Court of Justice (ECJ). Dominance has been established at all levels. The main questions before the ECJ concern the interpretation of the GDPR and its impact on the case. Germany welcomes the judicial review of questions regarding the interaction of data protection and competition law. Judicial clarification is welcome, particularly in light of regulatory initiatives such as the new sections of the German Competition Act (regarding gatekeeper power) and the proposed European Digital Market Act.

The Chair then asked **Germany** what was the expected outcome of this case. Germany said it is hard to predict what will happen at EU level, but, once the case comes back to the German courts, it might still take some time and appeals before the case finally ends. On the other hand, the new competition provisions such as section 19a allowing the imposition of orders on large digital players may facilitate timely enforcement of similar cases in the future.

The Chair then called on **Colombia,** which described in its contribution an infringement case based on a finding that a dominant telecommunications company was not complying with telecommunications regulation. Colombia said that this case is a good example of the complementarity of regulation and competition, and of the synergies that result from the co-existence and co-ordination of the regulator and the competition authority in certain sectors of the economy. The case concerned phone number portability, the conditions for which are set by the telecommunications regulator. A failure to provide such portability created an effective barrier to competition in the Colombian telecoms market. Previously, the sector regulator was the main authority with responsibilities on the sector, even if the competition authority had the power to evaluate sector regulation prior to its adoption by issuing opinions concerning the impact of regulatory projects on free competition in the markets. Following various complaints to the regulator, which were referred to the competition authority, the latter investigated a number of practices limiting competition by restricting data portability. It was argued that the dominant company had abused its position by obstructing the full access by competitors to the commercialisation channel, corresponding to the portability process. This was achieved particularly by locking handsets and hindering their unblocking, establishing fees to disconnect, and by fraudulently inflating the porting figures disclosed to consumers.

The Chair turned to **Professor Giorgio Monti** to comment on these presentations. The expert noted that Colombia's case tells a story of competition harm, while the German approach seems to be concerned mainly with a potential infringement of data protection regulation. He asked whether it might not be better to frame this latter case as an exclusionary theory, or approach it as involving a practice that circumvents data protection rules. Professor Monti also asked whether the Facebook case can provide us with some perspective on how best to apply data protection rules, e.g. whether dominant companies should be subject to special duties under these rules.

3. How competition law interacts with regulation in specific jurisdictions

The Chair then moved the discussion on to antitrust enforcement in regulated sectors. A first part of the discussion looked at how best to achieve co-ordination between a competition authority and regulators empowered to enforce antitrust laws.

3.1. Overlapping Competences

The Chair explained that in **Brazil**, the energy regulator, the telecoms regulator and the Central Bank all enforce some sort of competition rules. He asked Brazil if this would not lead to conflicts of jurisdiction. Brazil pointed out that competition and regulatory bodies have complementary roles, and that co-operation is crucial. The relationship between regulatory authorities and the competition authority was strengthened in Brazil in 2019 with the introduction of a general law governing regulatory agencies. This law describes the jurisdiction that regulatory agencies have over competition matters, and the role of Brazil's competition authority with respect to regulated markets. In effect, overlapping competences are not seen as a problem in Brazil. Instead, overlapping competences have

made public policy more effective. For example, regulators can now submit complaints to the competition authority, even when they have competition competences. The Brazilian model continues to work towards a more coherent regime based on co-operation between CADE and sector regulators.

The Chair then consulted **India** on a judgment by the Supreme Court that decided that, in the presence of concurrent jurisdiction, the authority addressing the relevant technical issue in a case should take priority. However, the technical issue can have both sectoral and competition natures, i.e. different objectives. In the judgment by the Supreme Court of India, the competition authority's competence was not removed, but pushed to a later stage by the competence of the telecommunications regulator. In effect, this doctrine only applies to cases where a sector regulator is seized of the matter, and the court found that the mere existence of regulation does not exclude the later intervention by the competition authority. However, this decision is now being used before the lower courts – e.g. in IP disputes – to argue that the competition authority's competence should be displaced in IP cases. India expressed a hope that developing jurisprudence on the issue of conflicting jurisdictions of sector regulators and competition authorities will give birth to a concurrent model of regulation and competition enforcement.

3.2. Competition Interventions in Regulated Sectors

The Chair then moved the discussion to instances where competition authorities intervene in regulated sectors. He began by asking Chinese Taipei about its interventions in regulated sectors.

Chinese Taipei has amended its rules to address the increasing number of barriers in media markets, and sought to empower the sector regulator to intervene directly as regards competition barriers. This can give rise to jurisdictional conflicts between the regulator and the competition authority. In practice, the competition authority referred to the regulator those cases it thought were most appropriate, but this created legal uncertainty. This issue was put to a public consultation that concluded that, while most discrimination cases in the cable TV market should be allocated to the sector regulator, a number of practices are likely to continue to fall within the remit of the competition authority when they amount to typically anticompetitive practices.

The Chair then called on **Canada**, where the regulatory conduct defence is a factor in the court's ability to assess the overall character of a conduct that needs to be balanced with evidence of anticompetitive purpose. In a recent case, the Bureau investigated the Vancouver airport authority's restrictions of entry by third parties into the provision of catering services. In this case, there was no vertical integration, but there were incentives for the Vancouver airport authority to exploit the catering service. The airport authority invoked the regulated conduct defence claim, alongside an argument that an excessive number of catering services would detract from quality and competition in the long run. This argument, and the evidence presented, was found not to be particularly persuasive.

Belgium was asked about the risk of double jeopardy in a case where the same discriminatory practice was sanctioned by the postal regulator and the competition authority – but the latter took the postal regulator's fine into account when setting its own fine. Both sector regulators and competition authorities have exclusive competence to enforce their rules, which may sanction very similar – or even completely identical – factual situations. In the case under discussion, the conclusion of the competition authority was that there was no *ne bis in idem* despite the facts that were sanctioned by the postal regulator being identical to those relevant for the competition authority's decision. The question is now before the European Court of Justice.

BIAC emphasised that legal certainty and coherence is crucial for business. Business is concerned with respect for the principles of *res judicata* and *ne bis in idem*. These doctrines seek not only to avoid duplicating sanctions for the same conduct, but also to reach finality on the issue at stake – including by avoiding re-litigating closed matters under different guises. This can happen when competition cases are pursued in parallel by different authorities, or when sector regulators and competition authorities investigate similar factual scenarios. Legal clarity and certainty, including on the application of competition and regulation, is crucial to incentivise investment.

The Chair then asked Professor **Howard Shelanski** whether the US Supreme Court judgment in *Trinko* could be construed as a form of *non bis in idem*. Professor Shelanski noted that the decision required competition law to step back when regulatory frameworks are in place that address related concerns. There is uncertainty as to how far this doctrine would apply to public enforcement, but, combined with the judgement in *Credit Suisse*, *Trinko* seems to make parallel or concurrent enforcement of regulation and competition law impossible. Congress could address this problem by means of specific 'savings clause', whereby the possibility of antitrust enforcement is preserved in regulation, and dual enforcement is made possible.

The Chair turned then to **South Africa**, and asked about an earlier instance of enforcement against excessive pricing by a port operator in a regulated sector. The Competition Act applies across regulated sectors, and regulators are required to enter into MoUs with the competition authority. In the port sector, some practices are regulated, and some are not. The case in question was brought against a State-Owned Enterprise (SOE) with a regulatory function. In particular, the case was against dues imposed by a division of that SOE. Those tariffs were set by the SOE, and the sector regulator had to approve them. The case was triggered by reports that the regulated prices charged by the SOE were much higher than comparators. The investigation revealed that higher than expected costs underpinned the high prices, so the case was closed. This experience has subsequently been used to inform enforcement in other regulated sectors.

The Chair then asked **Greece** about a merger to monopoly in the regulated maritime transport sector. This merger was approved, but subject to very intrusive commitments. Greece noted that this was not a merger to monopoly. The resulting market share was below 55% in the two Greece-wide product markets. In practice, however, there were 700 relevant markets, reflecting different itineraries. Only 20 of these markets were subject to intrusive remedies, because the merger had the potential to create monopolies on certain routes, but even in these routes there were viable competitors with spare capacity. As such, the remedies sought to liberalise the most routes giving rise to the greatest concerns. There is also a complementary regulatory framework that ensures access to Greece's inhabited islands, and the possibility to cap prices and avoid excessive or unfair prices.

Hungary was then asked about a case it pursued regarding card payments, particularly concerning an abuse of a dominant position by one card provider concerning its interchange fees. While the decision was quashed by the Hungarian Supreme Court, interchange fees provide a good example of how sector-wide regulation may sometimes be needed to address pervasive competition problems. Hungary's case had its origin when one of the main card providers saw its interchange fees regulated by means of a competition remedy. The other main card provider, which was not subject to this regulation, kept high interchange fees, leading to banks migrating their cards to its network. The Hungarian authority brought a case against this, but the Supreme Court considered that the abuse element was not fulfilled. In particular, there was no direct relationship between the higher interchange fees and the increasing monopolisation of the market, since there were many other market developments that might have explained this. Faced with this, the competition

authority started advocating more strongly for a regulatory solution, which was eventually adopted. This also demonstrates the importance of competition authorities and regulators co-operating.

In **Lithuania**, faced with complaints regarding a practice already sanctioned by the communications regulator, the Competition Council refused to investigate it despite having jurisdiction. The Council has discretion to set its own priorities with a view to enhance consumer welfare, and considered that this case was not a priority. The Competition Council co-operated with the telecommunication regulator in deciding not to investigate – in effect, the Competition Council is under a duty to do so. However, the telecommunications regulator is not under a reciprocal duty to co-operate with the Competition Council. This is an area where more work is required to enhance clarity as to who has primary competence over a case, and how to establish it. Lithuania also noted that this overlap between regulated and competition practices is a common issue.

Professor Niamh Dunne noted that the question of whether competition enforcement is appropriate in regulated sectors might be answered differently if the question were directed to sector regulators. In practice, to determine whether competition enforcement is appropriate in regulated sectors, we may need to look at the regulators' powers, jurisdiction and ability to address the issue quickly. A different, more difficult question is why we need competition enforcement in regulated markets in the first place. This might have to do with regulation or regulators incentivising or permitting anticompetitive behaviour. A further issue is why one needs subsequent competition interventions if regulators have already acted – and, relatedly, whether narrow readings of *ne bis idem* are appropriate (particularly from a rule of law perspective). Further, in some cases, regulators may not share the same territorial basis, which may lead to tensions and questions about why a competition authority is trying to challenge (the absence of) regulatory action in a different country. Professor Dunne also questioned whether antitrust law can sometimes amount to a second-best solution to enforce regulation in the midst of institutional jostling, and if such an institutional basis provides enough justification to applying competition law to enforce these regulatory norms. The best solution is probably to fix the regulatory scheme, whether by reforming defective regulation or having a more effective enforcement framework.

The Chair noted that there are indeed challenges in applying competition law and regulation from a technical perspective, even as competition authorities can provide and receive inputs from regulators, and regulators might try to address competition issues with or without support.

The Chair then asked the **United States** about its exceptions/immunities to antitrust, many of each have been eliminated recently. The United States explained that the antitrust agencies have long argued that these exceptions should be eliminated or, when justified by public interest, exceptionally limited to what is necessary to achieve this interest. Sometimes these arguments are successful. For example, the health insurance exception was recently limited, but not eliminated as regards co-operation that is necessary to bring new products to the market. This new law is a positive development, but repeals of exceptions are quite rare, and there are still circa 30 exceptions in the books without any re-examination or sunset clauses. In 2007, a bipartisan antitrust modernisation commission reviewed these immunities, and was sceptical that they were justifiable – some were special interest legislation, while others were the result of antiquated perspectives of some industries as being natural monopolies better subject to regulation. Efforts and discussions to narrow and limit these exemptions continue.

The Chair then asked how the concurrent authority of sectoral regulators and antitrust authorities works in the United States – in particular, whether one could successfully distinguish between the functional focus of each regime, and whether the approach to

concurrency adopted by the courts meant that the strictest, most detailed regime would always prevail. The United States remarked that whether regulation and antitrust can be applied concurrently will greatly depend on the regulatory architecture and market dynamics of specific regulatory regimes. This leads to different regulatory regimes applying depending on the circumstances, and potentially being applied concurrently with antitrust. However, this requires a case-by-case analysis. It would not be accurate to say, however, that the strictest regime would always prevail. The Chair asked how the antitrust agencies are informed about legislative initiatives at the state level. The United States replied that the federal agencies often make formal submissions to State legislators and regulators regarding the competitive impact of adopting certain rules. In some cases, states will actively solicit the federal agencies to make those contributions, at other times the federal agencies look for opportunities to offer their perspective.

3.3. The goals of Regulation and Competition Enforcement

The Chair then moved to the last part of the discussion, focusing on the objectives of economic regulation and on how they relate to competition enforcement.

In the **Russian Federation**, FAS is not only the competition authority but also the price regulator for natural monopolies. One interesting case that is discussed in its submission refers to heating, whose price was fully liberalised in 2019. While competition is thought to lead to investment and greater market efficiency, the market is still far from competitive. Market segmentation and barriers to entry lead to restrictions of competition, and introducing competition into the market has proved difficult.

Mexico has provisions allowing the competition agencies to study markets in order to identify and remedy barriers to competition. The IFT (the regulator and communications authority in the telecommunications and broadcasting sectors) is allowed to pursue such investigations as regards its regulated sectors, and has just pursued investigations into a number of digital markets. COFECE noted that this instrument goes beyond competition enforcement, but also involves an in-depth market analysis. The procedure also allows parties to participate in the process, and the final decision must be suitably justified. The competition authorities' resolutions are subject to judicial review, which emphasises the need to justify thoroughly both the absence of competitive conditions in a market, and the proposed remedies to address the competition problems identified.

In **Norway**, grocery markets are highly concentrated at the local level. One particularly noticeable barrier to entry that has been identified is planning restrictions by local planning authorities. The competition authority has over the years tried to convince these authorities to take competitive effects into account when adopting planning decisions, but it was often argued that the Planning Act did not allow such effects to be taken into account. The competition authority concluded that such objections were unfounded. Regardless, a regulatory act would be desirable to clarify that competitive effects could be taken into account when adopting planning decisions since the balancing of competition and other planning considerations is possible. The **Chair** asked whether refusals by local authorities to reassess earlier planning decisions was a problem, and **Norway** confirmed that this was indeed the case.

Spain combines sectoral regulation and supervision in telecommunications, media, energy, transport, postal services with the horizontal application of a competition policy in the same body. In its experience, the integration of regulation and competition has evolved over time, with these rules becoming increasingly complementary, particularly in markets involving high levels of disruption and innovation. These markets are diverse. For example, there is not a single digital market, but many digital markets and services. At the same time, many

of these markets are inter-related, since some platforms integrate different combinations of these services in their ecosystems. Given this, Spain suggests applying a case-by-case approach to *ex ante* regulation in the digital realm, building on the competition authority's extensive experience in acting in regulated sectors. Such an approach could help address forthcoming challenges, and could be associated with competition authorities also having regulatory duties.

The **European Union** is developing a proposal to regulate digital platforms, in another example of its experience of building on previous competition efforts to develop regulatory solutions to problems in certain market sectors. The digital markets' initiatives are an effort to complement antitrust enforcement, but also to tackle unfair business practices that cannot be addressed under competition law. It was the limitations of competition law, particularly as regards ensuring fair competition, which led the Commission to try to promote contestability as such in some digital markets.

The **United Kingdom** has the ability to address structural issues under its market studies and investigation powers. Despite this, it still felt the need to implement new enforcement mechanisms for digital markets within the competition authority. Market studies are designed to be one-off exercises, and are not well suited to pursue fast-moving and frequent investigations. The remedies that might be imposed following a competition case or a market study cannot be changed once they are imposed, which limits their flexibility. The proposed pro-competitive digital markets regime will lead to the adoption of codes of conduct for each gatekeeper, and of instruments aimed at tackling market power directly when a code of conduct is not sufficient. The advantages of this new regime over market studies include greater legal certainty, speed of enforcement, ability to investigate problematic practices, the accumulation of internal expertise, and a better and more flexible use of remedies over time. The Chair asked about the ability to choose remedies, e.g., regarding data, and the United Kingdom noted that there is a palette of possible remedies that can be deployed and refined over time.

Australia discussed the relationship between competition and regulation extensively in the 1990s, when a new competition policy was adopted amidst the liberalising trends of the time. Australia found that *ex ante* regulation was useful to address various instances of market power. Building on this tradition, the government recently requested the competition authority to pursue a study on how best to address the challenges created by digital platforms. This study concluded that ordinary competition enforcement would be insufficient to address a number of problems in this area, particularly regarding bargaining positions in sectors such as media, which see their viability being threatened. Australia is currently also looking at issues arising concerning *adtech* and App shops, and whether they can be best addressed through *ex ante* regulation. Finally, Australia is evaluating a number of possible measures to address the problems it has identified thus far. These include improving data portability and interoperability, implementing data separation measures which would restrict the way that firms can use data that they have gathered from consumers, and rules to manage conflicts of interest and self-preferencing in the supply of ad tech services, among others.

Professor Shelanski noticed that a convergence of thinking is emerging on how best to deal with digital platforms – e.g. by prohibiting discrimination and requiring interoperability. However, whether this is best achieved by competition or regulation is a question that will depend on the available legal tools. In the US, antitrust doctrine means that these goals may be achieved more effectively via regulatory means.

Commenting on the session, Professor Shelanski pointed out that regulation could have many goals beyond promoting competition, so sector regulators may not be focused solely on competition enforcement. Given this, it is important to keep in mind when designing a

regulatory regime that complements antitrust enforcement that this regulatory regime will, as a rule, merely supplement antitrust; and that it should not displace antitrust enforcement, absent a clear conflict with regulatory goals that should be prioritised. Four criteria should be kept in mind when such regulation is adopted. First, regulation should fill the gap between antitrust doctrine and enforcement. Second, there should be a clear articulation of why the regulatory administrative approach is more administrable and effective when compared to the competition regime. Third, the regulatory objectives need to be consistent with the goal of increasing competition. Lastly, the regulatory regime should not force a regulated entity to choose among one type of liability – i.e. obligations should be consistent across regulatory regimes. One may also consider integrating competition and regulators when there are common regulatory goals, thereby also avoiding regulatory gaming.

4. Conclusion

The Chair closed the session noting how many of these debates have parallels in discussions that took place in the 1990. Despite the problematic industries being different from the public utilities considered then, a number of the issues – non-discrimination, interoperability, etc. – are similar.