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Executive Summary 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 Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 71st Meeting of Working Party 2 on 7 June 2021.

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

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Executive Summary of the Roundtable on Competition Enforcement and Regulatory Alternatives

By the Secretariat[1]

Considering the discussion at the roundtable held by Working Party 2 of the Competition Committee on 7 June 2021, the delegates' submissions, the panellists' presentations and the Secretariat's background paper, several points are noted:

1. Economic regulation and competition policy are largely interdependent instruments of economic policy. While they differ in aims and methods, in practice they often overlap on both dimensions.

It is not always straightforward to distinguish between regulation and competition law, since they can overlap in terms of both goals and methods. First, even if regulation can pursue other goals that go beyond enhancing consumer welfare, both competition law and regulation can seek to control the acquisition and exercise of market power.

While it is often argued that economic regulation and competition law and policy typically use different tools, this is not always evident. It is true that competition law seeks to strengthen the workings of markets by prohibiting certain forms of anticompetitive behaviour that, alone or in concert, have the ability to exercise market power, while economic regulation generally involves a State-directed, coercive alteration of or derogation from free-market mechanisms in a particular sector to address certain 'market failures'. However, competition law and regulation can apply to the same economic sectors both *ex ante* and *ex post*, deploy similar enforcement tools and impose similar remedies. In practice, many competition agencies' actions are perceived to contain regulatory aspects. These include the increasing adoption of negotiated commitments, forward guidance in the form of guidelines, the pursuit of market studies (particularly when they can lead to the imposition of remedies), and the increasing application of specific structural or behavioural remedies.

As a result, even if one can distinguish them in theory, it may not be possible to delimit competition law and economic regulation clearly in all instances in practice. Market problems often can be addressed by means of competition enforcement or of a regulatory alternative – or by a form of public intervention that combines elements of both.

2. Distinct approaches to the relationship between competition law and economic regulation reflect different views about the appropriate roles of each.

Some view competition law and regulation as alternatives. From this perspective, regulation is the result of a public decision to remove a sector from the purview of market mechanisms and, thus, competition law, and replace it by another form of State intervention. Others view competition law and regulation as complements, and argue that well-functioning markets can often best be achieved by a combination of timely, targeted competition enforcement and *ex ante* regulation that draws on a breadth of market experience.

[1] This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the session, the delegates' written submissions, the panellists' presentations and the Secretariat's issues paper.

These different approaches reflect the different relationships that competition law and economic regulation can have in practice. Depending on the circumstances, regulation and competition enforcement can be alternative solutions, or they may complement each other. What is more, often the solution that will be adopted in practice will contain elements of both regulation and competition law.

In some cases, regulation effectively replaces (and displaces) competition law, and hence they are substitutes. In other cases – particularly when their goals are aligned or at least consistent - competition and regulation can operate in the same sphere of economic activity, address the same problems, and the use of one mechanism will not preclude the application of the other. In such cases, not only can competition enforcement complement economic regulation, but economic regulation can also complement competition enforcement.

It is recognised that the relationship between regulation and competition law is more complex than a simple substitutes-complements distinction allows. In effect, local choices on economic regulation and competition law often reflect sophisticated perspectives about the appropriate relationship between them. These perspectives can be said to predominantly reflect views on two issues: (i) is it appropriate to adopt economic regulation to address specific market issues, or should one leave the issue to competition law? (ii) if economic regulation is in place, what rules should govern its overlap with competition enforcement?

3. While competition mechanisms – including competition law and policy – should be preferred where possible, there are many scenarios where economic regulation is justified.

Market imperfections only provide an economic rationale for economic regulation where market responses do not remedy them effectively (or even exacerbate them), and where there are feasible interventions that, at least in principle, can achieve net welfare improvements. As a result, competition enforcement is generally to be preferred to economic regulation.

Nonetheless, there are a number of reasons why one might prefer to adopt economic regulation. This may be the case, in particular, where marker failures other than market power, or societal goals other than enhancing consumer welfare, are at stake; and where economic regulation provides a more effective tool to address market power or enhance consumer welfare.

4. The rules that govern the overlap between economic regulation and competition enforcement difffer across jurisdictions, but often depend on the type of regulation at play.

The question of how to manage overlaps between economic regulation and competition law is typically approached as being about the extent to which competition law can reach business conduct in regulated sectors – i.e. the regulated conduct defence. While the core principles, conditions and underlying legal doctrines governing potential overlaps between regulation and competition enforcement are similar across OECD jurisdictions, the particulars and scope of the regulated conduct defence vary across jurisdictions.

Across the OECD, it is more likely that antitrust authorities cannot intervene, and the regulated conduct defence applies, when firm behaviour has been mandated or dictated by regulation. When the firm was merely induced to violate competition rules, e.g. by administrative guidance, this often can be taken into account, e.g. at least as a mitigating factor, even if it does not necessarily exclude liability or preclude the imposition of a penalty. Further, the greater the extent, complexity and precision of regulatory duties, the smaller the perceived scope for competition enforcement.

As a result, most approaches to the regulated conduct defence fall somewhere along a continuum that starts from complete immunity from competition enforcement in regulated sectors, to full joint application of competition law and regulation.

5. The institutional set-up for enforcing competition policy and economic regulation matters for the management of the regulation/competition law interface.

Organisational structures for ensuring consistency between competition law and policy and economic regulation take a variety of forms.

While empowering a single authority to enforce both economic regulation and competition law remains rare, a number of OECD jurisdictions empower authorities to enforce both competition law and some types of economic regulation, reflecting the view that there are synergies to pursuing both competition policy and economic regulation in some contexts. This view is also reflected in how some jurisdictions have set up independent regulators and competition authorities, while granting them concurrent jurisdictions in respect of certain rules or economic sectors.

Institutional set-ups involving separate competition authorities and economic regulators with clearly distinct competences typically align with substantive rules assigning alternative roles for competition law and economic regulation. In practice, however, all institutional models involve some level of overlap and need for co-ordination in enforcing economic regulation and competition law. Even in jurisdictions where there is a clear division of functions between competition agencies and sector regulators, sector regulators sometimes exercise certain antitrust functions. Elsewhere, systematised informal concurrency is observed in practice, e.g. by means of duties to refer and overlapping powers to conduct market studies. Finally, common judicial review procedures can also contribute to coherence in economic regulation and competition enforcement.

6. Regulation and competition law not only overlap, they also influence each other.

Regulation and competition law not only inspire, but also often borrow from one another. Competition enforcement can affect whether regulation is adopted and how it is applied, while the existence of economic regulation typically has an impact not only on whether competition enforcement can occur at all, but, where competition enforcement is possible, on the types of cases that are brought and how they are pursued.

Regulation can and often follows from competition interventions. Recurring competition law complaints or investigations may highlight the existence of market-wide problems that are better addressed through systemic, market-wide intervention. An example of this is the ongoing transition from relying solely on competition enforcement to also adopting economic regulation to govern the digital sphere. Following a decade of efforts to enforce competition laws in this sector, the last couple of years have seen competition agencies take the lead in debates about whether and how to regulate business conduct by digital platforms.

Regulatory reform can also significantly affect competition enforcement, most notably when the introduction of regulation introduces antitrust exemptions or otherwise limits the scope for competition enforcement in the regulated sector. Another common instance of regulatory reform having an impact on competition enforcement are major deregulatory reforms, which often not only open the field for competition enforcement but also require heightened regulatory and antitrust scrutiny.

Competition enforcement can also influence the content of regulation that is adopted in its wake, while the content of regulation can influence the types of competition cases that are brought and the theories of harm they adopt. Regulation can and often adopts competition law concepts and approaches, particularly when it seeks to achieve more efficient, quasi-

market outcomes by replacing or complementing competition enforcement. This is particularly apparent in how proposals for regulatory oversight over digital platforms have found a source of inspiration in competition enforcement efforts. On the other hand, regulation can influence the substance of competition law and its enforcement in a number of ways, e.g. competitive assessments must address differences between regulated and unregulated markets; regulation can influence the content of individual competition law concepts, methodologies and theories of harm; and regulation may even provide a trigger for competition liability.

7. There are ongoing debates about the extent to which the breach of regulatory obligations can trigger antitrust liability.

Competition liability for conduct that amounts to the breach of a regulatory duty typically requires an autonomous finding of competitive harm, i.e. for a competition infringement to be established it does not suffice to establish that a regulatory breach occurred. Such scenarios have mostly given rise to concerns about double jeopardy, particularly where practices simultaneously breach competition law and sector regulation, and different public authorities bring parallel cases applying different substantive provisions.

However, recent cases have raised the possibility that a regulatory infringement can also equate to a competition law infringement in practice. This could be the case, for example, where a potentially anticompetitive practice concerns a non-price dimension such as privacy or quality, or the exploration of existing barriers to entry such as number portability, and there are regulatory benchmarks that can provide an evaluation parameter for whether the conduct under investigation is anticompetitive or not. The extent to which such proxies for competition infringement are appropriate, and the question of how to identify those circumstances where regulatory infringements leads to competition harm, remain disputed.