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Summary of discussion of the Roundtable on Monopolisation, Moat Building and Entrenchment Strategies

Annex to the Summary Record of the 139th Meeting of Working Party 3

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This document prepared by the OECD Secretariat is a detailed summary of discussion of the Roundtable on Monopolisation, Moat Building and Entrenchment Strategies, held by Working Party 3 on 11 June 2024.

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1. Introduction by the Chair

On 11 June 2024, Working Party 3 held a roundtable on Monopolisation, Moat Building and Entrenchment Strategies, chaired by Jonathan Kanter (the “Chair”).

The **Chair** introduced the agenda item, mentioning that this topic has generated numerous working papers and attracted a distinguished group of panellists for discussion.

The **Chair** highlighted the urgency and complexity of addressing market monopolisation, noting that modern monopolisation strategies differ significantly from those used two decades ago. Although previously competition was primarily horizontal or vertical, nowadays it also includes multi-sided markets, creating durable and entrenched monopoly positions that are hard to dislodge. Companies increasingly employ strategies focused on long-term durability rather than short-term profit maximisation. These trends are particularly evident in tech platforms but are not exclusive to them. The **Chair** emphasised that understanding moat-building strategies and their implications for competition policy enforcement is crucial and stressed the importance of discussing how various countries are adapting enforcement frameworks to tackle these issues.

2. Country Experiences

The **Chair** then transitioned to the panel discussion, giving the floor to **Mexico**.

Mexico proceeded to discuss a new procedure in Mexico aimed at addressing competition issues. The delegation explained that economic moats give companies strategic advantages to deter competitors, and traditional tools may be insufficient to address these problems effectively. Mexico highlighted Article 94 of Mexico’s competition law, which allows for the identification of specific competition problems, investigation, and implementation of various solutions. For example, to identify a barrier to competition, there could be issues such as a regulatory problem, the structure of the market itself, or some behavioural issues of economic agents. This happens in markets not functioning under competition conditions. Unlike typical procedures that punish illegal conduct, this new approach focuses on markets not functioning properly and devises specific actions to enhance competition. Therefore, it facilitates the identification and removal of barriers to competition, thereby restoring competitive processes or preventing future competition deficiencies in the market. The issues identified may be structural, such as high market shares held by economic agents, or behavioral, which do not necessarily constitute abuse of dominance practices. Additionally, these issues can be regulatory or legal in nature. Also, the delegate provided an example from the jet fuel market in Mexico, where a state-owned company was found to dominate certain activities. Recommendations included regulatory changes and internal restructuring of the company to ensure functional separation of related activities. Mexico underscored that this procedure could address current competition issues and preventing future anti-competitive effects. This is achieved by identifying and removing barriers to competition, thereby restoring, or maintaining competitive market conditions. Mexico also mentioned an ongoing investigation involving marketplaces and streaming services. These sectors are scrutinised for employing entrenchment and bundling strategies, which can create robust business models detrimental to competition. The recommendations in these

cases may include regulatory interventions to ensure markets remain competitive. Mexico concluded by emphasising the importance of distinguishing between legitimate business tactics and those that unduly hinder competition. Advocacy for pro-competitive regulation plays a crucial role, and competition agencies need to complement traditional tools for addressing cartels and abuse of dominance with innovative approaches to tackle non-traditional competition problems.

The representative from the Mexican Federal Telecommunications Institute (IFT) added that they have resolved two investigations within the scope of Article 94, and imposed measures to counter the adverse effects of the law and co-operated with the state officials to enforce them. As for the remedies, the market investigation tool under Article 94 is effective for addressing structural issues, such as economic moats, especially in sectors like telecommunications, and broadcasting, where traditional tools like merger control are insufficient. Thus, Article 94 can complement merger controls by addressing barriers created by existing conglomerates.

The Chair thanked Mexico and highlighted the importance of understanding the new market realities. He then asked Chile to present their approach on the matter.

Chile explained that their national economic prosecutor, which is an agency, has presented very few cases of abuse of dominance before the Competition Defense Tribunal in the past years. Chile chose to highlight the most relevant ruling, which refers to moat building by a football channel holding monopoly powers (Ruling 181 of 2024). Concerning the facts, Chile noted that in 2003, a particular football channel was established as a premium service by the National Association of Professional Football. By 2006, the channel bundled premium and basic channels, set minimum resale prices, and required a 30% minimum subscriber guarantee. Market conditions changed significantly between 2014-2017, reducing the dominant operator's market share. Despite changes in the market, the football channel maintained its 2006 practices, which led to a \$27 million fine in 2024 by the National Economic Prosecutor. The court ruled that while the initial practices in 2006 were not anti-competitive, they became so by 2017 when market conditions had changed, and the football channel continued its exploitative practices despite knowing the adverse effects on cable operators and consumers. Chile, lastly, emphasised the importance of assessing conduct in the context of evolving market conditions.

The Chair thanked Chile for the case study presentation and confirmed that the authorities need to adapt to changing market conditions. He then invited Austria to explain their approach.

Austria first expressed gratitude for the initiation of the project on gender-inclusive competition policy at the OECD and for maintaining institutional integrity as a core aspect of good governance. Second, on the topic, the delegate referenced the work of the famous economist Friedrich Hayek, who characterised competition as a discovery process, emphasising the need for open and contestable markets to promote innovation. Additionally, Austrian economist Jan van Belach's study showed a trend towards market concentration, with increasing market power and high markups in Austria. Following the above, Austria drew two conclusions: (a) the need for deeper data analysis and research, (b) proactive and “creative” enforcement using all available tools to investigate market concentration and tackle abusive behaviour. As an example, Austria cited their joint investigation with the German Bundeskartellamt into Amazon's practices, which led to a settlement changing Amazon's business terms for online traders. This demonstrated the importance of international co-operation in addressing monopolistic strategies. Austria also highlighted the importance of dawn raids and the collection of internal documents to prove anti-competitive strategies.

Austria emphasised in three of their tools to hinder monopolisation strategies. First, it referenced the success of new tools such as transaction value-based tests introduced in 2017, which helped investigate major mergers in the digital sector, like Facebook/Giphy, in co-operation with the European Commission (EC), Federal Trade Commission (FTC), and others. Second, Austria has conducted sector inquiries into food, energy markets, and electric vehicle charging infrastructure, resulting in regulatory suggestions, some of which have been implemented. Third, Austria's ability to provide opinions on planned legislation has influenced parliamentary and policymaker decisions, a tool which has strong impact on monopolies. Looking ahead, Austria is establishing a competition monitoring system to provide an overview of market concentration. This system aims to inform policymakers and legislators, helping to sharpen tools and empower competition authorities to address market concentration and monopolisation strategies effectively.

The **Chair** followed up on Austria's intervention and asked them to elaborate on the importance of documentary evidence in an investigation.

Austria replied that having access to internal documents of a company is the most effective way to respond to their defenses against a theory of harm. Austria mentioned that they have a prosecutorial model, like Chile, which means that internal documents can serve as proof for a business's anticompetitive plan or strategy.

The **Chair** added that a prosecutor must show that the facts on the ground are effective with regards to law enforcement tools. He also highlighted the importance of mergers, traditionally seen as ways to coordinate and raise prices or address vertical foreclosure. However, in the context of moat building, mergers or acquisitions can deepen competitive advantages and strengthen market power. This aspect of monopolisation is increasingly relevant and distinct from traditional merger enforcement goals.

Austria added that merger control should not be viewed negatively in terms of industrial policy. The delegate emphasised that it is a merger control procedure, not merely a merger clearance procedure, underscoring its critical role in maintaining competitive markets. This view was also shared by Austria in an event called "20 years of European Merger Control Regulation".

The **Chair** gave the floor to **Australia** to opine on those issues.

Australia began by acknowledging the Gender Equality Inaugural Forum and its intersection with green energy and digital transitions, highlighting the Canadian gender-inclusive toolkit's value in market studies. The ACCC (Australia Competition and Consumer Commission) uses consumer surveys to assess demand preferences across demographics, enriching antitrust analysis and broader discussions. **Australia** also discussed the ACCC's five-year digital platform services inquiry, focusing on expanding ecosystems and data collection. The delegation referred to two examples: first, expanding ecosystems is an enlightening example of moat building strategies in a structural and dynamic sense, and then data accumulation as one of the key dynamic strategies being used to entrench and envelope other market players.

The ACCC's 7th report examined expanding digital platform ecosystems, highlighting how business models of companies like Google, Amazon, Apple, Meta, and Microsoft have evolved, leveraging economies of scale and scope to exclude competitors and accumulate extensive data. As an example of the potential risk to competition and consumers, Australia stated that the majority of Australian adults have smart devices, social media accounts and use cloud storage services. Therefore, these platforms have significant control over vast amounts of personal data and daily activities, which allows them to create substantial barriers for competitors. This control leads to concerns about market dominance and consumer choice, as the platforms' practices like tying, bundling, and pre-installation of

services make it difficult for alternative providers to compete. Additionally, strategic mergers, acquisitions, partnerships, and loyalty programs further entrench their market position and prevent rivals from gaining a foothold. This dominance leads to concerns about market power and consumer choice, emphasising the need for robust regulatory frameworks to ensure competitive and fair markets.

The ACCC's latest report investigated data brokers and third-party data firms. These entities accumulate and sell extensive personal data, including identification, biometric, and socioeconomic data, raising concerns about privacy and potential misuse. The report highlighted how data brokers collect information from various sources, such as platforms, public records, and apps, to create comprehensive profiles of individuals. This data is then used to influence decisions in areas like rental applications and financial services, often to the detriment of disadvantaged communities. For instance, data brokers can provide landlords and financial institutions with detailed reports on prospective tenants and borrowers, influencing their decisions based on predictive analytics. This practice can lead to biased outcomes and reinforce social inequalities. The ACCC underscored the potential harms of such data practices, including issues related to privacy, discrimination, and online gendered violence. To address these challenges, the ACCC recommended several regulatory reforms. First, to move swiftly and effectively in response to the rapid developments in digital markets, Australia suggested a digital platforms regulatory reform with *ex ante* powers. Second, Australia is working towards a merger reform, to better manage and scrutinise mergers and acquisitions, ensuring they do not harm competition. Given the flexibility and adaptability of those transactions, Australia aims to expand the regulatory toolkit, enabling the ACCC to maintain competitive markets.

The **Chair** added that there is a shift in traditional thinking about competition law enforcement, where, instead of monopolising their satellite products and services, businesses might use them to build a moat around their core monopolies. He then asked Australia what their approach regarding this change is.

Australia emphasised the importance of understanding how separate loans, investments, and interests collectively enhance data accumulation, user engagement, and service bundling, thus discouraging users from leaving core services. The delegate highlighted that platforms present in multiple markets can anticipate and counter potential threats by analysing customer interactions with rivals. Australia, lastly, stressed the need for a holistic, forward-looking approach in investigations, acknowledging that platforms often plan far ahead of regulators.

The **Chair** responded that this argument is similar to what Austria mentioned regarding internal documents. He pondered upon the reasons companies engage in these practices, not just from a theoretical standpoint but from a pragmatic business strategy perspective.

Australia shared the same concern on the drivers of this practice.

The **Chair** added another concern regarding moats, i.e., what the relationship between data collection, privacy, and competition. The ability to extract data and perhaps be more invasive could have commercial roots. It is also important to think how privacy and competition intersect, because in some respects strong privacy rules limiting the collection of the data might diminish the chances to create or undermine the importance of a moat.

Australia agreed with the Chair's comments and highlighted the ACCC report in 2019 touching upon that intersection between privacy and competition and how it can be unraveled. The report also intended to shed light on consumers' awareness of the extensive third-party access to their data.

Next, the **Chair** gave the floor to the **European Union (EU)** for their comments on the subject.

The **EU** highlighted their historical and evolving approach to conglomerate enforcement in exclusionary conduct and merger control. As the delegate is an economist, the central theme of the discussion revolves around the economics of moat building and market entrenchment, emphasising how these strategies are distinct from traditional market power enforcement approaches. The EU began by differentiating the concept of moat building and entrenchment from traditional market power practices. Unlike past enforcement that focused on immediate monopolistic behaviors, current strategies focus on eliminating contestability in the future. This includes not only the active monopolisation of markets but also defensive measures to protect core services or products from future competition. Such strategies, often observed in tech markets, include creating barriers that hinder the entry of new competitors, thereby protecting a company's core monopoly. The strategies also entail a different view on efficiencies because what may be efficient and pro-competitive in the short run from the perspective of contestability, may prove less beneficial in the long term.

Moreover, the speaker mentioned that, economically, moat building involves leveraging complementarities between different products. Companies expand into adjacent markets not merely to monopolise them but to create defensive barriers around their primary market. The delegate used two examples to clarify that. First, in unilateral unilateral conduct, the representative noted that a monopolist with a core service may price aggressively in a complementary product market. This aggressive pricing is driven by the incentive to recapture monopoly profits in the core market. Unlike predatory pricing, this strategy does not involve profit sacrifice but is instead aimed at maintaining dominance in the core market by deterring entry into both the complementary and core markets. The monopolist benefits from elimination of double marginalisation, but the competition benefit to consumers remains limited. Second, in merger control, the EU used the example of two monopolists in complementary markets merging. Traditionally, such mergers were viewed favorably due to the elimination of double marginalisation and perceived efficiencies. However, a modern perspective raises concerns about creating a “fortress” of complementary monopoly products, which can stifle future contestability. Pre-merger, complementary monopolists might have incentives to enter each other's markets or facilitate third-party entry. Yet, post-merger, these incentives diminish, raising skepticism about such mergers.

The EU also described the potential relation between documentary evidence and competition, acknowledging the challenge of demonstrating potential competition in antitrust cases, particularly due to the difficulty of providing concrete documentary evidence. Dominant companies often acquire complementary businesses before having explicit plans to enter those markets, complicating traditional antitrust assessments.

Furthermore, the EU referred to their practical approach regarding striking a balance between potential transactional benefits and consumer harm in relative cases. In practice, EU has adapted its enforcement strategies to address these issues. One approach involves demonstrating short-term consumer harm alongside long-term contestability concerns. This emphasis helps meet legal standards while addressing broader competitive effects. Notable cases include: (a) Adobe/Figma, which focused on potential future competition but also emphasised on immediate innovation competition, (b) Booking/Etraveli, which highlighted future contestability impacts while pointing out expected short-term harm to hotels, (c) the Android case, which addressed both long-term and short-term competitive effects. For the delegate, another approach is using regulatory tools, such as the Digital Markets Act (DMA), which complement traditional antitrust enforcement. The DMA imposes remedies without the lengthy competition law process on digital services generally characterised by

significant scale and network effects that are offered by so-called gatekeepers. Remedies under the DMA often involve behavioural measures akin to vertical separation, addressing issues such as self-preferencing and mergers of complementary products.

The **Chair** thanked the EU and highlighted the limitations of traditional competition frameworks, noting that the focus on horizontal and vertical mergers no longer aligns with modern market challenges. He argued that past assumptions, such as those around predation and pricing, are formalistic and outdated. Today, anti-competitive behavior often involves moat building strategies aimed at eliminating future market contestability rather than immediate price effects. The Chair focused rather on the concern about reducing competition over time than about short-term price increases and gave emphasis to the need to shift focus from price effects and asked the **EU** if conduct limits future market contestability, impacting both core and satellite markets.

The **EU** agreed with the Chair and added that the key point is realising that in dynamic markets there are conglomerate and horizontal issues that act at the same time and the players focus on eliminating direct competition to some monopoly product. Also, for the EU, it is crucial to realise that the debate in the tech market enforcement was misguided, because it mostly referred to raising the rival cost rather than non-price effects. In addition, regarding predation, the EU referred to Prof. Dennis Carlton's paper, which argued that tying can protect monopolies but also that even standard pricing strategies could be anti-competitive. The EU underscored that the core issue is not minor cost adjustments but the broader market dynamics that restrict substantial competition.

Next, the **Chair** thanked both EU. Resuming from a coffee break, the **Chair** opened the floor to delegations and invited **Greece** to resume the discussion.

Greece expressed gratitude for the insightful discussion and presented a complex merger case involving digital platforms. The merger in question involved two platforms, one specialising in online restaurant reservations and the other in online grocery intermediation. The primary concern was the potential for increased entrenchment of market power, not through traditional horizontal or vertical issues, but through conglomerate effects. The authorities observed that the companies planned to use tying and bundling strategies, raising significant concerns about moat building and the entrenchment of market power. To address these concerns, the authorities built their theories of harm around these conglomerate effects, ultimately securing behavioural commitments from the merging parties. These commitments included refraining from tying or bundling their practices for selling groceries online and not combining end-user data sets in ways that could stifle competition.

Moreover, Greece stressed the importance of documentation in supporting theories of harm, noting that companies typically have detailed business plans outlining their strategies for maximising profits, which can provide valuable insights. Greece suggested that more dawn raids could be beneficial in merger control to obtain these business plans and better understand the companies' motivations and potential anti-competitive effects. This approach could help regulators move beyond fitting new cases into traditional theories of harm, allowing them to identify and address novel strategies for entrenching market power, particularly in the digital platform sector.

The **Chair** agreed with the comments made by Greece and confirmed that the way moats are dealt with is different than the past. He then gave the floor to **Brazil**.

Brazil appreciated the insights from the EU, observing a shift in understanding economic moats and entrenchment. Traditionally viewed as structural and strategic barriers to entry, these factors are now seen dynamically, with companies having the capacity to reinforce them. This introduces a new dynamic barrier to entry, unlike traditional ones. However,

Brazil emphasised the need for integrated approaches as current economic tools categorise barriers separately. The delegation acknowledged the challenge of lacking a well-organised economic theory for these new dynamics but stressed the importance of recognising and addressing it as a real issue.

The **Chair** endorsed Brazil's comments and noticed that same concepts are presented differently in different markets. However, there is a noticeable increase in intermediary markets where intermediaries build their power through moat building or other means. Therefore, the Chair pointed out that, given the current theories have not fully evolved, it is imperative to delve into these issues promptly. He gave the floor to **Japan**.

Japan stated that in their contribution document they outlined four key concerns related to practices in sectors such as telecommunications and music copyright, primarily focusing on companies with significant market shares, often related to former monopolies. These practices create substantial barriers to market entry. The Supreme Court has clarified that a distinction must be made between artificial practices that hinder competition and merit-based competition, where transactions are influenced by lawful, competitive practices. The requirement of "artificiality" was established to distinguish between these two forms of competition. Additionally, Japan touched upon a new draft law aimed at addressing challenges in the digital market, where existing competition law investigations are slow in gathering evidence, especially in fast-evolving markets. The mobile telecommunications sector is highlighted for its high barriers to entry, such as network effects, and high costs, which make market recovery difficult. Hence, the new draft law seeks to regulate entities in areas such as mobile operating systems, online app stores, browsers, and search engines. It outlines prohibited behaviors, compliance requirements, and measures in case of violations. The delegate expressed a desire for further opportunities to discuss the matter.

The **Chair** thanked Japan and then gave the floor to **Korea**.

Korea shared two cases of the Korean Fair-Trade Commission (KFTC). The first case involved Kakao Mobility manipulating its taxi-hailing app's algorithm to favor affiliated drivers, thereby expanding its franchise, and limiting competition. The KFTC imposed a fine of €19 million and required remedies for abuse of dominance. The second case concerned Google's abuse of market power by requiring game developers to release games exclusively on Google Play. In this case, Google restricted consumers' choice and the competitors' business activities to entrench its powerful position. The KFTC imposed a substantial fine (€30 million) and remedies to maintain fair business practices and foster a competitive market landscape. For Korea, both cases have implications that the KFTC established fair business practices and created a more competitive landscape through rigorous enforcement against abuse of dominance.

The **Chair** thanked Korea for the presentation of case studies and gave the floor to **Chinese Taipei**.

Chinese Taipei first mentioned that the concepts of economic moats and entrenchment are not explicitly defined in their Competition Act, but their principles are applied in case analyses. Chinese Taipei recognises that these strategies can have both positive and negative competitive effects, necessitating careful case review to distinguish between them. To elaborate, Chinese Taipei brought up two examples; One notable case involved a former government agency that was the sole provider of customer clearance services. After the market was opened to competition, a new entrant faced significant challenges due to the agency's implementation of an unreasonable rebate program and this strategy significantly increased switching costs for users. The competition authority concluded that this behavior violated the Competition Act and penalised the agency accordingly. Another case concerned a state-owned monopolist, the only supplier of aviation fuel. This company

refused to provide price quotations to a new entrant, preventing the entrant from offering competitive pricing to airline companies, thereby not allowing them to compete. The competition authority determined that this refusal constituted an abuse of market power and imposed penalties. For Chinese Taipei, these cases illustrate how economic moats and entrenchment strategies can be used to maintain market power and hinder competition.

Additionally, Chinese Taipei highlighted that economic moats and entrenchment can arise in the form of cartels, illustrated by a cement cartel case, where twenty one local businesses agreed to restrict each other's business activity. The cartel members adopted two main strategies: establishing a joint venture to control distribution channels and engaging in inefficient utilisation of facilities and silos to limit imports. These actions were aimed at integrating domestic manufacturers and preventing foreign competition. The CTFTC evaluates such strategies by considering the intent, market structure, product characteristics, and economic rationality behind the behaviours. However, a significant challenge lies in verifying the subjective motives of businesses, as they often argue that economic moats are essential for survival against powerful international competitors. For the delegate, one potential solution to address these challenges would be to amend the law to shift the burden of proof to the investigative party. However, such a revision would require changes to existing legal traditions in Chinese Taipei.

The **Chair** thanked Chinese Taipei, acknowledging that moat building also applies to cartels, not only monopolies, and gave the floor to the **United States (US)**.

The **US** stated that robust merger enforcement is considered a crucial tool to counter anti-competitive moat building and entrenchment strategies. The recently updated US merger guidelines, finalised in December 2023, incorporate these issues comprehensively. For the delegate, two specific guidelines, Guideline 6 and 9, are particularly notable. First, Guideline 6 addresses mergers that may entrench or extend a dominant position. This guideline marks a significant shift in the US approach to entrenchment, modernising the entrenchment theory of the 1960s. Historically, the entrenchment doctrine focused on concentration, but the 2023 guidelines included the exclusionary effects and stated that agencies can use both qualitative and quantitative evidence to demonstrate that a merger may reinforce an already dominant position, potentially leading to a monopoly. This approach aligns with the broader risk assessment framework outlined in US merger law, which deems a merger illegal if it may substantially lessen competition or tend to create a monopoly. The agencies do not need to predict outcomes with certainty; the more durable the dominant position, the greater the scrutiny. The US delegation also explained that Guideline 6 identifies several ways a merger may entrench or extend a dominant position, mentioning two methods. One method is by raising barriers to entry or competition. This can occur through increasing switching costs, making it harder for customers to move away from the dominant firm's products or services. Another method is depriving rivals of scale economies or network effects. Additionally, mergers can eliminate nascent competitive threats, further entrenching a firm's market power. The US delegation explained that while evaluating these factors, the agencies also consider arguments that a merger might offer pro-competitive benefits. However, it is significant to recognise that short-term benefits might hide long-term harms from entrenching a firm with durable market power. Second, Guideline 9 addresses the unique competitive issues in digital platforms, acknowledging the complexities of these markets. The 2023 guidelines are the first to explicitly recognise the distinctive characteristics of platform markets, such as scale and network effects, gatekeeping, market tipping, etc.. The guidelines describe how agencies scrutinise the potential for mergers to lessen competition in various ways, including competition between platforms, competition to offer products and services on a platform controlled by a merging firm, and competition to displace a digital platform.

The **Chair** thanked the US and invited Australia to present their view.

Australia referred to Warren Buffett's paper's, noting his reputation for insightful writing. Buffett's investment strategies, often marketed as robust commercial tactics, highlight the explicit intention to solidify market dominance. Australia highlighted the challenge competition agencies face in distinguishing between legitimate and illegitimate commercial strategies. From an investor's perspective, the primary goal is profitability, often without concern for the legitimacy of the strategies employed. Advisors to these investors face the critical task of delineating when these strategies cross legal boundaries. Australia proposed that future sessions should explore this distinction further and inquired whether any panel members had thoughts on retraining investigators to address these strategies more effectively.

The **Chair** talked about the growing divergence between traditional competition law theory and modern business practices, highlighting how business school students, unlike law or economics students, grasp these shifts. He shared an experience at Harvard Business School, where an associate dean noted they no longer teach Milton Friedman, as his ideas are no longer considered relevant to contemporary business strategy. The Chair emphasised that rational business strategies have evolved over the past decades. To address this shift, the US is incorporating insights from data scientists, business strategists, divestiture experts, and business school professors into their investigative teams. He then invited further observations from the **EU** on this approach.

The **EU** agreed with the recent updates to US guidelines on entrenchment, drawing attention on the value of dedicating a specific chapter to this issue for two reasons. Firstly, the delegate argued that while some elements like foreclosure and tying are covered in other chapters, firms with significant market power may require a different assessment and the evidentiary burden of proof will be more easily met by an investigating authority. Secondly, strategies in these markets are mutually reinforcing, and addressing them in isolation fails to capture their impact. Moreover, the EU highlighted the importance of considering market realities and the interactions between different business strategies. They noted that market definition should not be overly compartmentalised, as it can obscure the broader competitive landscape. Using the example of airline mergers, the EU illustrated the need to consider network effects rather than focusing narrowly on individual routes, also in tech markets.

The **Chair** agreed with the EU on the separation of entrenchment practices from other points, such as vertical foreclosure etc. In terms of market definition, he considers it a valuable tool which can often misinterpreted. Next, he gave the floor to **Austria**.

Austria endorsed the US guidelines and mentioned that Austrian Competition Law included a particular provision noting that any analysis needs to be close to the market reality. Therefore, Austria is not strictly bound by EU or US guidelines when conducting an assessment.

Next, **Australia** mentioned two complimentary arguments. First, the delegate highlighted the importance to keep an open mind regarding market definition. Second, Australia noted the need to employ technologists and behavioural economists to the data scientists, who would be useful regarding platform markets.

The **Chair** added that it depends on the angle the issue is examined, as a monopolist might be competing in its monopoly market by going to one of the satellites, and then the satellite might be competing in a different market. However, it refers to the same competitive interaction. Next, he invited **Costa Rica**, **Spain**, and **Germany** respectively to take the floor.

Costa Rica discussed a case in the telecommunications sector, focusing on the creation of an economic moat through normative issues that generate specific rights or advantages to certain agents. In Costa Rica, several administrative decisions have favoured the state-owned operator by granting it a significant advantage in holding spectrum over privately owned operators. This has led to market asymmetry, especially relevant in deploying new mobile technologies like the 5G network. The telecom regulator, SUTEL, expressed concerns about potential anti-competitive conduct arising from this imbalance. Specifically, SUTEL warned that an operator with excess unused spectrum could deter competitors from responding effectively to competitive pressures and use this capacity as leverage for anti-competitive practices. This could result in the operator absorbing customers from other providers, thereby weakening future competition. Recently, the state-owned operator has undertaken actions perceived as anti-competitive, leading to a complaint alleging the creation of barriers to the deployment of mobile 5G networks. Article 52 of the General Telecommunications Law outlines legal measures against such practices, including unjustified actions to increase competitors' costs, hinder their production processes, or deliberately obstruct market entry or force exit. In response, SUTEL has initiated an investigation into the state-owned operator's actions to maintain its market advantage. Costa Rica noted that the investigation is currently in its initial stages, and further developments are awaited to determine the outcome.

The **Chair** thanked Costa Rica and gave the floor to **Spain**.

Spain discussed the increasing importance of economic moats and entrenchment strategies in competition assessments. These concepts relate to the market power firms exhibit and their potential harm to competition. The Spanish National Markets and Competition Commission's (CNMC) approach involves careful assessment and enforcement when necessary, leveraging the flexibility of the competition framework to address these challenges. Spain's experience in the intellectual property sector highlights this approach. Collective intellectual property rights management organisations in Spain, such as SGAE, have operated as legal monopolies. In 2019, SGAE was fined €2.9 million for abusing its dominant position by imposing limitations on authors' freedom and bundling audiovisual and musical rights, hindering competitors' entry and growth. Spain noted that CNMC uses Article 2 of the Spanish Competition Act and relevant EU guidelines to assess dominance and abuse. Market shares, barriers to entry, and countervailing buyer power are key factors in this assessment. In the intellectual property sector, barriers to entry arise from network and scale economies, legal barriers, and insufficient countervailing power. While economic moats and entrenchment strategies are more prominent in digital markets, Spain mentioned that its existing framework is flexible enough to address these issues effectively, even if not explicitly mentioned in the law or cases.

The **Chair** thanked Spain and gave the floor to **Germany**.

Germany highlighted their comprehensive approach to addressing the unique challenges posed by digital markets. This strategy comprises three main components. The first element refers to casework. Germany has actively pursued significant cases, such as the 2013 Amazon case in collaboration with Austria, focusing on understanding the novel intermediation power held by Amazon in the digital marketplace. The second component is related to policy integration. By creating a think tank that merges casework with general policy considerations, Germany has fostered the development of new concepts. The German Authority has liaised with France and the Australian Competition and Consumer Commission's (ACCC) on platform regulation. The third element refers to legislative adaptation, where Germany has worked closely with its legislature and government to update laws in response to digital market realities. Notable legal advancements include the introduction of a transaction value threshold, in cooperation with Austria, legal recognition

of digital markets where money payments are not involved, and the implementation of Section 19A in 2021, which addresses structural decisions and specific business behaviours. Concerning Section 19A, Germany mentioned that the provision identifies companies with significant market influence, considering factors like financial strength and data access. It also describes specific anti-competitive behaviours associated with dominant business models. This section has facilitated rapid designation decisions against major tech companies, including Meta, Google, Amazon, and Apple, within 18 months. Despite challenges from some companies, like Amazon, Germany's Supreme Court upheld these decisions, confirming the constitutionality of Section 19A. Germany continues to pursue conduct-related cases against companies like Microsoft and Google, addressing issues like Google Maps platform and Google Automotive Services.

The **Chair** thanked Germany for their intervention and invited the **United Kingdom (UK)** to share their views.

The **UK** provided an overview of the Digital Markets Competition and Consumers Act (DMCCA), which received Royal Assent on May 24, 2024. This Act introduces significant reforms to the UK competition and consumer law, with a specific focus on the Digital Markets Unit (DMU), which operates the new pro-competition regime, the details of which are established by the DMCCA. The entry point to this regime is the strategic markets test, which determines whether a firm has strategic market status (SMS) in a digital activity linked to the UK. To qualify, a firm must have a substantial and entrenched market position and a position of strategic significance. While the Act does not explicitly define "entrenched," the Competition and Markets Authority (CMA) has published draft guidance clarifying its interpretation. The delegate clarified that according to this guidance, "substantial" refers to the extent of market power, and "entrenched" pertains to the persistence of that market power, ensuring it is not transient. This interpretation of "entrenched" differs from the OECD's definition discussed in the roundtable, which distinguishes between inherent factors and results of firm actions as sources of market power. However, the CMA's interpretation does not make this distinction, although it acknowledges that both sources have been relevant in various CMA cases. Lastly, The DMCCA outlines four conditions to determine a firm's strategic significance: achieving significant size or scale in the digital activity, the use of the digital activity by a significant number of other firms, the ability to extend market power to other activities, and the ability to influence how other firms conduct themselves in the digital activity.

If a firm meets the SMS test, it is designated for five years, subject to reassessment. The CMA can impose two categories of remedies: conduct requirements (CRs) and pro-competitive interventions (PCIs). Additionally, the firm will be subject to the SMS merger regime. CRs are intended to address existing issues and prevent the firm from exploiting its substantial and entrenched market position to the detriment of consumers and competition. Examples of CRs include obligations to trade on fair and reasonable terms and preventing restrictions on interoperability with other services. PCIs require a PCI investigation, which the CMA conducts to determine if a factor or combination of factors related to a digital activity adversely affects competition. If such an adverse effect is found, a PCI can be introduced to remedy it.

The **Chair** thanked the UK and concluded the roundtable.