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Working Party No. 3 on Co-operation and Enforcement

**Executive Summary of the Roundtable on Monopolisation, Moat building and
Entrenchment Strategies**

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

11 June 2024

This Executive Summary by the OECD Secretariat contains the key findings from the roundtable on Executive Summary of the Roundtable on Monopolisation, Moat building and Entrenchment Strategies held during the 139th meeting of the Working Party 3 on 11 June 2024.

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Executive Summary of the Roundtable on Monopolisation, Moat building and Entrenchment Strategies

By the Secretariat¹

On 11 June 2024, Working Party No. 3 on Co-operation and Enforcement held a roundtable on Monopolisation, Moat Building and Entrenchment Strategies.

Taking into account the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by the expert panellists, the following key points emerged:

1. The relationship between moats, entrenchment, and market power is complex, notably in digital markets. Both economic moats and entrenchment strategies may contribute to achieving, increasing and maintaining a firm's market power.

The relationship between economic moats, entrenchment, and market power is complex. Both economic moats and entrenchment may contribute to increasing and maintaining a firm's market power but in a different and complementary way. Firms operating in markets with wide and deep economic moats and firms engaging in entrenchment strategies seem to be more prone to achieve and maintain over time substantial market power in the market and become the dominant player.

This trend appears even more prominent in digital markets but is not exclusive to them. Online platforms may differ from the more traditional markets in several ways and some of the characteristics of the digital sector, including *inter alia* network effects, multi-sided markets, data accumulation, and development of new ecosystems, may make moats and entrenchment strategies more successful.

2. Moats and entrenchment may blur further the lines between lawful and unlawful practices. In this context, it is important to distinguish the activities which are justifiable, and part of a legitimate business model as opposed to those which may unduly hinder the competitive market conditions.

Economic moats and entrenchment strategies add complexity in the assessment of market power when determining whether a firm is dominant and risk blurring further the lines between lawful and unlawful practices.

Economic moats and entrenchment can in many instances be considered legitimate business strategies, which may be beneficial for businesses, investors and consumers resulting in higher quality and innovative products, better services and lower prices for consumers. However, in some circumstances, they may reduce the degree of competition if built and maintained through anticompetitive practices leading to consumer harm. Drawing the boundaries between firms' successful strategies and those which may become anticompetitive remains complex to assess and potential enforcement challenges, both in the unilateral and merger context, cannot be excluded when analysing these situations, potentially leading to a significant uncertainty.

The analysis of competition authorities therefore may not just rely on traditional enforcement tools, which may be insufficient to address these issues effectively, but follow a more dynamic approach to investigate market concentration and abusive behaviour. This

¹ This Executive Summary does not necessarily represent the consensus view of the Working Party. It does, however, encapsulate key points from the discussion.

will allow, for example, to better understand how structural economic moats are (i) embedded in the firm's business model, (ii) sustained over time by entrenchment, (iii) influenced by the market characteristics, (iv) the result of a superior product or technology or leading to anticompetitive conduct.

3. Internal documents play a crucial role for competition authorities to prove the strategy behind a firm's behaviour related to structural competition issues.

When analysing a firm's dominance and/or its practices, the assessment of economic moats by competition authorities may be based on qualitative and quantitative evidence.

Qualitative evidence to determine the firm's potential advantages over its competitors should include the analysis of internal documents. Having access to internal documents of a firm may be the most effective way to respond to its defence against a theory of harm. This will help, for example, analysing the firm's business model, its main activities and products/services involved as well as the overall business strategy and relevant moat sources. Internal documents may ultimately serve as proof of a firm's anticompetitive plan or strategy.

4. Incentivising the use of investigative and regulatory tools as well as adjusting antitrust analysis may be relevant for competition authorities to address potential challenges related to moats and entrenchment.

When economic moats and entrenchment strategies are maintained in the long-term through anticompetitive practices, namely as part of a dominant firm's strategy to leverage and maintain market power, they are likely to be anticompetitive leading to exclusionary and discriminatory practices both in the unilateral conduct and merger context. Competition authorities may need to adapt their assessment while considering these potential new concepts and strategies.

Structural issues resulting from economic moats may be addressed either by encouraging the use of investigative tools, including for example market studies and market investigations or by resorting to regulatory tools such as sector-specific regulations. A firm's behaviour associated with the concept of entrenchment may instead potentially be investigated and addressed by adjusting the current enforcement tools.

Adjusting antitrust analysis to a more forward-looking and innovative approach, while gaining insights of future market dynamics, may prove to be relevant to tackle modern market challenges, including analysing the strengths and durability of certain strategic behaviours, leading to entrenchment - i.e. a firm's dominance persisting over time and unlikely to be challenged in the short term by existing and potential rivals.

While mitigating the risk of reducing legal certainty, antitrust enforcement and policy may therefore need to focus more on the enforcement of a long-term impact on markets and consumers while keeping pace with global markets evolution. This may include also a slightly different view on efficiencies as what may be pro-competitive in the short run may be not the case in the future.