



CPI EU News Presents:

OECD Roundtable Quadriptych

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By Caroline P. Boisvert (Axinn, Veltrop & Harkrider)

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*By Caroline P. Boisvert**
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On December 2, the Organization for Economic Cooperation and Development's ("OECD") competition committee held a roundtable on the role of competition policy in promoting economic recovery, with a focus on the COVID-19 pandemic. While the roundtable was a closed-door, off-the-record event, the country submissions and speaker presentations are publicly available on the OECD's website.¹ Below are highlights from submissions by various countries and the Business and Industry Advisory Committee to the OECD (BIAC at OECD).

Background - Competition Authorities' Role in Economic Recovery

After a year of government measures in response to the COVID-19 crisis, the roundtable focused on how "competition policy and competition authorities [can] contribute to a faster and more sustained economic recovery."² As articulated by the secretariat's background note, competition authorities' "expertise in how markets function and the key role of competition in ensuring conditions for economic growth and recovery make them privileged stakeholders in a wider policy context."³

Perhaps reflecting COVID-19's disparate health and economic impact across countries, participants' submissions reveal that they undertook a wide range of initiatives aimed at mitigating the impact of the crisis. As but a few examples, participating countries and their competition authorities have: advocated for the prioritized development of ultra-broadband telecommunications infrastructure,⁴ advocated for state intervention in the aviation sector to mitigate its significant financial losses,⁵ and provided technical guidance to local policymakers on assessing the impact of their competition decisions.⁶ This article focuses on three types of initiatives undertaken by multiple participants: (1) issuance of guidance for recovery-related collaborations, (2) increased vigilance around exploitative pricing and related unlawful conduct, and (3) analysis of whether existing merger standards ought to be relaxed in times of economic crisis.

Recovery-Related Collaborations

Seeking to ensure the continued provision of essential goods and services and encourage innovation in response to the COVID-19 crisis, several competition authorities have issued guidance on recovery-related collaborations between competitors. The secretariat's background note identifies that permissible collaborations generally have three common key criteria: "i) the necessity and indispensability of . . . address[ing] a specific market disruption due to the Covid-19 crisis; ii) a positive impact of the co-operation on consumers; and iii) a strict time limit."⁷

The U.S. submission focuses on the March 2020 joint statement from the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), which committed to account for exigent circumstances and provide expedited antitrust guidance for collaborations related to COVID-19.⁸ Since March 2020, the DOJ has approved four COVID-related collaborations through their expedited business review process – three related to the manufacture and distribution of personal protective equipment and/or medication, and a fourth related to the production of pork.⁹ Of particular note, the DOJ permitted various pharmaceutical companies to "exchange limited information

about the manufacture of monoclonal antibodies that may be developed to treat COVID-19” in order to expedite innovation in vaccine production.¹⁰

Italy’s competition authority issued a similar statement in April 2020, announcing that it “d[id] not intend to oppose any necessary, temporary and proportionate measures taken to avoid shortages of supply.”¹¹ Since then, Italy’s competition authority has provided guidance in two instances. First, it declined to oppose a cooperative agreement between two pharmaceutical distributors for the joint purchasing and distribution to pharmacies of disposable surgical masks.¹² Second, it declined to investigate a common scheme among financial providers of consumer loans to defer customers’ main loan terms for a limited time period.¹³ In both instances, the authority concluded that the “exceptional health emergency” permitted such collaborations for a limited duration.

The European Commission similarly adopted a temporary framework for addressing antitrust issues in projects aimed at addressing the shortage of essential products and services during the COVID-19 crisis.¹⁴ The framework contemplates the issuance of “ad hoc written comfort” letters for specific projects. The Commission’s only letter to date favorably assessed a cooperation between pharmaceutical manufacturers to combat the shortage of critical medications for the treatment of COVID-19.¹⁵

Declining to interfere with such collaborations illustrates how competition authorities can exercise discretion in their enforcement powers to address the issues arising from an economic shock. But, as the secretariat’s background note cautions, while such collaborations help prevent supply chain disruptions and encourage critical innovation, “[s]ectors where co-operation between competitors arose as a response to the crisis should be made the target of stricter scrutiny as soon as circumstances change.”¹⁶

Vigilance Around Exploitative Pricing and Related Unlawful Conduct

Participants across the board showed increased sensitivity to exploitative pricing and other unlawful conduct arising from the COVID-19 economic environment. But, as the secretariat’s background note acknowledges, “[d]istinguishing legitimate from illegitimate pricing practices, as well as how best to deal with the latter, has created substantial challenges for competition authorities.”¹⁷ As a result, the roundtable submissions reflect various approaches.

In the U.S., the DOJ created a COVID-19 Hoarding and Price Gouging Task Force. While the U.S. (unlike, for example, the EU) does not regulate pricing or prohibit exploitative abuses, the Task Force “is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities.”¹⁸ Since its creation, the Task Force has aided the investigation of a range of conduct, including the sale of personal protective equipment (“PPE”) at exorbitant prices, fraudulent attempts by individuals to sell PPE they did not possess and had no means to acquire, and foreign countries’ shipment to the U.S. of misbranded and defective PPE.¹⁹

By contrast, rather than exercising purely legal authority, Italy’s initial response to crisis-related abusive conduct relied upon “a form of moral suasion.”²⁰ Specifically,

Italy's competition authority requested information on price spikes in the food and health sectors and announced the changes with a press release, which often prompted corrective action. For example, a press release about various laboratories' prices for antibody tests caused the laboratories to significantly reduce those prices, in some cases by nearly 70 percent.²¹ In another effort to prevent abusive conduct through increased transparency, Italy's competition authority also requested grocery retailers to report on the trend of prices for "basic groceries, detergents, disinfectants and gloves."²² Such reporting helped the authority distinguish legitimate price increases from those that caused concern.

With respect to other types of unlawful conduct, Canada's submission highlighted its Competition Bureau's issuance of warning letters to businesses which "sought to benefit from the fear and misinformation surrounding COVID-19 by selling products that allegedly prevented, treated or cured the disease."²³ In the United States, too, the FTC and the Food and Drug Administration have issued over 90 joint warning letters to companies marketing products as COVID-19 treatments or cures.²⁴

Assessment of Existing Merger Standards

Finally, participants' submissions reflect that many have reassessed whether existing merger standards – in particular, the failing firm defense – ought to be loosened in light of the COVID-19 crisis. The failing firm defense allows for approval of an otherwise anticompetitive merger if certain criteria are met, including that the acquired firm is in danger of failing and exiting the market altogether. Though the possibility that more businesses will fail as a result of the COVID-19 crisis has provoked a second look at the defense, the consensus is that rigorous enforcement of existing merger standards remains the securest path towards economic recovery.

For some historical context, similar discussions arose in 2008 and 2009, stemming from the notion that relaxed standards might help businesses better weather the then-ongoing financial crisis. At that time, participants in an OECD roundtable on the failing firm defense concluded that its "criteria should not be relaxed in times of crisis."²⁵ The secretariat's current background note reaffirms this conclusion, noting that past crises suggest that that suspension of antitrust laws holds back recovery and that relaxed merger control does not improve long-term resilience.²⁶

The roundtable participants tend to agree. For example, the U.S. submission states that the DOJ and FTC's "view of key U.S. antitrust standards has not changed."²⁷ With respect to the failing firm defense in particular, the agencies assert that they continue to apply the same test and to "require the same level of substantiation as was required before the COVID pandemic."²⁸ The EU submission takes a similar view, noting that "the crisis cannot and should not serve as a pretext for approving mergers that would hurt consumers and hold back recovery."²⁹ The positions taken by the U.S., the EU, and others reflect concerns that relaxing merger control based on economic uncertainty, standing alone, would set a challenging precedent and distort competition law in the long-term.

As a counterpoint, the OECD's BIAC, which represents a network of companies across the globe, took a more flexible view. The BIAC submission suggests that the defense "may justifiably be partially relaxed" by, for example, "specifically allow[ing] competition agencies to take imminent job losses into account."³⁰ Nevertheless, it seems unlikely that countries will change their views in response to this recommendation from the business community.

Conclusion

Despite the arrival of a COVID-19 vaccine, rising case numbers and new lockdowns have left many countries and their competition agencies in the emergency phase of pandemic management. Understandably, then, most country submissions to this roundtable focused on short-term, immediate measures to lessen the most disruptive economic impacts of the crisis – a necessary first step. But the true test of competition policy's role in promoting economic recovery is still to come, when, in the recovery phase, "the focus [will turn to] building back the economies in a speedy and sustainable manner."³¹

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¹ See The Role of Competition Policy in Promoting Economic Recovery, OECD, <https://www.oecd.org/daf/competition/role-of-competition-policy-in-promoting-economic-recovery.htm>.

² Note by the Secretariat, The Role of Competition Policy in Promoting Economic Recovery – Background Note, at 2, DAF/COMP(2020)6, [https://one.oecd.org/document/DAF/COMP\(2020\)6/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)6/en/pdf).

³ *Id.* ¶ 44.

⁴ See Note by Italy, The Role of Competition Policy in Promoting Economic Recovery, ¶¶ 29–31, DAF/COMP/WD(2020)78, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)78/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)78/en/pdf).

⁵ See Note by Egypt, The Role of Competition Policy in Promoting Economic Recovery, ¶¶ 20–23, DAF/COMP/WD(2020)85, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)85/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)85/en/pdf).

⁶ See Note by Canada, The Role of Competition Policy in Promoting Economic Recovery, ¶ 12, DAF/COMP/WD(2020)76, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)76/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)76/en/pdf).

⁷ Note by the Secretariat ¶ 134.

⁸ Note by the United States, The Role of Competition Policy in Promoting Economic Recovery, ¶ 27, DAF/COMP/WD(2020)82, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)82/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)82/en/pdf); see also U.S. Dep't of Justice & Fed. Trade Comm'n, *Joint Antitrust Statement Regarding COVID-19* (Mar. 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.

⁹ Note by the United States ¶ 28.

¹⁰ *Id.*

¹¹ See Communication from the Autorita Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency (Apr. 24, 2020), <https://en.agcm.it/dotcmsdoc/pressrelease/AGCM%20Communication%20on%20Cooperation%20in%20time%20of%20Covid-19.pdf> (non-official English version).

¹² Note by Italy ¶ 12.

¹³ *Id.* ¶ 13.

¹⁴ See Communication from the Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, 2020/C 116 I/02, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408\(04\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=en).

¹⁵ Note by the European Union, The Role of Competition Policy in Promoting Economic Recovery, ¶ 12 n.9, DAF/COMP/WD(2020)83, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)83/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)83/en/pdf); see also Letter from European Commission, Director-General (Apr. 8, 2020), https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf.

¹⁶ Note by the Secretariat ¶ 126.

¹⁷ *Id.* ¶ 120.

¹⁸ Note by the United States ¶ 5, see also Office of the Att'y Gen., Memorandum for All Heads of Department Components and Law Enforcement Agencies (Mar. 24, 2020), <https://www.justice.gov/file/1262776/download>.

¹⁹ See Craig Carpenito & Nicholas Grippo, *An Inside Look at DOJ Fight Against COVID-19 Price-Gouging*, Law360 (June 24, 2020), <https://www.law360.com/articles/1285498/an-inside-look-at-doj-fight-against-covid-19-price-gouging>.

²⁰ Note by Italy ¶ 17.

²¹ *Id.*

²² *Id.* ¶ 18.

²³ Note by Canada ¶ 8 n.7.

²⁴ Note by the United States ¶ 13.

²⁵ Executive Summary by the Secretariat, The Failing Firm Defence ¶ 5, DAF/COMP(2009)38, <https://www.oecd.org/competition/mergers/45810821.pdf>.

²⁶ See Note by the Secretariat ¶¶ 18–38.

²⁷ Note by the United States ¶ 20.

²⁸ *Id.* ¶ 21.

²⁹ Note by the European Union ¶ 18.

³⁰ Note by the Business and Industry Advisory Committee to the OECD, The Role of Competition Policy in Promoting Economic Recovery, ¶¶ 15, 17, DAF/COMP/WD(2020)88, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)88/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)88/en/pdf).

³¹ Note by the Secretariat ¶ 8.



CPI EU News Presents:

Highlights from the OECD Forum on Competition, Day One

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As governments around the world contemplate calls for fundamental reforms to competition policy, the OECD Global Forum on Competition convened virtually to exchange views and ideas on December 7, 2020. The four-day event began with a keynote address and panel titled “Competition Policy: Time for a Reset?” moderated by OECD Competition Committee Chairman Frédéric Jenny.

Discussion revolved around whether public interest goals should be added to prevailing competition standards and how best to address the unique issues presented by digital platforms, among other topics.

Problems with “Public Interest” Goals in Competition Law

Much of the panel discussion focused on whether the consumer welfare standard (“CWS”) should be replaced with a standard looking beyond effects on competition to reflect other public interest goals such as employment. With one exception, the panelists generally expressed skepticism and/or concern towards the idea of incorporating public interest goals into competition policy.

Keynote speaker Margrethe Vestager, executive vice president of the European Commission’s “A Europe Fit for the Digital Age” task force, was first to address the question of whether it is “time for a reset” in competition policy. “The answer very much depends on what you mean by a ‘reset,’” she said. “If we are asking if it’s time to change the aims of competition policy,” as advocates for a public interest standard have argued, “the answer has to be no,” she said. “Quite the contrary, it’s more important than ever that we take effective action to keep competition working the way it should.”

This view was echoed by U.S. Federal Trade Commissioner Christine Wilson, who said that she “remain[s] confident that competition is the best way to achieve the best results for consumers, and that antitrust law informed by economic analysis is the best way to achieve the most good for the greatest number.”

Panelists generally agreed that many public interest goals are better served through other policy tools. People often “lose sight of the fact that [competition law] is one tool in a broader toolkit that really does include a variety of levers that we can use to address larger public policy problems,” said Diana Moss, president of the American Antitrust Institute.

South Africa’s Approach - Chairman Jenny observed that the presence of public interest goals in some countries’ laws may reflect differences in the value placed on competition. On one hand, there are jurisdictions such as the United States and European Union, “where there is enough support for competition as a value to society.” On the other, there are certain developing countries, often with higher unemployment, “where it is not so evident to people that competition is a good thing, and where the only way to actually promote competition is, in fact, to have some public interest goal in the law.”

Panelist Thando Vilakazi offered views from South Africa, a country falling into the latter category that has long integrated public interest considerations into its

competition law.² In that region, the question is not whether such goals should be included but whether they should be broader and whether they are performing as intended, said Vilakazi, the executive director of the Centre for Competition, Regulation, and Economic Development at the University of Johannesburg. In South Africa, current law provides for consideration of a merger's effects on "(a) a particular sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (d) the ability of national industries to compete in international markets."³

While South Africa has published guidelines describing the process for consideration of these goals, they do not indicate the weight to be given to each factor or how conflicts between the various policy goals will be resolved.⁴

Transparency & Accountability - Incorporation of public interest goals, as done in South Africa, "puts a premium on the clarity with which policymakers are willing to describe what they've done and not hide tradeoffs they're making," said Bill Kovacic, professor at George Washington University. This is "a degree of transparency that is hard to achieve in practice" because "the tradeoffs are so hard that there is an enormous temptation to mask them." Under such standards, regulators "owe it to the public" to do as they would on a math exam and "show their work."

The addition of public interest goals posed similar concerns for Damien Neven, an Economics Professor at the Graduate Institute of International and Development Studies in Geneva and Senior Academic Advisor for Compass Lexecon. "If you have multiple objectives," he explained, "at the end of the day it is difficult to reach a decision for which the agencies can be accountable," and there is greater risk and scope of regulatory "capture."

Because antitrust enforcement "is law enforcement," it is "an evidence-based investigatory process and subject to judicial review," explained Moss. As such, "concepts of standards and administrability do play in a very important way." There is also a "danger" of replicating public interest standards already in place for regulated industries at other agencies, Moss said. Speaking from her experience as an industrial policy regulator at the Federal Energy Regulatory Commission, Moss said she and her colleagues there "struggled with [the] public interest standard at FERC."

Advantages of the CWS - Panelists identified a range of advantages to the prevailing CWS. "Precisely because it is tethered to economic principles," Commissioner Wilson explained, the CWS "provides predictability to market actors, administrability to the courts, and credibility to the decisions made by competition enforcers." These elements are necessary for competition law to have legitimacy and buy-in from stakeholders and citizens, she said. By contrast, a public interest approach would require enforcers to engage in an "unavoidably political calculus on who to serve" and "greatly increase subjectivity and uncertainty," she said.

As a standard for protecting competition, Moss observed that the CWS "is far more competent in addressing issues than it has been given credit for," noting that it "rightly focuses on the impact of anticompetitive mergers or conduct on market participants adversely affected by exercises of market power." This focus on the participants

affected, she said, enables the CWS to address (1) harm at any level in a supply chain, (2) both short-term static and longer-term dynamic effects, and (3) effects on non-price dimensions” such as quality and new products, she said. It also inherently accounts for the ability of consumers to discipline exercises of market power through consideration of barriers to entry/expansion and other competitive constraints, she said.

Dealing with Digital Platforms

The panel discussed several proposals under consideration in the U.S. and Europe that aim to address digital markets in particular.

Europe - The European Union is considering an approach that would designate specific digital platforms for additional regulation.⁵ These firms would be subject to a list of prohibited conduct (e.g. self-preferencing) and set of obligations to guarantee market contestability, which could include such requirements as data sharing, interoperability, and access to key inputs.

There is a risk with this proposal “of basically only allowing innovation by small firms and basically preventing large firms from innovating,” Neven said. The proposal would create “very strong presumptions about what large platforms can do and other platforms cannot do.” These presumptions should be informed by “stable economic theory, enforcement experience, and empirical evidence” that are not yet fully available.

Commissioner Wilson expressed skepticism about the economics underlying the potential obligations. “Economics teaches us that if you force companies to share certain assets with competitors, innovation and investment in those assets will decline.” This means that some proposals “may sound ‘fairer’ in how they would divide the pie, but they actually result in a smaller pie for policy makers to divide.”

United States - The U.S. panelists took a range of views on the idea of digital-specific antitrust legislation, which has been suggested in a recent report by select members of Congress. Moss suggested that further thought must be given “to the advent of the ecosystem business model,” which is “very unique” and gives rise to concerns about leveraging consumer data across platforms and about data and analytics “as assets.”

Commissioner Wilson disagreed, stating that antitrust laws in the United States “are broad enough to take into account the digital sector as it exists and will exist in the future,” and authorities have been grappling with these issues since the D.C. Circuit’s *Microsoft* case from the 1990s. Kovacic echoed that U.S. officials “have been so attuned to high tech innovation” for many years. “The notion that they were blind to these considerations is such a myth.”

Conclusion

Returning to the overarching question posed to the panel - whether it is “time for a reset” in competition policy - the answer was largely in the negative. While speakers differed in their views on how competition policy could be improved, there was significant skepticism about overhauling its goals or approach.

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² For example, South Africa's Competition Tribunal imposed conditions on a 2011 merger between Walmart and Massmart despite a lack of competitive overlap due to public interest concerns related to employment. See generally Mark Griffiths & Wiri Gumbie, *The Public Interest Test in the South African Merger Control Regime*, 3 J. ANTITRUST ENFORC. 408, 409-11 (Oct. 2015), <https://doi.org/10.1093/jaenfo/jnv001>.

³ Guidelines on the Assessment of Public Interest Provisions in Merger Regulation Under the Competition Act No. 89 of 1998 (May 31, 2016), <http://www.compcom.co.za/wp-content/uploads/2017/11/Gov-Gazette-Public-Interest-Guidelines.pdf>.

⁴ *Id.*

⁵ See generally Kati Suominen, *On the Rise: Europe's Competition Policy Challenges to Technology Companies*, CENTER FOR STRATEGIC & INT'L STUDIES, Oct. 26, 2020, <https://www.csis.org/analysis/rise-europes-competition-policy-challenges-technology-companies>.



CPI EU News Presents:

Highlights from the OECD's November 2020 Roundtable on Competition in Digital Advertising Markets

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Over the past decade competition enforcers across the globe have investigated various aspects of “digital” or “online” advertising. The Organization for Economic Co-operation and Development Competition Committee’s (“OECD’s”) “roundtable on competition in digital advertising markets” suggests enforcers’ interest in the digital advertising sector may continue, if not intensify, in the coming years. At the November 30 virtual roundtable, enforcers, academics, and representatives from the business community gathered virtually to exchange learnings from the past few years and set out an agenda for future market studies and legislative changes.

While the roundtable was an off-the-record meeting, the OECD has published OECD-member country submissions (“Notes”), an extensive OECD briefing document (the “Brief”), and remarks to the Committee by Hal Varian, David S. Evans, and Fiona M. Scott Morton.² A notable absence is the lack of a submission from the United States.

In this article I draw out some of the key themes from the roundtable material.

Market Studies, Enforcement Actions, and Regulatory Initiatives

The country submissions offer a helpful retrospective on major market studies and enforcement actions of the past decade. The Australian Note summarizes the Australian Competition and Consumer Commission’s (“ACCC”) recent Digital Platforms Inquiry and the ongoing Digital Advertising Services Inquiry. The French Note summarizes the 2010 and 2018 *Autorité de la Concurrence* inquiries into digital advertising, and a variety of decisions imposing interim measures, fines, and commitments in the search advertising sector. The UK Note discusses the 2020 Final Report from the Competition and Markets Authority’s (“CMA”) online platforms and digital advertising market study. And the Japanese Note raises the JFTC’s 2019 Report regarding trade practices on digital platforms.

Some Notes discuss existing or planned specialized competition “units” to oversee digital advertising and other digital sectors. The Australian Note provides an overview of the ACCC’s newly established digital platforms branch, charged with monitoring competition in digital platform markets and taking competition enforcement action.³ The French Note mentions the new digital economy unit in the *Autorité*, established in early 2020.⁴

The UK Note calls for the creation of a broader “Digital Markets Unit” within the CMA to oversee a new “pro-competitive ex ante regulatory regime” for the digital advertising sector, including an enforceable code of conduct to govern the behavior of platforms with “strategic market status” and a set of “pro-competitive interventions” including data access and interoperability remedies.⁵ The UK submission views the new Unit as a necessary response to perceived gaps in competition law.

The Spanish Note finds that “competition policy offers a flexible framework to adapt to complex industries such as online advertising” but agrees that “perhaps more and better resources are needed (in specialized units) to deal with the complexity of digital markets.”⁶

Other country submissions discuss the need for new enforcement powers. The French Note highlighted the importance of the *Autorité*'s power to issue interim measures (injunctions), and forthcoming legislative enactments that will allow the *Autorité* to "to start proceedings *ex officio* when it deems interim measures to be necessary in a given market, without having to wait for a referral by third parties," as is currently required.⁷

The *Autorité* has also made "proposals for possible adjustments to its means of intervention in order to address the challenges and specificities of the digital economy,"⁸ which call for "implementing a prevention and sanction system specifically for [large digital platform] players."⁹

Like the French Note, the Korean submission previews legislation by which the KFTC "has strengthened investigations and monitoring on infringements by online platform operators, while pushing ahead with institutional improvement including revision of laws and regulations to promote competition and establish order for fair trade in the field."¹⁰

The Spanish Note calls for additional scrutiny of mergers in "data-intensive digital services" to identify harms to competition "even if apparently they are not involving potential competitors."¹¹ The submission concludes that "apart from merger control, antitrust tools can adapt to theories of harm related to potential concerns in online advertising markets,"¹² but leaves the door open for "some type of regulation" around issues like data portability and interoperability, and transparency.¹³

The OECD Brief cautions that the proposed legislative and regulatory responses could have harmful unintended consequences, warning that "it will be important to consider any possible unintended consequences, such as undermining procompetitive digital business models that rely on digital advertising as a main or significant source of revenue."¹⁴

While these Notes do refer to more extensive comments made in market studies and issue papers, they lack an extensive discussion of error costs, administrability, and the risk of chilling procompetitive conduct.¹⁵ An exception is the Note by Spain, which states: "If regulation were to be enacted to overcome some of the challenges raised by digitization and, specifically, by online advertising, it is crucial that it is well-designed in order to avoid unintended effects on competition."¹⁶

The OECD Brief also suggests "[i]t will also be important to ensure that related policy experts, such as from data protection and privacy agencies, and consumer protection agencies, are involved to ensure there are no unintended consequences in these adjacent policy spheres."¹⁷ The call to align competition and data privacy initiatives is echoed by the OECD-member countries.¹⁸

The Structure of the Digital Advertising Sector and Attempts to Define Relevant Markets

Various member countries recognize digital advertising as an innovative sector. Business at OECD¹⁹ finds that "[a] common feature of digital media markets, including online

advertising, is that they bring fast and potentially disruptive innovation, are characterized by an impressive growth rate as well as by the presence of digital platform intermediaries that have a central role. Online advertising is able to compete with traditional advertising because it has generated unprecedented advantages for businesses and end consumer[s] alike.”²⁰

The French Note states that the display advertising sector “is developing within a powerful technological dynamic” and “[m]any intermediation and data processing service providers have entered the market.”²¹ The Spanish Note states “[d]igital advertising has been, in general, a positive disruption, increasing the efficiency of campaigns and bringing new innovations.”²²

These views find support in other expert analyses, such as the 2020 ACCC submission by Daniel S. Bitton and Stephen Lewis, *Clearing Up Misperceptions About Google’s Ad Tech Business*. Bitton & Lewis review industry data and conclude that “the ad tech space displays two key features of a highly competitive space: growing output and declining prices.”²³

Country submissions also suggest a taxonomy for digital advertising inventory (ad slots on different types of websites and apps). The United Kingdom, Australian, Mexican, and French Notes divide advertising into offline and digital,²⁴ and further divide digital advertising into search, display, and classified advertising, suggesting limited substitutability between the three.²⁵ The UK Note, for example, suggests search and display advertising serve different purposes: search advertising is “aimed at driving consumers to take a particular action” while display advertising is intended for “raising brand awareness and shifting brand perceptions.”²⁶

Catherine Tucker, whose work is quoted extensively in the Business at OECD Note, explains the key determinant is neither the type of format nor the objective of an advertisement, but the advertiser’s measured return on ad spend:

“In the past, advertisers believed that in the upper funnel, because they were competing against clutter, they needed to use storytelling and highly visual formats to gain attention. . . . However, this rule has been replaced by measurement, meaning that advertisers can effectively use any format at any place in the funnel and evaluate whether it is effective for that particular target audience. Ultimately, an advertiser is indifferent between whether it is a video ad, or a static text-laden ad that influences a customer to purchase as long as they can measure how effective that format was relative to its price.”²⁷

The ability to “target” advertising and measure its effectiveness is discussed at length in the country submissions.²⁸ But the Notes largely omit arguments about how targeting and measurement can blur the so-called “marketing funnel.” Targeting could be used in display advertising to elicit an action from the user, such as with “remarketing” advertising, or search advertising could be used for brand awareness, especially when a user’s search query does not suggest commercial intent (i.e., the user is not using search to make a purchase). As the UK Note acknowledges, the CMA has seen “some evidence that display advertising, particularly on Facebook, is increasingly being used for targeting in-market conversions.”²⁹

The French Note also acknowledges that while digital advertising's innovations in targeting and pricing distinguish it from traditional advertising, like television, "this observation could change in the future depending on the development of targeted and programmatic television advertising."³⁰

To varying degrees UK, Australian, and French Notes use the taxonomy for digital advertising inventory to suggest separate relevant markets for display and search advertising.³¹ With the exception of certain adjudicated enforcement actions, the member countries explain that these statements are not intended to provide binding conclusions about relevant market definitions.³² For example, The UK Note states clearly that the CMA market study "did not seek to undertake a formal market definition exercise."³³

In his remarks to the roundtable, David S. Evans cautions against drawing binding conclusions about market definition from market studies: "Market definition is very much tied to whatever it is the conduct is that we are trying to analyze Trying to make an overarching determination now as part of a market inquiry sort of approach . . . I'm not sure aside from providing general information that that's really a great thing to do."³⁴

Business at OECD encourages competition enforcers "to undertake any analysis of online advertising markets with precision to ensure that conclusions are robust and directed at identifiable competition violations, and that remedies are appropriate to address the competition violation at hand [and] to the extent that regulation (rather than enforcement) is considered on the basis of competition concerns, precision in identifying the underlying competition problems is both a necessary precursor and an essential element of an effective framework."³⁵

An Overview of the Ad Tech Stack and its Complexities

The UK, Australian, and Mexican submissions and OECD Brief provide an overview of the "ad tech stack,"³⁶ those services that "assist advertisers and publishers in the automatic purchasing and selling of digital display advertising."³⁷

The Notes highlight the complexity of the ad tech stack, but do not address arguments that the historical origin of each ad tech service or functionality explains how they increased competition and efficiency compared to the then-prevailing status quo. For example, Bitton & Lewis explain that, when viewed "in the context of market developments that took place over this time," Google's publisher ad tech product Google Ad Manager "has a track record of enhancing rather than inhibiting competition, and that its evolution reflects Google's responses to rapid technological and competitive changes, as well as attempts to balance the interests of users, publishers and advertisers."³⁸

Network Effects and Data in the Digital Advertising Sector

There is widespread agreement among member countries that digital advertising platforms are two-sided platforms that exhibit network effects and use user data as an

input,³⁹ and that these characteristics contribute to market power in the digital advertising sector.

The UK Note states that “network effects” and “unequal access to user data” “entrench” incumbent platforms’ market power.⁴⁰ And the Mexican and Spanish Notes argue that network effects and big data facilitate market concentration.⁴¹

Regarding network effects, country submissions do not discuss the risks of relying on network effects as indications of substantial power or monopoly power. As the American Bar Association Section of Antitrust Law has written, “[w]hen evaluating network effects, it is important to consider, next to switching costs and multi-homing and other factors, the possibility of negative network effects.”⁴²

As Koren Wong-Ervin has explained: “[n]etwork effects can cut both ways, sometimes leading to highly concentrated markets due to positive feedback loops or ‘tipping,’ and other times hastening the decline of a dominant player.”⁴³

In a prior publication, Evans and co-author Richard Schmalensee explained that “[n]etworks can have exponential growth when every additional customer attracts more consumers. . . . the same principle can lead to exponential decline. Each lost customer induces other customers to leave, which induces more to leave.”⁴⁴

Regarding the importance of data, the UK submission describes data as “highly valuable” and an “essential input” for ad targeting and measurement,⁴⁵ two uses of data also highlighted by the Spanish Note.⁴⁶ The Australian Note also characterizes data as a “source of competitive advantage.”⁴⁷

Multiple submissions discuss the allegedly unique characteristics of data. The Mexican, Spanish, and Business at OECD Notes agree data is non-rivalrous.⁴⁸ Business at OECD states data is also non-exclusive,⁴⁹ but the Spanish Note suggests “regulation actually promotes excludability in general.”⁵⁰

Wong-Ervin has explained that, while data is a valuable input, new entrants do not need to replicate incumbents’ data to succeed.⁵¹ Similarly, Darren Tucker and Hill Wellford have argued that “[a]n entrant that needs personal data can collect relevant information from its users once the service is operational. Data collected in this manner is free or nearly so. Entering the market and then collecting and analyzing user data is not a theoretical approach but rather the very model followed by many of the leading online firms when they were startups or virtual unknowns, including Google, Facebook, Yelp, Amazon, eBay, Pinterest, and Twitter.”⁵²

The Mexican Note states that, despite its risks, “the collection of large datasets and analysis of data could lead to benefits for consumers, such as access [...] to better and personalized services.”⁵³ Business at OECD also explains that targeted advertising results in efficiencies as advertisers waste a smaller portion of their budget advertising to an overly broad audience.⁵⁴

Types of Potential Conduct Raising Competition Risks

The OECD Brief provides a summary of the structural issues and conduct that were raised in countries' submissions as potential issues to examine in the digital advertising sector: conflicts of interest in vertically integrated firms, self-preferencing that raises rivals' costs, leveraging market power, opaque data practices, and more general market opacity that gives dominant platforms the ability to create market distortions.⁵⁵

Concluding Thoughts

The OECD's Competition Committee's "roundtable" offers a helpful summary of how key competition enforcers have approached the digital advertising sector. This article highlights some areas of agreement among countries as well as the disagreements and misunderstandings that still remain.

As David S. Evans told the roundtable, showing monopoly power or dominance in a relevant market is a fact-specific inquiry that must be conducted in the context of the merger or conduct at issue. Market studies, white papers, and submissions to the OECD may provide helpful general information but they are not dispositive. In the context of the digital advertising sector it is helpful to consider some of the arguments made by Business at OECD, Wong-Ervin, and Tucker regarding the complexities of network effects and data inputs.

Looking ahead, as certain member countries pursue new legislative initiatives, it will be important that they clearly identify market failures and consumer harms to be remedied, any actual gaps in competition law, and how the new regulation will mitigate error costs, administrability issues, and the risk of chilling procompetitive conduct. Member countries will often find that their existing competition regimes are the more appropriate channel for competition enforcement in the digital advertising sector.

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- ¹ Max Fischer-Zernin is an associate in the antitrust practice of Axinn, Veltrop & Harkrider LLP. The author thanks Koren Wong-Ervin for her insightful comments, and Parris Greenwood and Stephanie Goebel for their valuable assistance. The views expressed here are the author's alone and do not necessarily represent the views of Axinn or any of its clients. Axinn represents a number of clients, including Google, that have or may have an interest in the subject matter of this article.
- ² *Competition in Digital Advertising Markets*, OECD (Nov. 30, 2020), <https://www.oecd.org/daf/competition/competition-in-digital-advertising-markets.htm>.
- ³ Note by Australia, *Competition in Digital Advertising Markets*, OECD (Nov. 2, 2020), [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)2/en/pdf) (hereinafter *Australian Note*).
- ⁴ Note by France, *Competition in Digital Advertising Markets*, OECD (Nov 24, 2020) at 2, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)3/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)3/en/pdf) (hereinafter *French Note*).
- ⁵ Note by the United Kingdom, *Competition in Digital Advertising Markets*, OECD (Nov. 23, 2020) ¶¶ 81-5, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)9/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)9/en/pdf) (hereinafter *UK Note*).
- ⁶ Note by Spain, *Competition in Digital Advertising Markets*, OECD (Nov 2, 2020) ¶ 49, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)6/en/pdf) (hereinafter *Spanish Note*).
- ⁷ *French Note* at 7.
- ⁸ *French Note* at 2.
- ⁹ *Contribution of the Autorité de la Concurrence to the Debate on Competition Policy and the Challenges Raised by the Digital Economy*, Autorité de la concurrence (Feb. 19, 2020), https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf.
- ¹⁰ Note by Korea, *Competition in Digital Advertising Markets*, OECD (Nov. 12, 2020) § 2.2, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)4/en/pdf) (hereinafter *Korean Note*). Initiatives include advocating for “a law to enhance transparency and fairness in transactions on online platforms, a revision of the E-Commerce Act “to make online platforms more responsible for protecting consumers,” and “[i]ntroducing the guidelines for competition law enforcement reflecting on the features of the digital economy.” The Korean Note expressed particular concern regarding the collection and use of user data, user data portability and interoperability, and misleading advertising including by social media “influencers.”
- ¹¹ *Spanish Note* ¶ 50.
- ¹² *Spanish Note* ¶ 51.
- ¹³ *Spanish Note* § 5.2.
- ¹⁴ Note by Secretariat, *Competition in Digital Advertising Markets*, OECD (Nov. 30, 2020) at 51, <http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf> (hereinafter *OECD Brief*).
- ¹⁵ As the ABA explained in its *Comments to European Commission on New Competition Tool* earlier this year: “Existing market imperfections should be compared to market outcomes in the presence of the proposed new tool or regulation (taking into account error costs and administrability), rather than to the theoretical ideal of perfect or perhaps ‘better’ competition.” *Comments to European Commission on New Competition Tool*, A.B.A. (Sept. 8, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/antitrust-comments-eu-new-competition-tool.pdf; see also *Comments on European Commission’s Consultation on Proposed Digital Services Act*, A.B.A. (Sept. 8, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/antitrust-comments-on-eu-dsa-consultation.pdf (“The basis for economic regulation rests on the need to correct a market failure in a particular industry. Moreover, even if a market failure is identified through careful study, careful attention needs to be given as to whether a proposed regulatory solution sufficiently corrects it and has an overall positive effect as determined by a rigorous economic cost-benefit analysis, including consideration of potential unintended consequences. . . . Any assessment of potential ex-ante regulation must assess the impact on all sides of the relevant platform markets.”).
- ¹⁶ *Spanish Note* ¶ 52.
- ¹⁷ *OECD Brief* at 51.
- ¹⁸ *UK Note* § 4.2; *Australian Note* § 5; *Spanish Note* § 4.
- ¹⁹ Business at OECD is an independent international business association devoted to advising government policy makers at the OECD.
- ²⁰ Note by Business at OECD, *Competition in Digital Advertising Markets*, OECD (Nov. 24, 2020) at 5, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)8/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)8/en/pdf) (hereinafter *Business at OECD Note*).

- ²¹ *French Note* at 5, discussing *Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector*.
- ²² *Spanish Note* ¶ 60.
- ²³ Daniel S. Bitton & Stephen Lewis, *Clearing Up Misperceptions About Google's Ad Tech Business*, ACCC (May 5, 2020) at 36, <https://www.accc.gov.au/system/files/Google%20-%20Report%20from%20Daniel%20Bitton%20and%20Stephen%20Lewis%20%285%20May%202020%29.pdf>.
- ²⁴ *French Note* at 3; but see *Business at OECD Note* at 5 ("Online advertising generally serves the same goals as offline advertising: namely, to educate, influence, and drive consumers through the delivery of information.") (citing James D. Ratliff & Daniel L. Rubinfeld, *Online Advertising: Defining Relevant Markets* (2011) at 12, <https://www.law.berkeley.edu/files/Online-Advertising2011.pdf>).
- ²⁵ See *UK Note* § 1.2; *Australian Note* ¶ 19, citing *DPI Final Report*, ACCC (26 July 2019) at 89; *Note by Mexico, Competition in Digital Advertising Markets*, OECD (Nov. 2, 2020) ¶¶ 13-4, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)5/en/pdf) (hereinafter *Mexican Note*); *French Note* at 3.
- ²⁶ *UK Note* § 1.2; see also *Mexican Note* ¶ 14 (Search, display, and classified advertising "might have limited substitution with each other, because they serve different purposes depending of [sic] the objectives of the advertiser's campaign. For example, display advertising is suitable for raising brand awareness and reaching new audiences that might not yet have shown interest in the product, whereas search advertising is suitable for consumers that have shown interest and has immediate impact in sells [sic].").
- ²⁷ Catherine Tucker, *Competition in the Digital Advertising Market*, Section II, Report on the Digital Economy, Global Antitrust Institute (2020), <https://gaidigitalreport.com/2020/08/25/competition-in-the-digital-advertising-market/>.
- ²⁸ *UK Note* §§ 1.4, 5.2; *Australian Note* § 3.4; *Mexican Note* ¶¶ 18, 26; *Spanish Note* ¶¶ 7, 11;
- ²⁹ *UK Note* ¶ 10.
- ³⁰ *French Note* at 6, discussing *Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector*.
- ³¹ *UK Note* ¶ 33; *Australian Note* ¶¶ 21-27, 40-42; *French Note* at 3.
- ³² For discussion of enforcement actions see *French Note* at 8-9, 14, discussing market definition in enforcement actions against Google.
- ³³ *UK Note* ¶ 10.
- ³⁴ OECD Competition Division, *David Evans Describes the Economics of Attention Markets and Implications for Competition*, YouTube (Dec. 2, 2020), <https://www.youtube.com/watch?v=Ae46wwFWbCY&feature=youtu.be>.
- ³⁵ *Business at OECD Note* at 1-2. *Business at OECD* explains in its submission: "Business at OECD recognizes that there are numerous investigations and proposals related to online advertising and takes no position with respect to those initiatives. Our membership consists of companies that both support and oppose these initiatives. We believe that it is important, however, that any action considered or undertaken be based on sound competition principles, rigorous economic analysis and thoughtful remedies that address the specific competition problems identified." *Business at OECD Note* at 9.
- ³⁶ *UK Note* § 1.3; *Australian Note* § 2.3; *Spanish Note* § 1; *OECD Brief* § 3.
- ³⁷ *Australian Note* ¶ 29.
- ³⁸ Bitton & Lewis, *supra* note 23, at 3.
- ³⁹ *French Note* at 14; *Mexican Note* ¶ 10; *Australian Note* ¶ 44; *Spanish Note* ¶ 13; *Japanese Note* ¶ 4.
- ⁴⁰ *UK Note* ¶ 38; see also *French Note* at 6.
- ⁴¹ *Mexican Note* ¶ 16; *Spanish Note* ¶ 19.
- ⁴² *Comments to European Commission on New Competition Tool*, A.B.A. (Sept. 8, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/antitrust-comments-eu-new-competition-tool.pdf.
- ⁴³ Koren W. Wong-Ervin, *Assessing Monopoly Power or Dominance in Platform Markets* (Jan. 26, 2020) at 6, <https://ssrn.com/abstract=3525727>.
- ⁴⁴ David S. Evans & Richard Schmalensee, *Debunking the Network Effects Bogeyman*, Regulation, Vol. 40, No. 4, Winter 2017-2018, at 36, <https://ssrn.com/abstract=3148121>.
- ⁴⁵ *UK Note* ¶¶ 49, 60.
- ⁴⁶ *Spanish Note* ¶ 11.
- ⁴⁷ *Australian Note* § 3.4.
- ⁴⁸ *Mexican Note* ¶ 23; *Spanish Note* ¶ 23; *Business at OECD Note* at 8.

⁴⁹ *Business at OECD Note* at 8.

⁵⁰ *Spanish Note* ¶ 23.

⁵¹ Koren W. Wong-Ervin, *Assessing Monopoly Power or Dominance in Platform Markets* (Jan. 26, 2020) at 8-9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525727.

⁵² Darren S. Tucker & Hill B. Wellford, *Big Mistakes Regarding Big Data*, *Antitrust Source*, Vol. 14, No. 2, A.B.A. (Dec. 2014)

at 7, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec14_full_source.pdf.

⁵³ *Mexican Note* ¶ 28.

⁵⁴ *Business at OECD Note* at 8.

⁵⁵ *OECD Brief* at 51. See *Australian Note* ¶¶ 35-8; *French Note* at 6; *Spanish Note* §§ 3.3-4.



CPI EU News Presents:

OECD Roundtable on Market Studies: Consensus on the Strengths and Limitations & Divergence on Binding Remedies

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On December 10, the Organization for Economic Cooperation and Development's ("OECD") Competition Committee held a roundtable on "Using market studies to tackle emerging competition issues." The country submissions and speaker presentations are publicly available on the [OECD's website](#). The Secretariat's background note, country submissions by the United States, Japan, and Mexico, and the submission by Business at OECD ("BIAC") represent some of the key opinions on the use of market studies. The submissions explore the strengths and limitations of using market studies to diagnose and solve novel competition issues; the utility of using them beyond traditional enforcement actions; and the potential dangers of imposing market-wide binding remedies following market studies absent a finding of violation of the law, especially in dynamic sectors.

OECD Background Note: Market Studies Used as a "[F]lexible" and "[F]orward [L]ooking" Tool, But Remedies That Follow Should Be Proportionate and Principle-Based

The Secretariat's background note describes how market studies can be used by competition authorities as a "flexible tool" to examine new and evolving challenges "outside the context of merger reviews or antitrust investigations."² The submission by BIAC finds that "holistic yet structured assessments" are better suited to evaluate new business models with "overlapping ecosystems of suppliers and customers."³

Market studies are useful, according to the Secretariat, in part because they are forward-looking and market-wide in nature. Enforcement actions are limited to historical or ongoing anticompetitive practices by specific companies. Market studies, by contrast, can look at potential scenarios in the entire market and "identify and diagnose emerging competition issues."⁴ The Secretariat considers such a holistic tool important, especially in dealing with certain structural features such as "large economies of scale and scope, strong network effects, high barriers to entry, and 'winner-takes-most' dynamics" that risk leading to high concentration, even if no anticompetitive conduct has yet been taken by incumbents.⁵ In other words, market studies provide opportunities to "focus the analysis on the process of competition and not just on outcomes."⁶ The Secretariat's background note states that such a tool applies not only in digital markets, but also in any type of "challenger" businesses with "innovative business models and new technologies" that will potentially disrupt the existing markets.

The Secretariat believes market studies are good at creating "synergies" between competition law and other policy areas by analyzing the market from the perspectives beyond competition to include consumer protection or data and privacy considerations.⁷

The Secretariat's background note also points out potential limitations of market studies. Substantively, the Secretariat cautions that even though the studies can offer more predictability to companies entering the market, agencies need to avoid offering static recommendations or remedies that no longer fit market reality by the time the study is published, especially in fast moving digital markets. To solve that issue, the

Secretariat encourages broad “principle-based primary legislation,” to be followed by secondary legislation or guidance tailored to new sector conditions later on as needed.⁸

The Secretariat acknowledges the difficulty to implement recommendations coming out of market studies as they will not be legally binding in most jurisdictions. The note suggests putting the burden on lawmakers to explain why they opt out of adopting any recommendations of the competition authority. By contrast, for the few jurisdictions that can issue binding recommendations (including potentially the European Commission given the “New Competition Tool” currently being considered), the Secretariat believes such power should “com[e] with very tight governance and procedural checks and balances to ensure the competition authority remains within its remit and is accountable for its interventions.”⁹

The Secretariat believes there are clear benefits for different competition authorities and governments to work together and develop a “shared international approach” as the emerging competition issues are global in nature, and common issues deserve common approaches.¹⁰

Submission by the United States: Cautiously Optimistic About Market Studies’ Offering of Holistic Insights in Evolving Sectors Limited to “a [S]napshot in [T]ime”

The U.S. submission states that market studies may be appropriate in sectors with evolving competition landscapes, and when the competition authorities need to be educated on certain novel market conditions or past wins and losses therein.¹¹ The submission finds market studies helpful as they provide agencies with “stakeholder, academic, industry and consumer feedback,” and data that allow agencies to perform empirical research in support of policy recommendations.¹² As pointed out by the background note, the U.S. submission also recognizes that market studies can only provide information “relevant to a snapshot in time.”¹³ Any remedy based on the market study findings needs to be carefully evaluated as the snapshot captured by the market study might have already shifted. Moreover, the submission acknowledges that such studies are “extremely resource intensive” for the agencies and “burdensome to companies both in terms of time and cost of compliance.”¹⁴

The submission introduces the U.S. agencies’ market studies portfolio, including workshops, retrospective studies of consummated mergers, and market studies conducted without a specific law enforcement purpose under the FTC’s 6(b) authority.

The submission briefly summarizes several recently held workshops on evolving market trends, including a workshop on “Venture Capital Investment and Antitrust Law.”¹⁵ It covered trends in venture capital investment since the 1990s, tips from investors on how to “identify nascent competitors” and why some competitive alternatives to the market-leading platforms have tended to become less attractive investment opportunities in recent years.¹⁶

The retrospective studies are intended to analyze whether the agencies’ reporting threshold for mergers has been too high, how effective the tools used by the agency economists are in predicting effects of proposed mergers in the markets, and how

effective merger remedies are in maintaining or restoring competition lost due to a merger.¹⁷

The submission also illustrates how the FTC is currently using its 6(b) authority to study the “acquisition strategies” of the largest technology firms — including Alphabet, Amazon, Apple, Facebook and Microsoft — by looking at acquisitions falling below the reporting threshold.¹⁸ Information gathered from this study will be analyzed to examine to what extent those firms are making acquisitions of nascent or potential competitors, and whether those below-the-thread deals or agreements have raised competitive concerns.¹⁹ Although this study of below-the-thread deals may offer insights into whether current merger control is effective in digital markets, how agencies will manage the scope and frequency of similar studies given the submission’s acknowledgement of high burdens relating to market studies remains to be seen.

Submission by Japan: Market Studies — Leading to Recommendations for Businesses’ Voluntary Improvement — Considered “[N]ecessary” to Obtain a “[F]ull [P]icture” of a Market

Japan’s submission considers market studies “necessary” to gather reliable factual findings and to obtain a “full picture” understanding of market structures or trade practices, and eventually to ensure appropriate implementation of competition law and policy.²⁰ “[F]act-finding surveys” conducted by the JFTC also aim to “prevent” anti-competitive practices before they materialize, as mentioned in the background note.²¹

The submission points out fact-finding surveys, conducted by the Economic Affairs Bureau, bear no direct relationship with actual party-specific investigations conducted by the Investigation Bureau.²² The JFTC, however, will issue letters to companies that may “potential[ly] infring[e]” antitrust law, as found in the surveys, and encourage them to “voluntarily improve such practices in [a] pro-competitive way.”²³

The submission describes its recent market study on code payment services (one of the cashless payments methods). The JFTC interviewed over 50 banks and fintech companies and issued questionnaires to more than 100 businesses, during which the JFTC finds that the market condition made it “indispensable for nonbank code payment providers to make contracts with banks,” thus granting banks “incentives to exclude nonbank code payment providers from the market.”²⁴ The survey report therefore recommended that banks should consider “developing an environment” in which nonbank providers can have access to the Application Programming Interfaces used by large banks, and then develop substitutes for banks’ services.²⁵

Submission by Mexico: Enthusiasm for Article 94’s Authority to Issue Binding Remedies Following Market Studies. Expectations for More Jurisdictions to Adopt Similar Approaches

Mexico’s submission discusses the Federal Economic Competition Commission’s (“COFECE”) uncommon authority to issue legally binding recommendations following a “market investigation” under Article 94 of the Federal Law of Economic Competition.

The submission describes Article 94 as a “hybrid” competition and regulatory tool, allowing the Mexican agency to conduct a thorough market assessment aiming to identify “structural problems [and] order their correction through various remedies.”²⁶ Recommendations could be subject to judicial review if an appeal were filed.²⁷

The submission states that this tool has been effectively used by the COFECE to intervene in digital markets, when the issues are typically “unnoticed” by traditional antitrust tools.²⁸ Due to the “winners-take-all” dynamics in digital markets, the submission argues that Article 94 allows the Commission to intervene at an early stage, before any single market participant acquires substantial market power. The submission finds Article 94 useful in analyzing behaviors that “do not necessarily fit in the list of abusive of dominance practices” but were identified in the international discourse as potentially problematic, such as self-preferencing practices, imposition of abusive contractual terms, or collusion using algorithms.²⁹

Only the United Kingdom, Iceland, Greece and South Africa have similar broad authorities as Article 94 to impose binding remedies after a market study.³⁰ But the submission observes that the international community has started to recognize the effectiveness of similar *ex-ante* market study authorities independent from an entity’s specific anticompetitive conducts, especially in the analysis of digital markets, citing the EU’s contemplation of the “New Competition Tool.”³¹ Indeed, there is an ongoing debate on whether antitrust law needs a reform vis-a-vis the digitalization of markets and market-wide remedies may be more effective in tackling certain types of issues. However, as the Secretariat’s note cautioned, with great power comes great responsibility, such market-wide remedies need to come with strong procedural checks and balances. It is also worth considering whether one-size-fits-all remedy packages that will accurately target the issues corresponding to businesses with diverse business models truly exist.

Critiques by BIAC: Market Studies Not Predictive in Nature, Remedies That Follow Should Be Recognized as an “[E]xtraordinary” Power

BIAC’s submission cautions against unrealistic expectations for market studies and discusses several of their limitations and dangers.

First, BIAC explains that market studies are not inherently “predictive.” To the contrary, market studies are to some extent limited by agencies’ preconceived beliefs on how antitrust law is failing because they tend to focus on “markets with known and observable existing systematic challenges.”³² As a result, the submission expresses doubt on market studies’ potential as a “panacea” for resolving emerging and future issues in markets.

Second, to prevent market studies from becoming “burdensome fishing expeditions,” BIAC emphasizes the need for a “clearly articulated test for when a study is warranted,” including why existing competition powers are insufficient.³³ The submission does not believe “vague notions of concentration and profitability” are sufficient reasons, for example, to launch market studies. BIAC opines that a clearly-set out scope and objectives may potentially avoid subjecting companies to “mission creep.”³⁴ To

properly manage the scope and minimize unnecessary burden on companies, BIAC believes preliminary inquiries in the format of pilot questionnaires or consultations of key stakeholders in the preliminary stages can be useful.³⁵

Third, BIAC points out that the ability for a competition authority to impose remedies on businesses in the absence of any infringement is an “extraordinary power” without the “democratic legitimacy of an elected legislator.”³⁶ BIAC thus “strenuously disagrees with the need for powers to impose remedies” to be included in market studies.³⁷ The preferred route, rather, is for market studies to “analyze, diagnose and inform, but for changes to be achieved through other means.” Avenues like individual voluntary commitments, code of conduct, or legislation should all be options.³⁸ BIAC’s warning is on point because authority to issue binding remedies following market studies risks turning agencies into regulators.

If remedy powers are to be included, the submission stresses the need for agencies to “proceed cautiously and proportionately,” as market studies are not the place for “creative and speculative theories of harm.”³⁹ BIAC states that agencies should design remedies that are “effective and proportionate to the issues identified,” and avoid remedies that may “chill innovation.”⁴⁰ BIAC also suggests the importance of a “merits-based judicial review of any remedies” that come out of market studies, and to put in place structures to “revisit remedies over time” especially in dynamic markets.⁴¹ Agencies should recognize the potential need to allocate long-term resources to keep the code of conduct up to date because otherwise, a rigid outdated code of conduct may instead stifle innovation in fast-moving sectors.

Lastly, BIAC warns that the many emerging competition issues, especially the ones in digital markets, are inherently global, and therefore “inappropriate for consideration, and certainly unsuitable for remedy, at the level of a single jurisdiction.”⁴²

Conclusion

The country submissions reveal a varying degree of enthusiasm for the use of market studies in terms of how useful they will be in tackling emerging competition issues beyond the existing enforcement tools, and whether any legally binding remedies should come out of those studies. Overall, the submissions recognize market studies’ utility in obtaining a market-wide picture of evolving sectors, but also counsel that, before fully grasping the strengths and limitations of market studies, agencies should remain realistic about what they can achieve and stay vigilant to the danger of overusing them due to the high compliance costs they impose on companies. BIAC’s submission also urges agencies to keep in mind that imposing binding, one-size-fits-all remedies on companies without any specific violation may lead to unintended consequences. These may include preventing the flexibility needed, particularly in fast-moving and dynamic markets.

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- ¹ Pauline Tang is an associate at Axinn, Veltrop & Harkrider LLP. The opinions expressed are the author's alone and do not necessarily reflect the views of Axinn or any of its clients. The author thanks Koren Wong-Ervin for her insightful comments, and Parris Greenwood for his valuable assistance.
- ² OECD (2020), *Using Market Studies to Tackle Emerging Competition Issues*, at 3, <http://www.oecd.org/daf/competition/using-market-studies-to-tackle-emerging-competition-issues-2020.pdf>.
- ³ Contribution by BIAC, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 5, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)53/en/pdf).
- ⁴ OECD (2020), *supra* note 2, at 19.
- ⁵ *Id.* at 11.
- ⁶ *Id.* at 20.
- ⁷ *Id.* at 20.
- ⁸ *Id.* at 22.
- ⁹ *Id.* at 27; The New Competition Tool ("NCT") would allow the European Commission to intervene earlier in general—either “before a dominant company successfully forecloses competitors or raises costs, or [simply] when a structural risk of competition prevents the internal market from working well.” *Id.* at 18; see also *Public Consultations: Impact Assessment for a Possible New Competition Tool*, European Commission (Oct. 26, 2020), https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html.
- ¹⁰ OECD (2020), *supra* note 2, at 28.
- ¹¹ Contribution by the United States, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 29, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)37/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)37/en/pdf).
- ¹² *Id.* ¶ 27.
- ¹³ *Id.* ¶ 28.
- ¹⁴ *Id.*
- ¹⁵ *Id.* ¶ 14; *Venture Capital and Antitrust: Transcript of Proceedings at the Public Workshop Held by the Antitrust Division of the United States Department of Justice*, US Dep't of Justice (Feb. 12, 2020), <https://www.justice.gov/atr/page/file/1255851/download>.
- ¹⁶ *Id.*
- ¹⁷ *Id.* ¶ 21, 24.
- ¹⁸ *Id.* ¶ 19.
- ¹⁹ *Id.*
- ²⁰ Contribution by Japan, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 1, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)74/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)74/en/pdf).
- ²¹ *Id.* ¶ 4.
- ²² *Id.* ¶ 7.
- ²³ *Id.* ¶ 8.
- ²⁴ *Id.* ¶ 21.
- ²⁵ *Id.* ¶ 24.
- ²⁶ Contribution by Mexico, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 19-20, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)67/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)67/en/pdf).
- ²⁷ *Id.* ¶ 21.
- ²⁸ *Id.* ¶ 25.
- ²⁹ *Id.* ¶ 26.
- ³⁰ *Id.* ¶ 27.
- ³¹ *Id.* ¶ 28-29.
- ³² Contribution by BIAC, *supra* note 3, ¶ 9-10.
- ³³ *Id.* ¶ 25-26.
- ³⁴ *Id.* ¶ 28.
- ³⁵ *Id.* ¶ 28-29.
- ³⁶ *Id.* ¶ 16, 18.
- ³⁷ *Id.* ¶ 31.

³⁸ *Id.* ¶ 20.

³⁹ *Id.* ¶ 13.

⁴⁰ *Id.* ¶ 31.

⁴¹ *Id.* ¶ 32-33.

⁴² *Id.* ¶ 37.