Report on the Results of the ICN Survey on the Analysis of Theories of Harm and the Design of Remedies Concerning Unilateral Conduct With Dominance/Substantial Market Power in Digital Markets

Summary

- During the survey period, 19 out of 47 responding authorities reported having experience with enforcement actions against unilateral conduct by companies with dominance/substantial market power in digital markets, whereas the other 28 responding authorities said that they had no such experience.
- The responding authorities identified various challenges in enforcement in the digital sector, including (1) the difficulty in establishing dominance or anticompetitive effects by relying on the traditional theories of harm, (2) challenges in designing remedies to restore competition in rapidly-changing markets, and (3) capacity constraints.
- Several authorities have been taking actions to overcome these challenges, among other things, by introducing ex-ante regulations addressed at digital platforms, adjusting existing competition law provisions and analytical tools, and strengthening the authority's internal structure (e.g., by the establishment of digital specialist units).
- Several responding authorities have regulations addressing unilateral conduct by companies without dominance/substantial market power, which focus on an imbalance between trading parties or "unfairness" of business practices, to fill the regulatory gap on digital platforms.
- Most of the respondents supported further ICN guidance—in the form of a separate and focused document—on the analysis of theories of harm and the design, implementation, and monitoring of remedies concerning unilateral conduct by companies with dominance/substantial market power in digital markets.

1. Introduction

1.1. UCWG's Projects in Digital Markets

Recent developments in digital technologies have been changing the ways of businesses dramatically across industries, spurring innovations, and creating new products and services. Consumers have largely benefited from such digitalisation. However, along with

those significant changes in the business environment, the unique features of digital markets, such as network effects and multi-sided markets, have also opened the door to anticompetitive practices, especially by large digital platforms. Addressing those practices has become a top priority for many competition authorities across the world. However, some of the anticompetitive practices adopted by digital platforms might not fit well within traditional theories of harm, or might even fall outside of the scope of existing competition legislation on unilateral conduct, providing further challenges for competition authorities.

In response to this situation, in 2019, the ICN Unilateral Conduct Working Group (UCWG) started a new multi-year project, as part of which it conducted a survey collecting information on the ICN members' experiences in assessing dominance/substantial market power in digital markets. The result of this 2019 survey was compiled in the "Report on the results of the ICN survey on dominance/substantial market power in digital markets" published in 2020. This report illustrated the various approaches that ICN members have adopted in assessing dominance/substantial market power in digital markets. It also emphasised the need for further guidance in this area shown by a number of competition authorities and Non-Governmental Advisors (NGAs).

Since the 2019 survey, there have been several global developments both in legal frameworks applied to digital markets and enforcement practices. Against this backdrop, the UCWG launched a new initiative in 2021—as a successor project of the above-mentioned multi-year project—that aimed at providing additional insights and encouraging further discussion between competition authorities.

1.2. Questionnaire Survey

As part of the new project, the UCWG conducted a survey that focused on topics including "analysis of theories of harm" and "design, implementation, and monitoring of remedies" concerning unilateral conduct by companies with dominance/substantial market power in digital markets. These topics were chosen based on the result of the 2019 survey, where they were exemplified as potential topics for future guidance by a number of competition authorities.[1]

Accordingly, a questionnaire[2] was sent to 100 competition authorities. Among those, 47

[1] ICN (2020), "Report on the results of the ICN survey on dominance/substantial market power in digital markets", Section 5.2., available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf.

[2] See ANNEX I: "ICN Unilateral Conduct Working Group Questionnaire on the analysis of theories

provided information regarding their enforcement practices, challenges, and solutions in the application of theories of harm in digital markets, as well as the design, implementation, and monitoring of remedies in these markets.

In parallel, another questionnaire[3] on the same issues was sent to 272 NGAs such as practitioners and academics, and responses were received from 31 NGAs.

The survey period is from 1 January 2016 to 1 November 2021.

1.3. Overview of the Report

This report is based on the contributions from "the responding authorities"[4] and "the responding NGAs"[5] (collectively referred to as "the respondents"), and it is structured as follows:

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of harm and design of remedies concerning unilateral conduct with dominance/substantial market power in digital markets (for Competition Agencies)".

[3] See ANNEX II: "ICN Unilateral Conduct Working Group Questionnaire on the analysis of theories of harm and design of remedies concerning unilateral conduct with dominance/substantial market power in digital markets (for NGAs)".

[4] The responding authorities are Australian Competition and Consumer Commission (Australia), Brazilian Administrative Council for Economic Defense (Brazil), Competition Bureau of Canada (Canada), Chilean Competition Authority (Chile), Croatian Competition Agency (Croatia), Czech Office for the Protection of Competition (Czech Republic), Ecuadorian Superintendency for Market Power Control (Ecuador), Eurasian Economic Commission (EEU), European Commission, Directorate-General for Competition (EU), French Competition Authority (France), Georgian National Competition Agency (Georgia), German Federal Cartel Office (Germany), Hellenic Competition Commission (Greece), Hong Kong Competition Commission (Hong Kong), Hungarian Competition Authority (Hungary), Competition Commission of India (India), Indonesia Competition Commission (Indonesia), Italian Competition and Market Authority (Italy), Japan Fair Trade Commission (Japan), Korea Fair Trade Commission (Korea), Lithuanian Competition Council (Lithuania), Luxembourgian Competition Council (Luxemburg), Malaysia Competition Commission (Malaysia), Competition Commission of Mauritius (Mauritius), Mexican Federal Economic Competition Commission (Mexico), Authority for Fair Competition and Consumer Protection of Mongolia (Mongolia), Netherlands Authority for Consumers and Markets (Netherlands), New Zealand Commerce Commission (New Zealand), Norwegian Competition Authority (Norway), Philippine Competition Commission (Philippines), Polish Office of Competition and Consumer Protection (Poland), Serbian Commission for Protection of Competition (Serbia), Competition and Consumer Commission of Singapore (Singapore), Antimonopoly Office of the Slovak Republic (Slovak Republic), Competition Commission of South Africa (South Africa), Spanish National Markets and Competition Commission (Spain), Swedish Competition Authority (Sweden), Swiss Competition Commission (Switzerland), Trade Competition Commission of Thailand (Thailand), Trinidad and Tobago Fair Trading Commission (Trinidad and Tobago), Turkish Competition Authority (Turkey), UK Competition and Markets Authority (UK), US Department of Justice, Antitrust Division (US DOJ), US Federal Trade Commission (US FTC), Vietnam Competition and Consumer Authority (Vietnam), Zambian Competition and Consumer Protection Commission (Zambia), etc.

[5] A list of the names, affiliations, and jurisdictions of the responding NGAs is attached in ANNEX III to this report.

Section 2 highlights the challenges that competition authorities faced, and the solutions they have developed to address those challenges when applying various theories of harm and designing remedies in cases involving unilateral conduct by companies with dominance/substantial market power in digital markets.

Section 3 discusses the approaches that have been adopted to address legal or structural challenges in addressing unilateral conduct by companies with dominance/substantial market power in digital markets.

Section 4 focuses on competition authorities that have no enforcement experience in cases related to unilateral conduct by companies with dominance/substantial market power in digital markets, and analyses the challenges that might explain the lack of enforcement.

Section 5 illustrates the legal frameworks that some countries have to regulate the unilateral conduct by companies without dominance/substantial market power in digital markets.

Section 6 discusses ideas and needs for an ICN guidance on the analysis of theories of harm and the design, implementation, and monitoring of remedies concerning unilateral conduct by companies with dominance/substantial market power in digital markets.

1.4. Definitions

The term "unilateral conduct by companies with dominance/substantial market power" used in this report is equivalent to the concept of "abuse of dominance"[6], which encompasses various legislative provisions in different jurisdictions with differing terminology but sharing a core principle, including: "abuse of dominance" in the EU,[7] India,[8] and South Africa,[9] "monopolization" in the US,[10] "private monopolization" in Japan,[11] "relative monopolistic practices" in Mexico,[12] "misuse of market power" in Australia,[13] and "anticompetitive conduct" in Brazil.[14]

The term "digital markets" refers to the provision of products or services by use of digital

[6] OECD (2020), "Abuse of dominance in digital markets", p. 9, available at: https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.
[7] Article 102 of the Treaty on the Functioning of the European Union (TFEU).
[8] Section 4 (1) of the Indian competition law.
[9] Section 8 of the South African competition law.
[10] Section 2 of the Sherman Act.
[11] Article 2 (5) of the Japanese competition law.
[12] Article 54 and 56 of the Mexican competition law.
[13] Section 46 of the Australian competition law.
[14] Article 36 of the Brazilian competition law.

technologies, mainly the internet, but also by any other digital medium.

1.5. Disclaimers

This report is based on the information provided by the respondents as of November 2021.[15] The main purpose of this report is to summarise the experience and views of the respondents, as well as provide an overview of the current status and activities of the responding authorities in the context of unilateral conduct in digital markets. This report does not represent the official views of the ICN or any of its member authorities or NGAs.[16]

The survey results show that there have been (at least) 41 unilateral conduct cases in digital markets brought by 19 competition authorities (out of 47 that responded to the survey). Among them, some responding authorities chose to focus their answer on one or several cases. The case law mentioned in this report is therefore non-exhaustive.

The other 28 responding authorities said that they had no enforcement experience against unilateral conduct in digital markets during the survey period. This report analyses in Section 4 the background on the lack of enforcement, and obstacles and reasons that those authorities reported.

The survey questionnaire and this report were prepared by the Japan Fair Trade Commission (JFTC) as one of the UCWG Co-Chairs with the support of the Directorate General for Competition of the European Commission (European Commission) and the French Competition Authority (ADLC).

2. Theories of Harm and Remedies for Addressing Unilateral Conduct in Digital Markets

2.1. Overview of Enforcement Experiences

During the survey period, 19 out of 47 responding authorities took a total of 41 enforcement and/or legal actions against unilateral conduct of companies with dominance/substantial market power in digital markets. Those actions resulted in cease and desist orders, structural and behavioural remedies, and monetary sanctions, as well

[15] This report contains some updates from the survey period as far as the responding authorities optionally provided additional information.

[16] This report compiles answers from the respondents to the questions in ANNEX I or ANNEX II. Please note that it cannot eliminate the possibility of answering different replies depending on their respective interpretation even if they have the same or similar views and experiences that are referred to in this report.

as the filing of lawsuits. Some competition authorities report that they have rich enforcement experiences while others do not, although unilateral conduct in digital markets has been a common and urgent issue among many ICN member authorities.

The survey asked competition authorities about their enforcement experience against unilateral conduct by digital platform operators, and Section 2 overviews those experiences, including the used theories of harm, the adopted remedies, and the challenges that the competition authorities faced in those enforcement actions. The reported cases differed in several aspects. They did not always target the so-called "big tech" companies, as some competition authorities took actions against digital platform operators that had a dominant position only at the national level. The business models of those targeted platform operators and the sectors in which they operated also differed from case to case. Therefore, the survey did not necessarily reveal any general consensus on the approaches that the responding authorities adopted in challenging unilateral conduct in digital markets.

2.2. Types of Conduct

The responding authorities specified the categories of unilateral conduct that were challenged in their enforcement actions. The results showed that, during the survey period, they dealt with a wide range of unilateral conduct.

Among the 41 reported cases, 11 cases involved "new forms of unilateral conduct in digital markets", which are classified by the OECD report[17] as non-traditional types of unilateral conduct. Other 29 cases fall under "major" or "traditional" types of unilateral practices. No response was received regarding one case.

It is often said that competition authorities are facing new challenges brought about by "new" types of unilateral conduct in digital markets. However, the survey revealed that "traditional" types of conduct, such as refusal to deal and exploitative conduct, are still frequently observed. Therefore, those "traditional" types of conduct may continuously be a main focus for competition authorities in their enforcement against unilateral conduct in digital markets.

Some responding authorities also reported new forms of unilateral conduct in digital markets such as self-preferencing.[18] In some cases, the responding authorities even

[17] *Supra* note 6. This report sets out the main types of abuse of dominance cases in digital markets: refusal to deal, predatory pricing, margin squeeze, exclusive dealing and loyalty discounts, tying and bundling, and exploitative abuses, as well as new forms of abuse of dominance.

[18] Examples of new forms listed in the OECD report are: forced free riding, abusive leveraging or

referred to types of conduct that were not listed in the survey question such as the use of most-favoured nation (MFN) clauses, anti-steering provisions, and monopoly maintenance through anticompetitive acquisitions. When focusing on digital markets, competition authorities often face unilateral conduct cases that are more complex and involve novel types of behaviour, which would require competition authorities to adopt a different approach when analysing theories of harm.

2.3. Theories of Harm

2.3.1. Burden of Proof

The survey sought to understand who, in each jurisdiction, bears the burden of proof for establishing the illegality of the challenged unilateral conduct. Whereas only one responding authority (one case) applies a "per se illegal" approach, most other authorities indicate that both anticompetitive and procompetitive effects of the challenged conduct are required to be considered or procompetitive effects can diminish the illegality of the conduct under their competition regimes.[19] Those responding authorities bear the burden to prove the anticompetitive effects of alleged unilateral conduct (and dominance/substantial market power in the relevant market), while it is for the companies under investigation to prove the procompetitive effects to justify their conduct.

2.3.2. Analysis of Theories of Harm

The responding authorities explained in detail the "anticompetitive effects" that were considered when analysing the theories of harm in their unilateral conduct cases in digital markets. The responses show that "Adverse effects on consumers such as price increase and decline of quality (Consumer welfare)" were not the sole factors considered by the responding authorities. "Lack of an effective competitive process (Effective competition)", "Decreased consumer choices (Restriction of freedom of trade including business to business transactions, and autonomy of general consumers)", and "Exclusion of potential/actual competitors from the relevant markets or foreclosure of the relevant markets (Exclusionary effects or foreclosure effects)" were also considered as "anticompetitive effects" under the applied theories of harm. There are fewer cases where the responding authorities focused on "Reduced innovation (Efficiencies)". Some responding authorities also selected "Others" which included marginalisation of competitors, and limiting competitors' ability to compete.

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self-preferencing and privacy policy tying.

[19] One responding authority declined to answer this question.

The survey also shows that the responding authorities considered a variety of factors when assessing both anticompetitive and procompetitive effects. When assessing anticompetitive effects, they frequently examined traditional factors such as "Extent of dominant/substantial market position", "Position of actual/potential competitors", "Availability of alternative choices for customers or trading partners", and "Facts indicating foreclosure effects on the relevant markets". "Characteristics of relevant markets" such as "Two/multi-sidedness", "Economies of scale" and "Indirect network effects" were considered in most cases related to digital markets. A few examples of "Others" include cross-network effects and the intention to increase the market share. In contrast, factors for assessing procompetitive effects were not always taken into account by the responding authorities, and in most cases, they rejected the procompetitive effects arguments presented by the investigated companies.

While it is difficult to conduct a detailed analysis because the number of reported cases is limited, it may be worth analysing which factors are considered in the various types of unilateral conduct; in its ANNEX IV, this report took two emerging practices—i.e. "Exploitative conduct (Unfair terms and conditions)" and "Self-preferencing"—as examples, and shows the factors that the responding authorities relied on in their cases. Most of the listed factors were considered in one or more cases of both types of conduct. Thus, at the very least, the possibility of establishing unilateral conduct by combining various factors should not be ruled out.

The survey also inquired details of how the responding authorities took into consideration the above factors in proving anticompetitive effects. Among others, this report presents cases from Italy and France illustrating how they assessed the theory of harm in these specific instances:

In the *Android Auto* case,[20] the Italian Competition and Market Authority (AGCM) found that Google abused its dominant position in the markets for i) licensing of smartphone/tablet OS, and ii) app stores for the Android OS, by refusing the access of competitor's "JuicePass" app to its Android Auto, which is a specific Android feature that allows apps for car drivers to be used while driving. JuicePass provides services for recharging electric vehicles such as showing recharging facilities on maps. Google consequently refused to integrate JuicePass into Android Auto on the grounds of safety concerns and technical reasons. The AGCM found that this Google's conduct had anticompetitive effects after considering factors such as the indispensability of Android

[20] See: https://en.agcm.it/en/media/press-releases/2021/5/a529.

Auto to connected smartphones/tablets and cars, the network effects of Android Auto, the importance for competitors of data obtained from users through their apps, and the fact that the safety and technical reasons for this refusal were not justifiable.

In the *Google News Corp* case,[21] the ADLC found that Google abused its dominant position with its advertising server (DFP) in the advertising server market for website and mobile applications publishers. The practices consisted of granting a preferential treatment to its proprietary technologies offered under the Google Ad Manager brand, both with regard to the operation of its advertising server DFP, which allows those publishers to sell their advertising space, and of its supply side platform (AdX), which organises the auction process allowing those publishers to sell their "impressions" or advertising inventories to advertisers and shares the winning bid with the advertising server. In this case, Google i) shared the price information of the competing supply side platforms (SSPs) obtained through DFP with AdX to optimize the bidding process conducted by AdX, and ii) imposed technical and contractual limitations on the use of the AdX platform through third-party ad servers competing with DFP. The ADLC analysed the anticompetitive effects of Google's conduct by considering a variety of factors, including the fact that the two practices have harmed Google's competitors by limiting the attractiveness of ad servers and third-party SSPs, and have enabled Google to significantly increase its market share and its already high revenues. The practices also affected the customers (i.e. the publishers) that have been deprived of the possibility of making full use of the competition between the various SSPs. In particular, publishers have not been able to obtain the best deals from SSPs, and in particular from Google's AdX platform, which has seen the competitive pressure exerted by its competitors lessened as a result of the practices.

Canada and the EU also provided detailed summaries explaining how they considered procompetitive effects as well as anticompetitive effects in their cases:

In the *Toronto Real Estate Board* (*TREB*) case,[22] the Competition Bureau of Canada (CBC) filed an application to the Competition Tribunal alleging that the TREB abused its dominant position in the market for residential real estate brokerage services by restricting real estate brokers' and consumers' access to and use of historical home sales data and novel real estate services. While TREB allowed its members to share data with clients by

[21] See: https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-online-advertising-sector.
[22] See: https://www.canada.ca/en/competition-bureau/news/2018/08/backgrounder-abuse-of-dominance-by-the-toronto-real-estate-board.html.

hand, email, or fax, it prevented the same data to be displayed online. TREB argued that its rules over members' access to and use of data to protect consumer privacy. It claimed broader access to their data would lead to decreases in services and quality. The Competition Tribunal noted that the anticompetitive effects resulting from the restriction on access to data increased barriers to entry and expansion; increased costs imposed on secure password-protected online portals; reduced range of brokerage services; reduced quality of brokerage service offerings; and reduced innovation. The Competition Tribunal rejected the TREB's privacy arguments and concluded that TREB's intention was to maintain their control of data in an effort to block new forms of competition; namely the emergence of new and innovative business models and services.

In the *Google Shopping* case,[23] the European Commission argued that Google abused its market dominance as a search engine by giving an advantage to its own comparison shopping service and demoting competitors' comparison shopping services in its search results. The European Commission found the conduct anticompetitive on the grounds that it had the potential to foreclose competing comparison shopping services and was likely to reduce the ability of consumers to access the most relevant comparison shopping services. Then the European Commission concluded that Google did not demonstrate that the conduct at stake was either objectively necessary, or that the exclusionary effect produced was counterbalanced, outweighed even, by advantages in terms of efficiency gains that also benefited consumers. One of the reasons was that Google did not provide evidence to demonstrate that users did not expect search services providing search results displaying rival services. Another was that Google failed to demonstrate that it could not use the same underlying processes and methods in deciding the positioning and display of the results of its own comparison shopping service and of those of competing comparison shopping services. The European Commission's decision in the Google Shopping case was upheld by the General Court of the European Union in November 2021.

2.3.3. Challenges and Solutions Concerning Analysis of Theories of Harm

The survey sought to understand whether ICN member authorities faced specific challenges in applying theories of harm in digital markets. In 17 out of 41 cases, the responding authorities (nine out of 19) said that they faced such challenges. Information on eight cases (by six responding authorities) was not shared due to the confidentiality of on-going cases and for other reasons. In the other 16 cases (by eight responding

[23] See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.

authorities), they said that they experienced no particular challenge.

As the survey obtained few responses to this question, it is difficult to conclude whether ICN member authorities generally face obstacles for analysing theories of harm in digital markets. However, there are still some observations to be mentioned; one of them was submitted by the EU. The EU expresses that classical and established forms of theories of harm can be applied even to unilateral conduct in digital markets, but those need to be "adapted" to the realities of digital markets in some cases.

Other competition authorities identified the challenges as follows:

(a) Assessing Anticompetitive Effects by a set of Different Practices

In the *Sports in Pay-TV* case,[24] the Swiss Competition Commission found that Swisscom, a former monopolist in the telecommunications sector, abused its dominant position in the provision of sports content in pay-TV by entirely or partly refusing to deal/supply, discriminating between trading partners, imposing unfair trade conditions, and tying/bundling. The Swiss Competition Commission highlights the challenge in assessing how the conduct decreased competition because of a set/series of different practices were combined into one anticompetitive conduct. This challenge is also pointed out by the ADLC, which finds it sometimes difficult to assess the anticompetitive effects of a conduct that has been implemented through very different means over the considered period (e.g. for technological reasons). In order to overcome this challenge, the ADLC noted that a theory of harm can be established by focusing on the lowest common denominator of those apparently non-related practices, e.g. they all pursue the same self-preferencing objective. Also, Mexico mentions that it is particularly difficult and challenging to establish a causal link between determined conduct and its effects when there are multiple strategies and other factors simultaneously interacting among themselves, and additionally these could be more complicated when the market is comprised by multiple instances of the value chain and technologically very sophisticated.

(b) Assessing Anticompetitive Effects Based on the Characteristics of the Relevant Markets

In the *TREB* case,[25] the CBC proved the anticompetitive effects of the conduct by focusing on its impact on quality and innovation rather than prices.

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[24] See: https://www.weko.admin.ch/dam/weko/de/dokumente/2016/04/RPW%202016-4.pdf.download.pdf/RPW%202016-4.pdf (only available in German).
[25] *Supra* note 22.

(c) Proving Anticompetitive Effects Outweigh Procompetitive Effects

In *Decolar, Booking.com, and Expedia Brazil* case,[26] the Brazilian Administrative Council for Economic Defense (CADE) found that the three booking websites imposed MFN clauses that prevented listed hotels from offering rooms at more advantageous prices or sales conditions elsewhere. The CADE indicates a challenge in balancing anticompetitive and procompetitive effects due to the difficulty of measuring consumer welfare. The CADE also faced a challenge in conducting a counter-factual analysis of the competitive situation in the relevant market. As the case was closed with the adoption of commitments to abandon the MFN clauses, the CADE was not required to directly address these two issues.

(d) Selecting, Collecting or Assessing Necessary Evidence

In the *Naver* case,[27] the Korea Fair Trade Commission (KFTC) found that Naver caused anticompetitive effects on its online platform, where Naver and its competitors provide a free online trading space, by taking advantage of its dominant market power in the online comparison shopping service market and by manipulating its comparison shopping service algorithms. Naver manipulated the algorithms and decreased displays of online stores using rival open markets services on its comparison shopping pages. The KFTC says that there were difficulties in analysing the details and effectiveness of changing search algorithms and, however, it was possible to overcome the difficulties by conducting thorough investigations, for example, by securing internal documents of businesses in violation of the law and writing employee confirmation letters.

In the *FBA Amazon* case,[28] the AGCM found that Amazon leveraged its dominant position in the Italian market for intermediation services on marketplaces to favour the adoption of its own logistics service, Fulfilment by Amazon (FBA), by sellers active on Amazon. For the purpose of the investigation, the AGCM decided to survey a representative sample of the retailers active on the Amazon.it marketplace: Due to their numerosity and heterogeneity (as the majority of them are foreign based), the AGCM

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[26] See: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcTxHTesk7ujM0u5JLxr9KheofVYrD_3wGZyVwWqL1PUl (only available in Portuguese).

[27] See: http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8759 (only available in Korean). This case is currently pending in the Supreme Court of Korea and is not a confirmed case.

[28] See: https://en.agcm.it/en/media/press-releases/2021/12/A528.

focused its attention on Italy-based retailers only. Moreover, according to the AGCM it was not possible to assess Amazon's claim about the superior efficiency of the FBA compared to other third-party logistics services since the company did not provide any meaningful analysis or data supporting such claim.

(e) Intersections With Other Legal Areas Such as Privacy Laws

In the *TREB* case,[29] TREB used data privacy as a justification for the refusal to deal. The CBC, in light of this experience, emphasised the importance for competition authorities to cooperate with other domestic regulators when appropriate, as well as with other competition authorities that have experiences on similar issues in their jurisdictions.

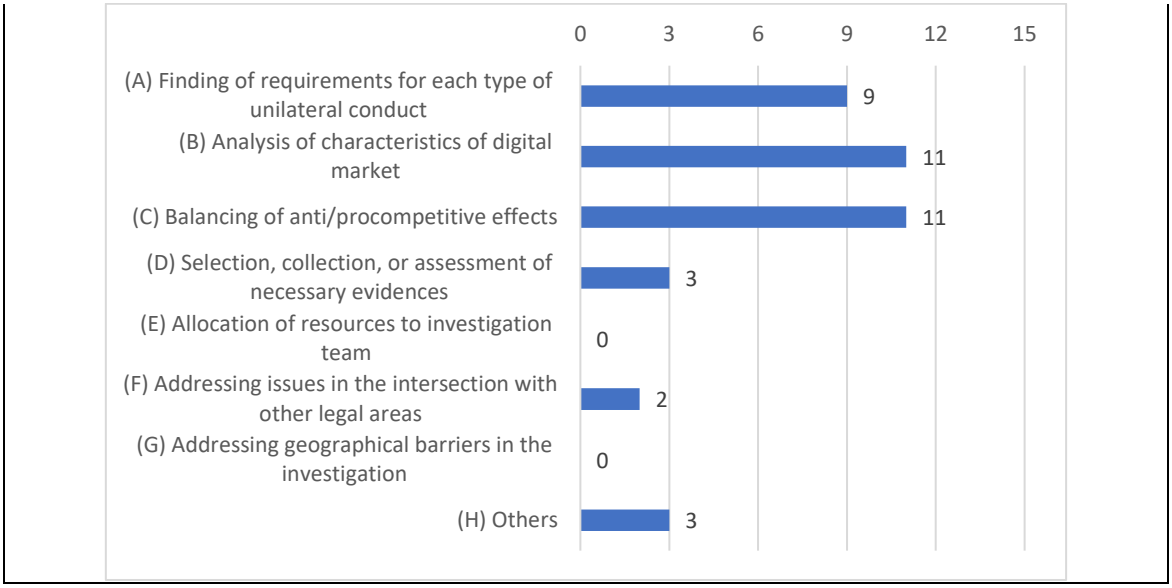
(f) NGAs' Views

The survey also inquired NGAs' observations on challenges concerning the analysis of theories of harm that competition authorities face in unilateral conduct cases in digital markets. Several NGAs observe that competition authorities in their jurisdictions face some challenges. As shown in Chart 1 below, it appears that "Finding of requirements for each type of unilateral conduct", "Analysis of characteristics of digital market" and "Balancing of anti/procompetitive effects" are key challenges for competition authorities from their viewpoints.

Chart 1: NGAs' responses to the survey question "select the specific challenges, which you are aware of, affected the process of analysis of theories of harm by the competition agency in your jurisdiction."

(15 responding NGAs; multiple answers allowed)

[29] *Supra* note 22.



Some responding NGAs said that competition authorities have not properly taken into account the characteristics of digital markets, nor considered how theories of harm fit into the new markets. Others criticise approaches taken by competition authorities in specific cases. Several responses are highlighted as follows:

Some NGAs argue that the competition authority in their jurisdiction relies on traditional theories of harm, and alternative theories of harm capable or better equipped to assess the anticompetitive impacts on digital markets have not been developed.

Another NGA recognizes that competition authorities around the world are making efforts to respond to the particularities of digital markets, and argues that competition authorities should consider in depth four theories of harm, namely; i) increase in non-monetary prices charged from consumers (users), such as data or any other inputs; ii) quality reduction of products or services offered; iii) harmful effects arising from incremental innovation which could, for example, increase barriers to entry and limit consumer choice, excluding smaller competitors from the market; and iv) existence of integrated structures and creation of ecosystems that permeate different markets.

Other NGAs point out that competition authorities face challenges in assessing the dynamics and unique characteristics of the relevant markets in the digital sector, as the issues regarding digital markets are still new to them, and they lack case laws and expertise.

2.4. Remedies

2.4.1. Types of Remedies and Grounds for Choosing Them

The survey inquired about the types of remedies that responding authorities imposed or sought to obtain in their cases. "Cease and desist order (including articles ordering termination of particular conduct)" and "Monetary sanctions" appeared to be the main tools for the responding authorities. Some responding authorities gave preferences to "Behavioral remedies" over "Structural remedies". "Interim measures" were also employed in a few cases. The survey also shows that focusing on the proportionality of remedies is a key part of some responding authorities' consideration when designing remedies.

In the *Naver* case,[30] the KFTC chose a cease and desist order and monetary sanctions. The KFTC explains the necessity of imposing both direct enforcement action, i.e. cease and desist order against Naver's algorithm manipulation, and indirect enforcement action, i.e. fines to deprive the Naver of profits gained by the illegal conduct, in order to terminate and prevent abuse of dominant position and promote fair competition.

In the *Facebook* case,[31] the German Federal Cartel Office (BKartA) found that Facebook abused its dominant position by making the use of its social network conditional on the collection of user and device-related data outside Facebook's social network, and by combining that information with the user's Facebook account. The BKartA imposed behavioural remedies which prohibited Facebook from engaging in such conduct and required Facebook to obtain users' consent for using their data. The BKartA deemed the obligations necessary and proportionate to terminate the infringement.

2.4.2. Challenges and Solutions Concerning Remedies Specific to Digital Markets

The survey asked whether ICN member authorities faced any challenges in imposing remedies suited to the digital field. In 11 cases out of the 41 (by seven responding authorities), competition authorities faced challenges concerning remedies. Information on ten cases (by seven responding authorities) was not shared due to the confidentiality of on-going cases and other reasons. In the other 20 cases (by nine responding authorities), competition authorities did not identify any challenges concerning remedies.

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[30] *Supra* note 27.

[31] See: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html;jsessionid=97AF5D0B25FB06E871F1FCAD0ECDDC06.1_cid371?nn=3591568.

As was the case with respect to the obstacles concerning analysis of theories of harm (See section 2.3.3.), there was no conclusive answer as to whether ICN member authorities face obstacles when imposing remedies on unilateral conduct in digital markets, due to the small number of responses. Nonetheless, the following section seeks to provide some additional information by describing observations made by some responding authorities.

(a) Designing Appropriate Remedies

In the *Google News Corp* case,[32] the ADLC imposed monetary fines and accepted remedies proposed by Google that aimed at re-establishing a level playing field for all players. The ADLC points out the challenge to ensure that the remedies would be sufficient to eliminate the conduct. In order to overcome the challenge, an intermediary version of the remedies has been market-tested in accordance with a specifically designed protocol that was accepted by Google. The ADLC also indicates that another challenge was to ensure that the proposed remedies would remain effective in the fast-changing market. A principle based approach was therefore retained, ensuring a given remedy would not simply become obsolete for technological reasons.

(b) Timely Remedies

In the *iFood* case[33] by the CADE, iFood was suspected to abuse its market dominance as online food delivery platform by entering into exclusive contracts with "must-have" restaurants, and by giving more favourable treatment to those restaurants with exclusive deals on its platform. The CADE adopted an interim measure to suspend the conduct and prevent its (re-) emergence in the future. The challenge identified by the CADE was to impose formal remedies to restore competition in a timely manner in digital markets with dynamics and ever-changing feature.

(c) Monitoring of the Implementation of Remedies

In the *Google News Corp* case,[34] the ADLC expected that the monitoring would take a long period of time and thus need significant human resources. In order to overcome this challenge, an independent monitoring trustee was designated for the monitoring. The

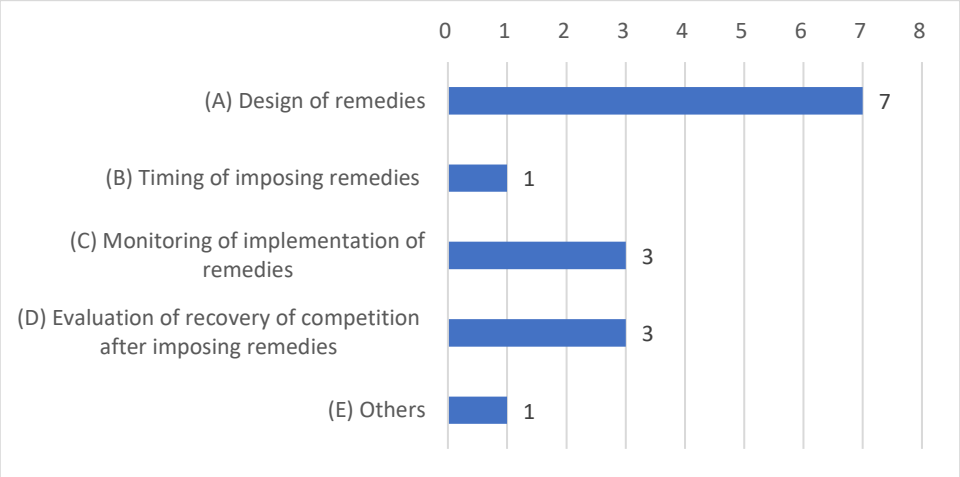
[32] *Supra* note 21.
[33] See: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcaPonKpemYl591TZDVz41cKkeMG3znSccU-isTZDv-qj (only available in Portuguese).
[34] *Supra* note 21.

difficulty in monitoring is also mentioned by Canada. In the *TREB* case,[35] the Competition Tribunal ordered TREB to terminate its anticompetitive practices, as well as imposing other measures necessary to restore competition. In order to monitor the implementation of those remedies, the CBC relied on its complaint procedures where third-party stakeholders could report TREB's non-compliance of the remedies, which would require additional resources from the CBC to address. However, the CBC did highlight that its extensive network of market contacts in the industry was beneficial in ensuring that the CBC was able to identify and detect potential compliance issues at an early stage.

(d) NGAs' Views

The survey also inquired NGAs' observations on challenges concerning remedies imposed on unilateral conduct in digital markets. As shown in Chart 2 below, many responding NGAs listed "Design of remedies" among the challenges. The survey also shows that "Monitoring of implementation of remedies" and "Evaluation of recovery of competition after imposing remedies" are recognized as major challenges for competition authorities.

Chart 2: NGAs' responses to the survey question "select the specific challenges, which you are aware of, affected the imposition of remedies by the competition authority in your jurisdiction." (nine responding NGAs; multiple answers allowed)



Some NGAs recognise that designing remedies that fit into digital markets is challenging,

[35] *Supra* note 22.

and point out that competition authorities have been and will continue to be required to take new approaches rather than traditional ones in designing their remedies. This report describes some of the responses by the NGAs as follows:

One NGA points out that competition authorities are hesitant to adopt behavioural remedies because they have a strong perception that the adoption of classic behavioural remedies is insufficient to eliminate anticompetitive practices and effects in digital markets.

Another NGA refers to the *Amazon Japan* case[36] as an example of the new form of remedies employed by the JFTC. In this case, Amazon Japan imposed disadvantages on its suppliers that were in an inferior bargaining position vis-a-vis Amazon Japan. More specifically, Amazon Japan i) deducted certain amounts from its payments to the suppliers although the wholesale prices had been agreed between the two parties beforehand, ii) requested the suppliers to provide financial contributions without justification, and iii) returned items already delivered by the suppliers without justification. The JFTC approved the proposed commitment plan including refunds to suppliers by Amazon Japan. The NGA argues that it is generally considered that "traditional" cease and desist orders by the JFTC cannot include an order for refunds, and commitments are a new tool given to the JFTC to impose monetary remedies without taking formal procedures.

By reference to the *Google Shopping* case,[37] one NGA observes that the European Commission signalled that it would not hesitate to impose significant fines in cases involving digital markets even when the conduct may have some novel features. The NGA finds it hard to estimate whether this attitude is right at this stage as digital markets are changing rapidly. Regarding the same *Google Shopping* case, another NGA states that the implementation of remedies in digital markets involves significant uncertainties from both legal and practical viewpoints. The NGA argues that an open debate between competition authorities and private practitioners should take place in order to design and implement remedies that are able to properly restore competition and are also legally sound in future cases, based on lessons learnt from this case.

3. Legal or Structural Challenges and Approaches Specific to Digital Markets

3.1. Overview

The survey also sought to inquire whether there are legal or structural challenges when

[36] See: https://www.jftc.go.jp/en/pressreleases/yearly-2020/September/200910.html.
[37] *Supra* note 23.

bringing enforcement actions against unilateral conduct by companies with dominance/substantial market power in digital markets. Forty-six responding authorities and 31 responding NGAs answered this question; among those, 41 responding authorities[38] and 19 responding NGAs pointed out one or more legal or structural challenges. Section 3, therefore, describes those challenges as well as the approaches taken by competition authorities to address those challenges, including the introduction of new legislation, amendment of existing competition laws, and other structural reforms.

3.2. Specific Challenges and Approaches Taken by Competition Authorities

3.2.1. Requirements of Dominance/Substantial Market Power

Eleven responding authorities[39] and some responding NGAs considered the necessity to prohibit unilateral conduct that does not meet the requirements of "dominance/substantial market power" stipulated in existing competition legislation regarding unilateral conduct.

(a) Challenges

Details for the challenges related to the requirements of dominance/substantial market power are as follows:

Some responding authorities[40] state that some difficulties may be encountered in establishing "dominance" or "substantial market power" in a given relevant market, preventing them from dealing with unilateral conduct that does not fulfil those requirements but may have anticompetitive effects. Traditional concepts of market share, market definition and market power might not be fully applicable in digital markets, which contain zero-price services and multi-sided markets. Discussion on digital ecosystems is noteworthy; the notion of dominance in a certain market may not be able to apprehend digital platforms being in the centre of ecosystems and exercising their power across multiple different markets or tipping neighbouring markets.

One responding authority[41] considered that the notion of abuse of a dominant position has proved to be well suited to apprehending the conduct of major digital platforms.

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[38] Australia, Brazil, Canada, Chile, Croatia, Czech Republic, the EEU, Ecuador, the EU, France, Germany, Greece, Hong Kong, Hungary, Indonesia, Italy, Japan, Korea, Lithuania, Luxemburg, Malaysia, Mauritius, Mexico, Mongolia, the Netherlands, New Zealand, the Philippines, Poland, Serbia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Thailand, Turkey, the UK, the US FTC, Vietnam, Zambia, etc.

[39] Australia, Brazil, Ecuador, France, Greece, Mongolia, Singapore, Slovak Republic, Spain, Sweden, and Zambia.

[40] France, Greece, Spain, and Sweden.

[41] France.

However, the responding authority also mentioned that avenues for improvement may be considered, without affecting current legislation, and one approach could be to extend the notion of dominant position to include certain players who are in a position of near-dominance or on the verge of tipping the market.

Another responding authority[42] has had experience in some digital markets with a few large players, which may not be singly dominant, engaging in similar conduct that may cause some adverse effects on competition. The provision regarding abuse of dominance in their competition law covers collective dominance as well as single dominance, but collective dominance requires evidence to prove coordination or links between the firms.[43] In this regard, another responding authority[44] notes that in another jurisdiction with collective dominance, proving coordination or links between firms could be established from various indirect factors rather than directly.

On the other hand, there are some responding authorities that do not report challenges in meeting the requirements for establishing dominance/substantial market power; one[45] mentions that they can apply a rebuttable presumption of dominant position based on market share.

(b) Approaches Taken by Competition Authorities

Some responding authorities have already adopted, or are now considering the adoption of legislative approaches to clarify or extend the notion of dominance/substantial market power that can entail harm on competition.

The Digital Markets Act (DMA) in the EU established narrowly defined objective criteria for qualifying a large online platform as a so-called "gatekeeper," which would allow focused enforcement against, among others, the most evident and prominent concerns arising in the digital sector in relation to large and systemic online platforms.[46] The practices addressed by the DMA are based on issues identified, among others, in previous competition enforcement cases.

Also, Germany responds that it has newly introduced the provision (Section 19a) in the German competition law through the 10th amendment, which stipulates that the BKartA

[42] Singapore.
[43] Section 47 of the Singapore competition law.
[44] Mexico.
[45] Brazil.
[46] The DMA entered into force on 1 November 2022 and will start to apply on 2 May 2023, full text available at: https://data.europa.eu/eli/reg/2022/1925/oj.

can declare an undertaking to be of "paramount significance for competition across markets"[47], taking factors into consideration such as the company's market position, financial strength, access to data relevant for competition, and the relevance of its activities for third-party access to markets and its related influence on the business activities of third parties.[48] The BKartA can prohibit certain types of conduct by companies with "paramount significance for competition across markets" (e.g. self-preferencing of a group's own services or impeding third companies from entering the market by processing data relevant for competition). This rule is aimed at a small circle of companies predominantly active in the digital sector which, as digital ecosystems extend across markets, are particularly able to expand their position of power across market boundaries or to protect their incontestability.

The UK also notes that in its "A new pro-competition regime for digital markets", it has proposed introducing the notion of digital platforms with "strategic market status", which is described as having a substantial and entrenched market power that gives them a strategic position in one or more activities.[49] The Australian Competition and Consumer Commission (ACCC) has also proposed mandatory codes that would apply to 'designated' digital platforms that meet clear criteria relevant to their incentive and ability to harm competition.[50]

Moreover, to deal with digital platforms holding a dominant position in digital ecosystems, Greece has proposed a new provision[51] in their competition law, which would prohibit abuse of "position of power in an ecosystem" with paramount importance to competition, defining those requirements in detail.

Other than legislative initiatives, some jurisdictions address the challenges by issuing guidelines clarifying the requirements and criteria of dominance/substantial market power; for example, the KFTC drafted the Guidelines for Unilateral Conduct in Platform

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[47] BKartA, "What are undertakings 'of paramount significance for competition across markets'?", available at: https://www.bundeskartellamt.de/EN/Abusecontrol/abusecontrol_node.html;jsessionid=C8CE0E25F23C661E51E5E0477843A5EA.2_cid387#doc3600026bodyText5.

[48] See BKartA, "Amendment of the German Act against Restraints of Competition", available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

[49] The UK DCMS and BEIS (2021), "A new pro-competition regime for digital markets", available at: https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

[50] See the ACCC's (2022) "Digital platform services inquiry, interim report no.5 – regulatory reform", available at: https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-25/september-2022-interim-report.

[51] Article 2A of the Greek competition law.

Markets, which would provide criteria for defining relevant markets and assessing "dominance" considering the characteristics of digital platforms.

3.2.2. Scope of Unilateral Conduct

Twelve responding authorities[52] highlight the challenges in prohibiting anticompetitive practices by companies with dominance/substantial market power that do not fall within the scope of existing legislation on "unilateral conduct".

(a) Challenges

Some responding authorities[53] point out that existing competition law regimes are not sufficient to address competition concerns derived from dominant digital platforms. They particularly mention the difficulty in addressing exploitative conduct by digital platforms rather than their exclusionary behaviours, i.e. focusing on adverse effects on competition rather than competitors under existing laws. For example, one responding authority[54] mentions that, under the current case law, an intended negative impact on a competitor that is predatory, exclusionary, or disciplinary is a necessary element in order to demonstrate the contravention. Recently however, legislative amendments in that jurisdiction have come into force that now captures conduct that is also harmful to the competitive process. It will be interesting to see how this plays out before the courts and reflected in future case law. Another responding authority[55] indicates that their current provision on unilateral conduct requires companies taking advantage of dominance/substantial market power for an anticompetitive purpose, which would be difficult to be proven and therefore raise the hurdles for the authority to apply and enforce.

Many of the responding authorities call for brand-new legislation or amendment of competition laws, or even a special regulator of digital platforms or sector-specific regulations, to fill the gap in the existing provisions on unilateral conduct.

(b) Approaches Taken by Competition Authorities

A few jurisdictions introduced brand-new legislation, with cooperation between competition authorities and other sector regulators, to fill the regulatory gap in the existing provisions on unilateral conduct. The DMA in the EU made it clear that certain practices by "gatekeeper" platforms are ex-ante prohibited, such as ranking their own

[52] Australia, Brazil, Canada, Ecuador, Greece, Luxemburg, the Netherlands, New Zealand, Mongolia, Singapore, Spain, and Turkey.
[53] Australia, Canada, the Netherlands, New Zealand, Singapore, and Spain.
[54] Canada.
[55] New Zealand, Section 36 of the New Zealand competition law.

products or services higher than those of others (self-preferencing), pre-installing certain apps or software, or preventing users from easily un-installing these apps or software, requiring the most important software (e.g. web browsers) to be installed by default when installing an operating system, preventing developers from using third-party payment platforms for app sales or reusing private data collected during a service for the purposes of another service. The UK's proposal on the new regime requires digital platforms with "strategic market status" to comply with an enforceable code of conduct, which would anticipate and prevent practices that exploit consumers and businesses or exclude innovative competitors. Similarly, the ACCC has proposed establishing mandatory service-specific codes of conduct for 'designated' digital platforms to address anti-competitive issues. Such issues include anti-competitive self-preferencing, tying, exclusive pre-installation agreements, unfair dealings with business users, as well as impediments to consumer switching, transparency and interoperability. [56] Turkey, likewise, proposed establishing an extra, and clear-cut regulation on digital platforms, particularly focusing on the prohibition of exclusivity or use of wide MFN clauses.[57]

Some other jurisdictions respond to this challenge by broadening the scope of their existing competition law provisions; for example, New Zealand states that they are currently amending the provision on unilateral conduct in their competition law, in order to lower the threshold by replacing the test of "taking advantage of market power for an anticompetitive purpose", which is difficult to be proved, with a more effects-based test, "conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market".

In addition, Australia indicates that consumer law could be one of the effective tools to address this gap. The ACCC has initiated a number of enforcement proceedings under the Australian consumer law due to concerns about Australian consumers being misled by digital platforms. This includes false or misleading conduct by digital platforms in relation to the collection and use of consumers' personal data for their commercial benefits; for example, misleading consumers about the collection and use of personal location data[58] and misleading consumers in promotion of a mobile application to keep

[56] *Supra* note 50.
[57] The Turkish Competition Authority (2022), "Final Report on the E-Marketplace Sector Inquiry", available at: https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-raporu-pdf-20220425105139595-pdf (only available in Turkish).
[58] See: https://www.accc.gov.au/media-release/google-misled-consumers-about-the-collection-and-use-of-location-data.

users' personal data private.[59]

At the same time, there would be a need to ensure that those regulations on digital platforms do not reduce the incentive for innovation. Some responding NGAs and even responding authorities themselves are aware of the importance of this balancing exercise.

3.2.3. Risk of Over/Under Enforcement

(a) Challenges Regarding the Risk of Over-Enforcement

Six responding authorities[60] note that there is a risk of over-enforcement (a false positive) when addressing the unilateral conduct of companies with dominance/substantial market power in digital markets. According to these responding authorities, a false positive can be caused by the vagueness of competition law provisions, failure in balancing exercise of procompetitive and anticompetitive effects, or an insufficient scheme or framework for the analysis of theories of harm.

Similarly, several responding NGAs mention the need for competition authorities to carefully consider both procompetitive and anticompetitive effects of conduct by digital platforms, otherwise there would be the risk of over-enforcement. One NGA states that the discussion in the cases is very often more focused on the anticompetitive effects than the pro-competitive effects, thereby leading to the possibility of tilting the balance towards false positives, and this may have a ripple effect where the decision in such cases serves to influence the outcome in later cases.

On the other hand, other responding authorities[61] indicate that the inherent risk of over-enforcement would not be peculiar to the digital markets, while recognising the additional difficulty in understanding markets with digital features.

(b) Challenges Regarding the Risk of Under-Enforcement

Twelve responding authorities[62] and five responding NGAs mention that there is a risk of under-enforcement (a false negative).

Firstly, some responding authorities[63] indicate that competition authorities, especially

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[59] See: https://www.accc.gov.au/media-release/accc-alleges-facebook-misled-consumers-when-promoting-app-to-protect-users-data.
[60] Brazil, Ecuador, the EEU, Greece, Mongolia, and Zambia.
[61] Brazil and Ecuador.
[62] Australia, Brazil, Canada, Ecuador, the EU, France, Greece, Hungary, Italy, Mongolia, Poland, and Spain.
[63] Australia, Poland, and Hungary.

smaller ones, may be less likely to pick up digital cases given that it would be difficult for them to satisfy the existing standard of proof. Also, one responding authority[64] mentions that they face a challenge in establishing theories of harm in unilateral conduct cases in digital markets, particularly because they are often based on indirect evidence and detailed economic analysis, while courts usually require clear-cut evidence. The high burden of proof under their judicial systems leads competition authorities to narrow down the focus on proving the infringement of competition law, thus, broader, systemic conduct occurring on a larger scale may not be adequately addressed through their enforcement action.

In addition, several responding authorities[65] note the difficulty of assessing and proving future anticompetitive effects, or counterfactual scenarios of impacts especially on nascent businesses in digital markets. Among them, one responding authority[66] mentions that, in addition to the complex nature of competition taking place in digital markets, economic literature is yet to provide a clear picture of how competition takes place between digital platforms, which makes competition authorities wary of intervening. Another responding authority[67] mentions that it is difficult for competition authorities to prove anticompetitive practices by dominant companies halting the emergence of nascent competitors, and they may potentially escape the scrutiny under competition law.

One responding authority[68] notes that the notion of "essential infrastructure" is, under EU and French law, subject to very strict criteria, which may be a hurdle to the enforcement of competition law in the digital field, in particular when dealing with indispensable databases, user communities or ecosystems. Further reflections would thus be useful to determine whether the standard applied to the notion of "essential infrastructure" should be relaxed or whether a new standard should be developed to qualify these "indispensable" assets. These reflections should also take care to uphold a framework that is conducive to innovation.

On the other hand, similarly to (a) above, some responding authorities[69] note that every market, not only digital markets, contains the inherent risk of under-enforcement.

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64 Hungary.
65 Canada and Spain.
66 Spain.
67 Canada.
68 France.
69 Brazil and Ecuador.

(c) Approaches towards the Risk of over/under Enforcement

Some responding NGAs note that commitment procedures would be one of the solutions to the risk of over/under enforcement. Commitments may address competition concerns in a more prompt and effective manner, without harming businesses and incentives for future investment and innovation.

In addition, one responding NGA points out the necessity of striking a balance in setting the standard of proof for competition authorities; a lower standard leads to a greater possibility of a false positive, whilst a more rigorous standard (proof beyond reasonable doubt) leads to a greater probability of a false negative.

3.2.4. Difficulty in Collecting and Analysing Evidence

Twenty-eight responding authorities [70] indicate that competition authorities have difficulty in collecting and analysing evidence as follows:

(a) Challenges

Firstly, 21 responding authorities[71] mention the difficulty in assessing and evaluating evidence to prove anticompetitive practices and effects in digital markets with complexity. On the one hand, competition authorities obtain a vast amount of data on investigated digital platforms, and businesses interacting with them or their users, which require enormous human resources and expertise for appropriate assessments. On the other hand, they sometimes face limitations in access to necessary evidence to prove the cases, which is also an obstacle for their investigation and enforcement.

Also, three responding authorities[72] highlight technological issues in particular. They face a lack of expertise and IT forensic capabilities in collecting data stored digitally, understanding computer systems in companies investigated, and sorting and proceeding with the data properly.

Furthermore, five responding authorities [73] note the difficulty of obtaining enough cooperation from the involved companies when requesting internal documents or a large

[70] Australia, Brazil, Canada, Chile, Croatia, Czech Republic, Ecuador, the EEU, France, Greece, Hong Kong, Korea, Hungary, Indonesia, Italy, Malaysia, Mauritius, Mexico, Mongolia, the Philippines, Poland, Serbia, Slovak republic, South Africa, Spain, Thailand, the UK, and Vietnam.
[71] Brazil, Canada, Chile, Czech Republic, Ecuador, the EEU, Greece, Hungary, Indonesia, Italy, Korea, Malaysia, Mauritius, Mexico, Mongolia, Poland, Slovak republic, Serbia, Spain, the UK, and Vietnam.
[72] Chile, Mauritius, and Spain.
[73] Czech Republic, the EEU, Malaysia, Mexico, and the Philippines.

amount of data. This is particularly challenging when those companies are located outside the jurisdiction and do not have local offices, and it is actually quite common in unilateral conduct cases involving so-called "big techs" operating their businesses internationally. Some responding authorities[74] specifically mention the difficulty in obtaining evidence from digital platforms domiciled in other jurisdictions for legal, logistical, and technical reasons. As for the legal obstacles, such international digital platforms often ignore requests for information and other requests from competition authorities that have no extraterritorial authority and cannot compel them to provide information or cooperate in the investigations. Other responding authorities[75] also note that they cannot compel investigated parties to appear for interrogations, or even notify the initiation of investigation when they are based in other jurisdictions. In addition, one responding authority[76] points out challenges arising from logistical (e.g. serving statutory notices) and technical (e.g. transferring electronic data from overseas servers) reasons, despite their competition law having an extraterritorial reach.

(b) Approaches Taken by Competition Authorities

In order to address these challenges in collecting and analysing evidence, several responding authorities implemented institutional reforms:

Firstly, as for approaches against the difficulty of evaluating a vast amount of data, the UK established the Digital Markets Unit[77] to support evidence-gathering on digital markets within the UK competition authority (CMA) on a non-statutory basis. It also improved its data science capabilities through the work of its Data Technology and Analytics unit, which provided the expertise needed in increasingly complex digital cases including unilateral conduct/abuse of dominance cases. The need for digital tools to analyse data obtained in the course of investigations is underlined by another responding authority[78]. Also, the ACCC established a specialist Digital Platforms Branch to build on and develop expertise in digital markets, which would proactively monitor and refer to its enforcement arms potentially anti-competitive conduct by digital platforms, so they could conduct inquiries and take enforcement actions as necessary.[79] The work of the Digital Platforms Branch is also supported by a Strategic Data Analysis Unit, which

[74] Australia, Brazil, Chile, Czech Republic, Ecuador, the EEU, Hong Kong, Mexico, and South Africa.
[75] South Africa and Ecuador.
[76] Australia.
[77] See: https://www.gov.uk/government/collections/digital-markets-unit.
[78] Serbia.
[79] See: https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

provides expert quantitative analytical support across the ACCC.

The ADLC has established the Digital Economy Service, which takes part in sector-specific inquiries on new issues related to the development of digital technology, and is also responsible for developing new digital investigation tools, based on algorithmic technology, big data and artificial intelligence.

Moreover, for a more effective evaluation of evidence, one responding authority[80] highlights the need to access market statistic information through the procurement of data or services of third-party research institutions and consultants. On the other hand, another responding authority[81] mentions that this resource-intensive approach is not sustainable for smaller competition authorities.

Furthermore, as for the technological difficulty, several responding authorities[82] note their efforts to develop the IT forensic capabilities for dawn raids or requests for information, and to strengthen technology experts such as IT specialists and econometricians. Also, several other responding authorities[83] note that the specialised unit works to develop convergent and standardised methods of analysis and intervention in digital markets, in close cooperation with industry regulators, relevant government departments and other competition authorities at the international level.

Finally, some responding authorities[84] highlight the importance of international cooperation to tackle the challenges regarding gathering evidence from outside the jurisdiction. To be more precise, one responding authority[85] mentions that some recent cases against international big tech companies in different jurisdictions had similarities, and therefore smooth cooperation could be anticipated. Another responding authority[86] highlights the importance of ICN and other international organisations, aimed at enhancing international cooperation between competition authorities, discussing the need to utilise mechanisms to lower legal barriers for information exchange and coordination in investigations.

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[80] The Philippines.
[81] South Africa.
[82] Greece, South Africa, and Spain.
[83] France and South Africa.
[84] Australia, Brazil, and Mexico.
[85] Brazil.
[86] Australia.

3.2.5. Institutional Hurdles for Efficient Investigations

(a) Challenges

Fourteen responding authorities[87] find institutional obstacles in conducting efficient investigations in digital markets, which are often complex due to the technological advancement and the opacity of business practices adopted by digital platforms.

Capacity restraints are the major challenge pointed out by those responding authorities. Not only smaller and younger competition authorities, but also advanced authorities have obstacles in investigating unilateral conduct cases in digital markets, as those investigations generally require more complex analysis and are therefore more resource intensive.

This lack of capacity and human resources leads to prolonged investigations, although the fast-moving digital sector requires generally quick interventions. Some responding authorities[88] report that they took years to conclude their cases in digital markets. Also, one responding authority[89] indicates an inherent problem of competition law enforcement; investigations by competition authorities and court proceedings are lengthy and necessarily retrospective, seeking to prove a dominant position or negative effects on competition after they have occurred. Another responding authority[90] mentions that remedies imposed by the competition authority may turn out to be ineffective at the time after prolonged judicial reviews, which may happen especially in digital markets, and therefore it is meaningful for not only the competition authorities but judicial bodies to be specialised.

Besides, one responding authority[91] points out practical issues regarding the interaction with other policy areas and sector regulators. Issues that arise in investigations involving digital platforms often involve other policy areas, particularly privacy and data protection. Competition authorities are therefore required to coordinate with those governmental regulators. Another responding authority[92] highlights a jurisdiction issue between competition authorities and other government bodies. Both competition authorities and other national institutions may be responsible for competition policy, or competition

[87] Australia, Ecuador, the EU, Indonesia, Italy, Malaysia, Mauritius, Mexico, Mongolia, the Philippines, Poland, South Africa, Spain, and the UK.
[88] Australia, Lithuania, Mauritius, the Netherlands, and the UK.
[89] Australia.
[90] Mexico.
[91] The Philippines.
[92] Mexico.

authorities are even excluded from certain sectors where regulators are in place.

(b) Approaches Taken by Competition Authorities

Some responding authorities have taken (or are considering taking) measures to overcome institutional obstacles for effective enforcement, mainly time and resource constraints, as follows:

(i) Ex-ante Regulation

It might be desirable to have ex-ante regulations in addition to existing competition laws with a mechanism for intervening quickly or beforehand to the risk of distortion on competition by digital platforms. The UK notes that the introduction of ex-ante regulation focusing on digital platforms with "strategic market status", in particular a code of conduct, would facilitate swifter action to prevent harm from occurring.[93] The DMA in the EU could also be an additional powerful tool to effectively address ex-ante some of the most harmful and common behaviours adopted by large platforms in the digital market.

Some responding NGAs support the necessity of ex-ante rules to regulate unilateral conduct by dominant digital platforms. One of them notes that when adopting the DMA, the European Commission has reached the almost unanimous agreement that competition law, despite its importance, cannot address all types of competition concerns that arise in digital markets.[94]

(ii) Earlier Intervention by Competition Authorities

In order to shorten the duration of investigations and to quickly restore competition in digital markets, some responding authorities implemented legislative reforms to introduce additional resolution procedures, including interim measures, commitments, and settlements, as well as the strengthening of the authorities' investigation power.

Germany describes that the new provision of German competition law, Section 19a, allows the BKartA to intervene at an early stage in cases where companies of "paramount significance" for competition across markets engage in certain types of unilateral conduct. Also, appeals against decisions issued by the BKartA will be brought directly to the Federal Court of Justice, which is the supreme court in Germany, as the first and last instance of all disputes in this regard.

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[93] *Supra* note 49.
[94] See, Urska Petrovcic and Gonçalo Coelho, *Proposed Solutions for Big Tech in the United States: Out of Step or Déjà Vu?*, Competition Policy International (Feb. 8, 2021).

One responding authority[95] in Europe mentions that the transposition of the ECN+ Directive[96] has provided EU national competition authorities with new tools to better implement competition law, including the ability of filing an action on their own initiative to impose interim measures. This can be particularly useful in emerging digital markets, where quick intervention for restoring competition is necessary.

(iii) Self- and Co-regulation with Digital Platforms

As abuse of dominance/unilateral conduct cases involving digital platforms can touch on novel or particularly complex issues for competition authorities, an interplay between competition authorities and investigated digital platforms themselves could lead to more effective enforcement. In this regard, the UK's proposal for a new regime puts emphasis on a participative approach.[97]

Also, Japan[98] indicates the benefits of "co-regulation" approach that combines a general regulatory framework stipulated by law with voluntary efforts by businesses within the framework. More specifically, digital platform operators that are designated as "specified digital platform providers" under the "Act on Improving Transparency and Fairness of Digital Platforms" are required to disclose terms and conditions to users in advance, establish appropriate internal procedures to ensure the fairness of transactions or to settle disputes with users, and submit a report that includes self-assessment results annually to the Minister of Economy, Trade and Industry. The Minister reviews the activities of those platforms based on the submitted report, and publishes the assessment results together with an overview of the report. In case any infringement is found, the Minister can request the JFTC to take necessary measures under the Japanese competition law. One responding NGA notes that this Japanese approach may be one of the answers to respond to the need for regulating large digital platform operators and at the same time avoiding possible harm from ineffective remedies and over/under enforcement.

(iv) Promotion of Private Enforcement

One responding authority[99] notes that, in order to address the challenge concerning a resource constraint of competition authorities, the promotion and expansion of private enforcement may provide an avenue for restoring competition. This will also serve to

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[95] France.
[96] European Parliament and Council Directive (EU) 2019/1.
[97] *Supra* note 49.
[98] See: https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/index.html
[99] Canada.

more rapidly expand valuable jurisprudence and bring relief for businesses in situations where meritorious cases are unable to be taken by competition authorities due to resource constraints.

(v) Cooperation With Other Government Authorities

The promotion of cooperation with other relevant government authorities would be desired to address concerns regarding the intersection of competition and other policies, namely data privacy protection policies.

In the UK, the CMA[100] has been working to ensure regulatory alignment and coherence in the statutory framework for digital markets, such as through close cooperation with the Information Commissioner's Office (ICO) and the establishment of the Digital Regulation Cooperation Forum, whose members include the CMA, the ICO, the Office of Communications and the Financial Conduct Authority. A similar body has been established in Australia, to support a streamlined and cohesive approach to the regulation of digital platforms.[101] Another responding authority[102] concluded a memorandum of understandings even with an academic institution aiming at conducting joint research and enhancing the expertise for more effective competition law enforcement in this field.

From other perspectives, one responding NGA points out that competition and privacy laws and policies should not be used for the purpose of instrumentalizing one policy to serve another and the objectives of each policy should not be missed.

On another note, another responding NGA mentions that cooperation with IP authorities could be valuable in instances that require expert advice on disputes that concern IP protected subject matter.

3.2.6. Challenges Regarding Remedies and Sanctions

Some responding authorities[103] point out the institutional challenges regarding remedies; one of them[104] indicates that the current antitrust system often cannot allow for the design and implementation of adequate remedies that can evolve and respond to the rapid

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[100] See: https://www.gov.uk/government/publications/cma-ico-joint-statement-on-competition-and-data-protection-law and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982898/DRCF_response_to_DCMS__PDF.pdf.

[101] The Digital Platform Regulators Forum (DP-REG), comprising the ACCC, Office of the Australian Information Commissioner, Office of the eSafety Commissioner and the Australian Communications and Media Authority.

[102] Greece.

[103] Sweden, the UK, etc.

[104] The UK.

changes of digital markets, whereas large digital platform operators are able to conduct thousands of tests at any one time to fine tune potentially abusive practices. Also, another responding authority[105] notes that the insufficient deterrence of monetary sanctions for imposing meaningful consequences for non-compliance of competition law. Since the time of the survey however, legislative amendments in that jurisdiction have significantly increased the monetary penalties.

3.2.7. Challenges Concerning Predictability of Enforcement

Some responding NGAs point out the importance of enhancing the predictability of competition law enforcement for businesses. One responding NGA mentions that there is a problem of predictability for businesses since there have been few cases appealed and reviewed in the court so far, and the details of cases are often not clear enough from press releases published by competition authorities. Also, another responding NGA points out that the analysis of competition in digital markets may differ from traditional perception of that in other markets, thus competition authorities should clarify their views on theories of harm in cases relevant to digital markets even when they proceed with commitments or close them without making formal decisions.

4. Background on Lack of Enforcement Experiences

As mentioned above, 28 out of 47 responding authorities report to have taken no enforcement actions against the unilateral conduct by companies with dominance/substantial market power in digital markets during the survey period. The survey sought to understand the reasons for this lack of enforcement and obstacles that those responding authorities are facing.

4.1. Overview

The majority of the responding authorities (15 out of 28[106]) have started formal investigations against digital platforms during the survey period. Ten responding authorities[107] started a formal investigation but closed the case without taking any actions or with commitments offered by the investigated parties; nine out of ten responding authorities[108] closed their cases without taking any enforcement action, and two out of

[105] Canada.
[106] Australia, Chile, Greece, Hong Kong, Hungary, Japan, Lithuania, Luxemburg, Mexico, Poland, Singapore, South Africa, Sweden, the UK, and Zambia.
[107] Australia, Greece, Japan, Lithuania, Luxemburg, Mexico, Singapore, South Africa, Sweden, and the UK.
[108] Australia, Greece, Japan, Lithuania, Luxemburg, Mexico, Singapore, South Africa, and Sweden.

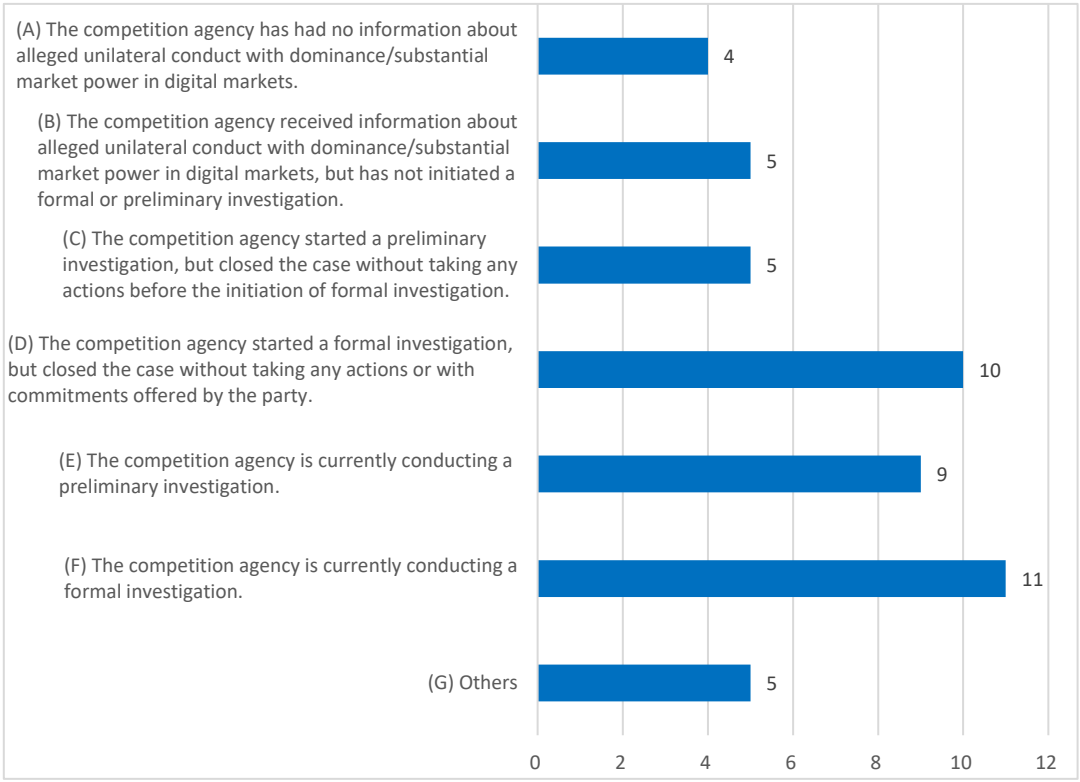
ten responding authorities[109] did with commitments offered by the investigated parties. Eleven authorities[110] have cases that are still ongoing at the time of the survey.

Furthermore, 11 responding authorities[111] have started preliminary investigations, and five[112] of them closed the cases before the initiation of formal investigations, and nine[113] of them are still ongoing at the time of reporting. Five responding authorities[114] did not initiate formal or preliminary investigations although they received information on alleged unilateral conduct by companies with dominance/substantial market power in digital markets. Four responding authorities[115] respond that they did not receive any such information.

[109] Australia and the UK.
[110] Australia, Chile, Greece, Hong Kong, Hungary, Mexico, Poland, South Africa, Sweden, the UK, and Zambia.
[111] Australia, Greece, Hong Kong, Indonesia, Norway, the Philippines, Poland, Singapore, Slovak Republic, Spain, and Sweden.
[112] Australia, the Philippines, Singapore, Spain, and Sweden.
[113] Australia, Greece, Hong Kong, Indonesia, Norway, Poland, Slovak Republic, Spain, and Sweden.
[114] Croatia, Greece, New Zealand, the Philippines, and Sweden.
[115] Ecuador, Georgia, Serbia, and Trinidad and Tobago.

Chart 3: Competition authorities' responses to the survey question "identify the state of investigation against unilateral conduct with dominance/substantial market power in digital markets during the period January 1, 2016 to November 1, 2021."

(28 responding competition authorities; multiple answers allowed)



4.2. Reasons not to Initiate Investigations

The survey asked the nine responding authorities[116] the reason for not initiating formal or preliminary investigations even in the case where they received information about alleged unilateral conduct by companies with dominance/substantial market power in digital markets.

The result indicated that there were various obstacles for competition authorities to initiate investigations, for example; lack of enough enforcement experiences in similar cases,[117] lack of human resources such as economists and technical experts,[118] the

[116] Croatia, Ecuador, Georgia, Greece, New Zealand, the Philippines, Serbia, Sweden, and Trinidad and Tobago.
[117] Greece and the Philippines.
[118] Greece and the Philippines.

difficulty of obtaining internal documents from digital platforms,[119] and the difficulty of analysing the theories of harm in this field[120].

Some responding authorities[121] specify other obstacles to their investigations, as, for instance, the difficulty of meeting the requirements for proving infringements under current competition laws. Also, one responding authority[122] points out positions of relatively smaller competition authorities that would monitor the success of overseas authorities in regulating digital services and liaise with them, rather than conducting investigations on their own. In those countries with younger competition authorities and developing digital economies, cases involving digital platforms can be perceived as less relevant and tangible compared to competition issues in other sectors, therefore they put less focus on those cases. Besides, one responding authority[123] refers to the difficulty of stepping into the area where competition law and other regulations (i.e. consumer protection and data protection laws) are overlapping.

Another authority[124] states it does not prioritise digital cases that include situations when a supranational authority is already investigating the same conduct.

4.3. Closure of Cases

As mentioned above, several cases were concluded without any enforcement actions or with commitments. The majority of the responding authorities (seven[125] out of 12[126]) mention that one of the reasons for closing cases was that no anticompetitive effect was found as a result of their investigations.

One authority[127] mentions that it prioritised other areas and therefore closed the cases in digital markets. Besides, "Closing the case was a better option than imposing remedies"[128], "It was difficult to design and monitor remedies"[129], and "The competition authority did not have enough human resources such as economists and tech people"[130] were chosen

[119] Croatia and the Philippines.
[120] The Philippines.
[121] New Zealand and the Philippines.
[122] New Zealand.
[123] The Philippines.
[124] Sweden.
[125] Greece, Lithuania, Luxemburg, Mexico, Singapore, Spain, and Sweden.
[126] Australia, Greece, Japan, Lithuania, Luxemburg, Mexico, the Philippines, Singapore, South Africa, Spain, Sweden, and the UK.
[127] Australia.
[128] Japan.
[129] Australia.
[130] Greece.

by one responding authority each.

5. Existing Legal and Institutional Frameworks for Addressing Unilateral Conduct by Companies Without Dominance/Substantial Market Power

5.1. Background

Sections 2 to 4 above discussed unilateral conduct by digital platforms with dominance/substantial market power. Some responding authorities and responding NGAs pointed out that the challenges in establishing "dominance" or "substantial market power" in digital markets, or that anticompetitive practices by digital platforms may fall outside of the scope of "unilateral conduct" under the current competition law regimes. Because of that, competition authorities may not always be able to adequately deal with practices by digital platforms that raise competition concerns.

There are, however, several jurisdictions that have legislation on unilateral conduct by companies "without" dominance/substantial market power. Such legislation focuses on the abuse of imbalance in bargaining power between trading parties and economic dependency of one to another, or "unfairness" of business practices which may result in distortion of competition. In particular, several jurisdictions have legislative provisions that prohibit abuse of imbalance in bargaining power or economic dependency. Although they often use a different terminology, these provisions share a similar core objective; "abuse of relative market power" in Germany[131] and Switzerland,[132] "abuse of a state of economic dependence" in France,[133] "abuse of economic dependence" in Italy,[134] and "abuse of superior bargaining position" in Japan[135] and Korea.[136] These are collectively referred to as "abuse of superior bargaining position" (ASBP) in this Section.

Traditionally, the regulation of abuse of dominance has been an effective way to respond to unilateral anticompetitive conduct by dominant players in defined relevant markets. Several responding NGAs caution against further expansion of competition law provisions to companies that are not dominant. They reason that most concerns in digital markets relate to practices adopted by companies that are clearly dominant, which suggests that primary concerns would not be addressed by regulating the unilateral

[131] Section 20 of the German competition law (Prohibited Conduct of Undertakings with Relative or Superior Market Power).
[132] Article 4 (2bis) and Article 7 (2) (g) of the Swiss competition law.
[133] L. 420-2, paragraph 2, of the French Commercial Code.
[134] Article 9 of Law No. 192/1998.
[135] Article 2 (9) (v) of the Japanese competition law.
[136] Article 45 of the Korean competition law.

conduct of companies that are not "dominant".[137] One NGA suggests that the adoption of regulation that complements competition law, such as the DMA adopted in the EU, might be a better alternative.

On the other hand, it has been observed that unilateral conduct by digital platforms are causing competition concerns without having dominance/substantial market power. One responding NGA also indicates that it would be difficult to address the problems emerging in digital markets without overstretching the boundaries of existing competition law, taking the prohibition of "abuse of economic dependence" in their jurisdiction as an example. These provisions, which do not require to prove "dominance" in relevant markets, can be seen as an alternative enforcement tool to address this regulatory gap on unilateral conduct in digital markets, where competition authorities have particular challenges in defining markets and analysing market share.

Section 5, therefore, gives attention to laws in different jurisdictions that address unilateral conduct by companies without dominance/substantial market power, especially those on ASBP, and their actual enforcement cases. Considering that anticompetitive practices of non-dominant digital platforms are observed in many jurisdictions, it would be helpful to review their experiences in this area.

5.2. Overview

According to the result of the survey, 14 out of 47 responding authorities[138] have existing legal frameworks to address the unilateral conduct by companies without dominance/substantial market power. Eight responding authorities[139] have specific provisions focusing on ASBP (as described in Section 5.3. below) and five responding authorities[140] have general provisions that can cover unilateral conduct by companies without dominance/substantial market power in competition law (as described in Section 5.4. below).

5.3. Specific Provisions on ASBP

Some jurisdictions have specific provisions regulating unilateral conduct by companies without dominance/substantial market power in their competition laws. In Germany,

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[137] For example, US House of Representatives (2020), *Investigation of Competition in Digital Markets*, available at: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.
[138] Australia, Brazil, Chile, Ecuador, France, Germany, Indonesia, Italy, Japan, Korea, Spain, Switzerland, Thailand, and the US FTC.
[139] France, Germany, Indonesia, Italy, Japan, Korea, Switzerland, and Thailand.
[140] Brazil, Chile, Ecuador, Spain, and the US FTC.

abuse of dominance is prohibited by Section 19 of the German competition law, and abusive conduct by a party with "relative or superior market power" is also prohibited, even if the party is not dominant, by Section 20 (1). Section 20 (1) states that: "Section 19 (1) in conjunction with subsection (2) No.1 shall also apply to undertakings and associations of undertakings to the extent that other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on them in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or associations of undertakings and the countervailing power of other undertakings (relative market power)."[141] This Section 20 (1) was established with the purpose of protecting small and medium sized enterprises (SMEs) that are dependent on retailers from unfair practices by those retailers with large purchasing power. The scope of the application used to be limited to transactions with SMEs, however, it has now extended to cover transactions between companies of all size by the recent amendment described in Section 5.5. below.

In Switzerland, the new concept of "relative market power" was introduced to their competition law (Article 4 para 2bis)[142] and the abuse of such market power would be prohibited in the same way as abuse of dominance. According to this provision, a company shall be regarded as having a "relative market power" if customers or suppliers depend on it for the supply of or demand for any goods or services, with no sufficient and reasonable possibilities of switching. This provision covers transactions between companies of all size.

In Japan, Article 2 (9) (v) of the Japanese competition law prohibits a company that has a "superior bargaining position" to transaction partners from making use of such a position to impose a disadvantage on these transaction partners, unjustly in light of normal business practices. This Article defines practices seen as "abuse" concretely: (a) causing transaction partners in continuous transactions (including those who intend to newly engage in continuous transactions) to purchase goods or services other than those to which the relevant transactions pertain; (b) causing transaction partners in continuous transactions (including those who intend to newly engage in continuous transactions) to provide money, services or other economic benefits; and (c) refusing to receive goods in

[141] Section 20 of the German competition law (Prohibited Conduct of Undertakings with Relative or Superior Market Power), available at: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html.
[142] The Swiss competition law; amended Jan. 1 2022.

transactions with transaction partners, causing them to take back such goods after receiving, delaying payment or reducing the amount of payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to them. This "abuse of superior bargaining position" is prohibited as one of the "unfair trade practices", on the basis that it would impede fair competition by putting these transaction partners in a disadvantageous competitive position against its competitors, while putting the company with a superior bargaining position in an advantageous competitive position against its competitors. Notably, this provision is applied to transactions between businesses and consumers as well as those between businesses.

Also in Korea, trading with certain transaction partners by unfairly taking advantage of its position in trade is listed as one of the "unfair trade practices" that are likely to undermine fair trade, under Article 45 of the Korean competition law.[143] This provision on abuse of superior bargaining power can be applied to transactions between businesses and consumers in a case where a company forces purchase or profit sharing, or imposes unfair terms and conditions on customers, and such abuse potentially causes harm to a large number of unspecified customers or takes place continuously and repeatedly, which results in undermining fair trade environment.

In France, the ADLC is empowered to implement Article L. 420-2, paragraph 2 of the French Commercial Code, which prohibits the abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings, if it is likely to affect the functioning or structure of competition. The notion of "abuse" of a state of economic dependence is not limited to predefined conduct but can result from a contractual clause, a conduct, or the imposition of several rules or commercial constraints, presenting a manifestly abnormal, unbalanced or excessive character. According to Article L. 420-2, paragraph 2, it may include refusals to sell, tie-in sales or discriminatory practices. This provision was introduced notably to prevent large general retailers from abusing their market power towards suppliers, which are often SMEs. However, it is now applicable to any commercial relationship between all sizes of companies, regardless of the sector.

In Italy, Article 9 of Law No. 192/1998 prohibits "abuse of economic dependence", which refers to a situation where a company holds significant commercial strength with respect to another particular company. Italy describes that this provision mirrors discipline of unfair terms in consumer contracts, i.e. in long-term contractual relations characterised

[143] It also prohibits other "unfair trade practices" including refusal to trade (Paragraph (1) 1), discriminatory treatment (Paragraph (1) 2), exclusion of a competitor (Paragraph (1) 3) and unfair solicitation of customers (Paragraph (1) 4).

by a significant imbalance in the bargaining position of the parties, some companies may indeed be in the same position as end consumers vis-à-vis their contractual counterpart and should therefore be granted protection against the risk of exploitation. This provision also reflects their view that not only conduct by companies holding a dominant position could distort competition, but also conduct by companies being able to exercise market power only to a certain extent and in relation to certain companies is also deemed to be capable of having negative effects on competition. By law, the AGCM may apply such provision provided that the abuse of economic dependence is "relevant" for competition in the market: in the AGCM practice, such provision is enforced when the abuse is capable of excluding a competitor from the market, whether through arbitrary termination of contractual relations or the imposition of unfair contractual terms.

Besides, Indonesia has a specific ex-ante legislation that focuses on the relationship between large companies and SMEs; large companies are supervised in their transactions with SMEs regardless of their market share/position, in order to improve the bargaining position of SMEs, encourage procompetitive market structure, and ensure fair competition.

5.4. General Provisions Covering Unilateral Conduct by Companies Without Dominance/Substantial Market Power

Five responding authorities[144] respond that they have general provisions in their competition laws that can regulate unilateral conduct by companies without dominance/substantial market power. Spain responds that it has a provision on "unfair acts" in order to cover conduct that does not qualify as an abuse of dominance but nonetheless harms competition in a relevant market, and this may include the exploitation of economic dependence.[145] Chilean competition law also has a general provision that prohibits multiple types of anticompetitive practices without an explicit requirement for dominance/substantial market power – focusing on the effects of those practices and aiming at the protection of the competitive process, rather than competitors.[146] Ecuador's competition law prohibits "unfair acts" that distort competition, and threaten economic efficiency, or the general welfare or the right of consumers or users.[147] In addition, Section 5 of the Federal Trade Commission Act in the US prohibits "unfair methods of competition", which may apply in certain circumstances to unilateral conduct where the

[144] Brazil, Chile, Ecuador, Spain, and the US FTC.
[145] Article 3 of the Spanish Competition Act.
[146] Article 3 para 1 of the Chilean competition law.
[147] Articles 25-27 of the Ecuadorian competition law.

party does not have dominance/substantial market power.[148]

Furthermore, Australia has a regulation concerning "unfair contract terms" with consumers or SMEs in its consumer law, stating that a term of a consumer contract or small business contract is void, if: (a) the term is unfair; and (b) the contract is a standard form contract. This provision is based on an imbalance in bargaining power between the contracting parties, with consumers or small businesses having little ability to negotiate the terms of contracts.[149] This provision was strengthened during 2022 to include the introduction of penalties for businesses that include unfair contract terms in their standard form contracts with consumers and small businesses.[150] The Australian consumer law also regulates misleading or deceptive conduct; it is illegal for a business to engage in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses.[151]

5.5. Adjustment Towards Digital Markets

5.5.1. Legislative Efforts

The survey found out that several responding authorities that have provisions regulating unilateral conduct by companies without dominance/substantial market power were even trying to tailor those provisions to the characteristics of digital markets, in an attempt to more actively regulate digital platforms.

The first example is Germany's recent amendment of Section 20 of the German competition law. Section 20 (1) now stipulates that all sizes of companies, not limited to SMEs, are covered by this provision. Also, Section 20 (1a) is added to provide a new regulation on limited data access, taking into account that dependence can also result from the fact that a company is dependent on access to data controlled by another company for its own activities. Refusing access to such data may also constitute an unreasonable hindrance if no commerce has been opened for such data yet. Section 20 (3a) is also added to regulate practices prone to facilitate market tipping. If an undertaking with superior market power according to national law impedes the independent attainment of positive network effects by competitors and thereby risks a considerable restriction of competition

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[148] The US FTC issued a policy statement with respect to Section 5 of the FTC Act on 10 November 2022, available at: https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition.
[149] Sections 23-28 of the Australian consumer law.
[150] See: https://www.accc.gov.au/media-release/accc-welcomes-new-penalties-and-expansion-of-the-unfair-contract-terms-laws.
[151] Section 18 of the Australian consumer law.

on the merits, antitrust enforcement may now intervene absent the finding of a dominant position. The provision is of relevance for the digital platform economy as it applies to multi-sided markets that have been identified as particularly vulnerable to market tipping.

Secondly, regarding its provision on abuse of "economic dependence," in August 2022 Italy introduced a rebuttable presumption of parties' economic dependence to digital platform operators offering intermediation services as a key gateway for reaching end users and/or suppliers. Furthermore, to complement this presumption, it has envisaged a non-exhaustive "black list" of practices that builds upon the "abuse of dominance" in the EU competition law and the newly proposed the DMA regulations on digital "gatekeepers".

In the third place, Korea has proposed the "Act on Fairness in Online Platform Intermediary Transactions," which enables the KFTC to more effectively regulate unfair trade practices using a superior bargaining position, which is already regulated under Article 45 of the Korean competition law, in digital markets through law enforcement considering the characteristics of digital markets.[152]

5.5.2. Guidelines

Aside from legislative amendments, two responding authorities[153] have developed guidelines that clarify their approach towards unilateral conduct by companies without dominance/substantial market power in digital markets.

In response to the concern that digital platforms providing zero-price services in exchange for users' personal information or data may cause a disadvantage to them or adverse effects on the fair and free competition by collecting or utilizing those data, Japan[154] established "Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc." These guidelines ensured the transparency and predictability of competition law enforcement for digital platform operators, by clarifying the concepts of "abuse of a superior bargaining position" by digital platforms in the context of collecting or using the personal information of consumers.

Thailand developed specific guidelines on online food delivery platforms. The guidelines

[152] Currently, Korean government is approaching this issue in the form of self-regulation of online platforms before the enactment of the law.
[153] Japan and Thailand.
[154] See: https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217DPconsumerGL.pdf.

clarify "unfair trade practices" by food delivery platforms towards their users i.e. restaurants, such as imposing excessive fees and unfair terms and conditions.

5.6. Examples of Relevant Cases in Digital Markets

Examples below were provided by several responding authorities[155] as recent ASBP cases involving companies "without" dominance/substantial market power in digital markets:

Case 1: Abuse of a State of Economic Dependence by a Digital Tech Enterprise Against Its Resellers[156]

In March 2020, the ADLC fined Apple for several anticompetitive practices including abuse of economic dependency on its premium resellers (mostly SMEs). This abuse manifested itself in particular through supply difficulties, discriminatory treatment and unstable remuneration conditions for their business (discounts and outstanding balances). These practices consisted, in a context where the distributors' margins were extremely low, in keeping the distributors extremely dependent on receiving products, particularly those most in demand (new products). This resulted in a loss of customers, including regular customers. In some cases, in order to meet an order, they were even forced to source from other distribution channels, for example, by ordering directly from an Apple Store as an end customer would have done, in order to supply their customers.

According to the ADLC, the prohibition of the abuse of a state of economic dependence was useful in this case, as it allowed to impose fines in consideration of the resellers' economic dependency towards Apple without demonstrating Apple's dominant position in the relevant market.

Case 2: Abuse of Superior Bargaining Position of a Digital Platform Retailer Against Its Suppliers[157]

The JFTC investigated Amazon Japan and suspected that the activities of Amazon Japan violated Article 19 (abuse of superior bargaining position) of the Japanese competition law.

The JFTC suspected that Amazon Japan had abused its superior bargaining position over trading partners i.e. suppliers in continuous transactions, whose business status is inferior

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[155] France, Indonesia, Italy, Japan, and Korea provided one or more cases.
[156] See: https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-apple-products-distribution-sector.
[157] *Supra* note 36.

to that of Amazon Japan, unjustly in light of normal business practices by, for example, reducing payments and returning items.[158] The JFTC approved the commitment plan offered by Amazon Japan, which included termination of those abusive practices and refunds to suppliers, and closed the case accordingly.

Case 3: Abuse of Superior Trading Power of Delivery App Service Provider Against Restaurants

The KFTC investigated the case of abuse of superior trading power by Yogiyo, which is the second largest food delivery application in Korea, accounting for 26% of the market share. Yogiyo provides an intermediary service that connects consumers with restaurants, providing consumers with information on nearby restaurants and delivering the order information to the restaurants.

Yogiyo implemented the lowest price guarantee policy on restaurants registered with its application, through which it prohibited the restaurants from selling at lower prices via other sales routes such as ordering by phone or other delivery applications. Yogiyo even terminated the contracts with the restaurants in case of refusal of the lowest price guarantee policy. The KFTC imposed a corrective order along with an administrative fine on Yogiyo for intervening in delivery restaurants' right to freely set prices, which constituted an abuse of superior trading power.

5.7. Necessity and Significance of Introducing Legal Frameworks for Addressing Unilateral Conduct by Companies Without Dominance/Substantial Market Power (NGAs' Views)

The survey also sought to ask responding NGAs whether competition law should prohibit unilateral conduct by companies without dominance/substantial market power in digital markets. Their views are largely divided; 15 out of 31 responding NGAs support the idea, whereas 16 of them do not.

As shown in Section 5.1., several responding NGAs show a negative attitude towards the idea of expanding the scope of competition law to unilateral conduct by companies that are not "dominant". For example, one responding NGA specifies that legislatures should be cautious in addressing the inequities of bargaining power, because unfair contract terms are generally regarded as consumer protection issues. Also, some responding NGAs point out that digital markets are not inherently different from other "traditional" markets, and they just evolve more rapidly than those markets. In addition, some responding NGAs

[158] See also section 2.4.2.(d).

show their concern about the ambiguity of interpretation and legal uncertainty, and unpredictability of digital platforms if dominance is not required for intervention by competition authorities.

On the other hand, several responding NGAs mention the necessity for regulating the unilateral conduct of companies without dominance/substantial market power by competition law. One responding NGA supports the idea by pointing out the fact that the provision on abuse of superior bargaining position in Japan has been playing a significant role in protecting the interests of SMEs that have transactions with so called big tech companies in digital markets.

6. Usefulness of Future ICN Guidance, Possible Topics, and Format

The survey inquired whether the respondents have been consulting existing ICN documents, and whether, in the light of their experience, they find the need for specific ICN guidance on the analysis of theories of harm and the design, implementation, and monitoring of remedies concerning unilateral conduct by companies with dominance/substantial market power in digital markets.

6.1. Consultations of ICN Documents

Over one-third of the responding authorities[159] (17 out of 47) state that they have consulted existing ICN documents in view of investigations into unilateral conduct by companies with dominance/substantial market power in digital markets. A significant number of them[160] have consulted even several ICN documents for that purpose.

The most popular of the ICN documents is the "Report on the results of the ICN survey on dominance/substantial market power in digital markets" mentioned by nine authorities.[161]

Other documents that have been consulted include the "ICN Unilateral Conduct Workbook" [162], the "Dominance/Substantial Market Power Analysis Pursuant to

[159] Australia, Brazil, Chile, the EEU, the EU, Germany, Greece, Hong Kong, Indonesia, India, Italy, Mexico, Poland, South Africa, Vietnam, Zambia, etc.
[160] Australia, Brazil, Chile, the EEU, the EU, Hong Kong, India, Mexico, etc.
[161] *Supra* note 1, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf; mentioned by the EEU, Greece, Hong Kong, India, Mexico, Poland, South Africa, Vietnam, and Zambia.
[162] https://www.internationalcompetitionnetwork.org/working-groups/unilateral-conduct/investigation-analysis/; mentioned by Australia, Brazil, India, the EU, etc. In this regard, reference was notably made to Chapter 2 on "Analytical Framework For Evaluating Unilateral Exclusionary Conduct" (mentioned by Australia), Chapter 3 on "Assessment of Dominance"

Unilateral Conduct Laws; Recommended Practices"[163], the "Report on ICN Members' Recent Experiences (2015-2018) in Conducting Competition Advocacy in Digital Markets"[164], the "Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws"[165], the "Online Vertical Restraints Special Project Report"[166], the "Report on ICN Chief/Senior Economists Workshop"[167], "Report on Predatory Pricing"[168] and the "Report on Tying and Bundled Discounting"[169].

Out of 17 responding authorities that have consulted those existing ICN documents, 15[170] have conducted actual investigations into unilateral conduct cases in digital markets, and seven of them[171] have resulted in enforcement actions.

Similarly, 15 out of 31 responding NGAs have consulted the existing ICN documents in advising on investigations into unilateral conduct cases in digital markets.[172]

6.2. Future Guidance[173]

6.2.1. Overview

A vast majority of responding authorities[174] (44 out of 47) and responding NGAs (30 out

(mentioned by Australia, the EU, etc), Chapter 5 on "Exclusive Dealing" (mentioned by the EU), and Chapter 6 on "Tying and Bundling" (mentioned by the EU).

163 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_DomMarPower.pdf; mentioned by Chile, the EEU, Italy, etc.

164 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/AWG_AdvDigitalMktsReport2019.pdf; mentioned by India and Hong Kong.

165 https://centrocedec.files.wordpress.com/2015/07/report-on-the-analysis-of-refusal-to-deal-with-a-rival-2010.pdf; mentioned by Brazil.

166 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/UCWG-2019-Vertical-Restraints-Project.pdf; mentioned by Mexico.

167 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/10/AEWG_EconWorkshop2016Report.pdf; mentioned by India.

168 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_PredPricing.pdf

169 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_TyingBundDisc.pdf

170 Australia, Brazil, Chile, the EEU, the EU, Germany, Greece, Hong Kong, India, Italy, Mexico, Poland, South Africa, Zambia, etc.

171 Brazil, the EEU, the EU, Germany, India, Italy, etc.

172 Among the responding NGAs, "Report on the results of the ICN survey on dominance/substantial market power in digital markets" was the most popular of all ICN documents, followed by the "Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws: Recommended Practices", the "ICN Unilateral Conduct Workbook", and the "Report on ICN Chief/Senior Economists Workshop".

173 The term "guidance" was not defined in the survey so the "Future Guidance" can be any types of potential ICN work products, not limited to specific types of documents.

174 Australia, Brazil, Canada, Chile, Croatia, Czech Republic, Ecuador, the EEU, the EU, France,

of 31) states that it would be useful to have further guidance concerning unilateral conduct by companies with dominance/substantial market power in digital markets. Among them, 42 responding authorities[175] and 29 responding NGAs concur in finding that it would be helpful to have further ICN guidance on the analysis of theories of harm. Similarly, 41 responding authorities[176] and 25 responding NGAs state that they would welcome further ICN guidance on the design, implementation, and monitoring of remedies.

6.2.2. Possible Elements for Future Guidance

Forty-two responding authorities and 30 responding NGAs suggested elements to be included in future ICN guidance when focusing on the analysis of theories of harm, as well as on the design, implementation, and monitoring of remedies for unilateral conduct by companies with dominance/substantial market power in digital markets.

(a) Factors for Analysis of Theories of Harm

Many responding authorities, supported by a number of NGAs, specifically request further guidance on analysing and establishing theories of harm for unilateral conduct cases in digital markets. They basically highlight the need for guidance on how to define relevant markets and estimate market share, assess dominance/substantial market power and dependency of users on digital platforms, and analyse negative (or positive) effects on competition. Some of them[177] suggest that the guidance should include a compendium of relevant cases in different jurisdictions and theories of harm used in those cases.

Notably, the need for guidance on market definition and market power in digital markets, which the 2019 survey and the "Report on the results of the ICN survey on dominance/substantial market power in digital markets" focused on, is echoed again by

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Georgia, Germany, Greece, Hong Kong, Hungary, India, Indonesia, Italy, Japan, Korea, Lithuania, Luxemburg, Mauritius, Mexico, Mongolia, the Netherlands, Norway, the Philippines, Poland, Serbia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, the UK, the US DOJ, Vietnam, Zambia, etc.

[175] Australia, Brazil, Canada, Chile, Croatia, Czech Republic, Ecuador, the EEU, the EU, France, Georgia, Germany, Greece, Hong Kong, Hungary, India, Indonesia, Italy, Japan, Korea, Lithuania, Mauritius, Mexico, Mongolia, the Netherlands, Norway, the Philippines, Poland, Serbia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, the UK, the US DOJ, Vietnam, Zambia, etc.

[176] Australia, Brazil, Canada, Chile, Croatia, Czech Republic, Ecuador, the EEU, the EU, France, Georgia, Germany, Greece, Hong Kong, India, Indonesia, Italy, Japan, Korea, Lithuania, Luxemburg, Mauritius, Mexico, Mongolia, the Netherlands, Norway, the Philippines, Poland, Serbia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, the UK, the US DOJ, Vietnam, etc.

[177] Australia, Croatia, Ecuador, France, Japan, and Spain.

some responding authorities[178] and responding NGAs. Several responding authorities pointed in particular to the need for guidance on market definition in cases involving two/multi-sided markets and digital ecosystems.

In addition, a number of responding authorities[179] and responding NGAs mention the usefulness of more detailed guidance on how to analyse each factor specific to digital markets such as: two/multi-sided markets, economies of scale, economies of scope, direct/indirect network effects, big data/user data, zero-monetary prices (including competition on quality), complexity of digital services and technologies (e.g. algorithms), switching costs, multi-homing, lock-in, consumer biases and behavioural economics (e.g. customer inertia or effect of default settings), digital ecosystems and vertical integration digital markets.

Moreover, one responding authority[180] and responding NGAs request a collection of examples of evaluation and balancing of both procompetitive and anticompetitive effects in establishing the theories of harm. Taking an example, one responding NGA emphasises the importance of the balancing of positive and negative impacts of innovation on competition, such as increasing barriers to entry and restricting consumer choice with the exclusion of smaller competitors. Another responding NGA suggests that to understand the impact of anticompetitive conduct/tipped markets on innovation objectively, IP registrations could be used as a proxy: a negative impact on innovation could be suggested where the conduct coincides with a dip in IP registrations.

Some responding authorities[181] request guidance on the analysis of theories of harm corresponding to specific types of unilateral conduct, particularly exploitative abuses, in digital markets, which is also mentioned by some responding NGAs. This includes guidance for analysing "new" forms of conduct such as self-preferencing and anticompetitive practices involving data, as well as unilateral conduct by companies without dominance/substantial market power. One responding NGA indicates that self-preferencing requires the balancing of positive and harmful effects stemming from the integrated market structures and the creation of digital ecosystems that permeate different markets. Another responding NGA mentions the exploitation of personal data by

[178] Brazil, Croatia, Georgia, Greece, India, Indonesia, Mongolia, the Philippines, Singapore, Slovak Republic, Switzerland, Trinidad and Tobago, Vietnam, Zambia, etc.
[179] Australia, Brazil, Canada, Chile, France, the EEU, Georgia, Greece, Hungary, India, Italy, Korea, Lithuania, Mauritius, Mexico, the Netherlands, Poland, Singapore, Switzerland, Sweden, Thailand, Trinidad and Tobago, and Turkey.
[180] Czech Republic.
[181] Chile, the EEU, France, Greece, Georgia, Mauritius, Poland, Singapore, Spain, and Turkey.

dominant platforms could be clarified to move beyond the traditional focus on excessive pricing, excessive data collection, and its combination across multiple platforms owned by the same dominant platform.

Furthermore, one responding authority[182] suggests further guidance focusing on cases where more than two types of unilateral conduct are combined, e.g. self-preferencing and predatory pricing.

(b) Factors for Designing, Implementing and Monitoring Remedies

Forty-one responding authorities and 25 responding NGAs provide ideas on topics for future guidance on the design, implementation, and monitoring of remedies for unilateral conduct cases in digital markets.

A significant number of responding authorities[183] and responding NGAs request a guidance on how to design remedies that adequately address competition concerns considering the peculiarities of digital markets including: effective remedies in two/multi-sided markets or ecosystems (interaction between different sides), network effects, big data/user data, barriers to entry, remedies to the market already tipped, interoperability of platforms, remedies using technological tools, and remedies for an algorithm. As in the case of the analysis of theories of harm ((a) above), some competition authorities[184] request for a compilation of case studies of remedies that includes actual experience and challenges of different competition authorities.

Moreover, some responding authorities[185] welcome guidance on how to design appropriate and feasible remedies to address various types of unilateral conduct, and also discussion of the available types of remedies; including interim measures, behavioural remedies, and structural remedies (e.g., pros and cons, practical implications and effects of each type of remedies), as well as sanctions. Besides, one responding NGA also requires guidance on remedies to address issues related to providing access to data to third parties.

In addition, some responding authorities[186] request guidance to overcome the challenges in striking a balance between prudent decision-making and timely action, between the

[182] Lithuania.
[183] Brazil, Chile, Greece, Korea, Mauritius, Poland, Sweden, and Trinidad and Tobago.
[184] Australia, Canada, Ecuador, Japan, Spain, and the UK.
[185] France, Georgia, India, Indonesia, Lithuania, Serbia, Switzerland, Poland, Singapore, and Vietnam.
[186] Brazil, the EEU, Georgia, Italy, and Mexico.

risks of over-and under-enforcement, and between procompetitive and anticompetitive effects, i.e., eliminating the harmful effects on competition while preserving incentives on innovation and benefits for consumers.

For the implementation and monitoring of remedies, some responding authorities[187] request guidance to tackle the challenges in monitoring behavioural remedies in evolving and ever-changing digital markets. Similarly, some responding NGAs also suggest guidance on the effectiveness of behavioural or structural remedies within digital markets. Guidance on market studies to measure the effectiveness of remedies is also requested by some responding NGAs.

(c) Guidance on Practical Aspects of Enforcement

As well as a collection of real case examples by different competition authorities in this field mentioned above, some responding authorities[188] and responding NGAs request guidance focusing on more practical examples for investigations and enforcement against unilateral conduct in digital markets, for example: methods of collecting evidence (including those from outside the jurisdiction), detection of cases, and market studies. Some responding authorities[189] also ask for guidance on competition advocacy in digital markets.

Also, some responding authorities[190] highlight the need for guidance on international cooperation in this field, including the alignment of remedies across different jurisdictions, as well as guidance on how to approach enforcement towards global business models by international (foreign-based) digital platforms.

Moreover, one responding authority[191] points out that, since resources are limited for smaller competition authorities, guidance on a screening mechanism for prioritising cases would be useful.

(d) Intersection with Other Areas of Laws

Furthermore, a few responding authorities[192] request guidance on the interface between competition law, data protection/privacy law and consumer protection law in the digital

[187] Brazil, France, Mexico, and the Netherlands.
[188] Georgia, Indonesia, Serbia, Singapore, Trinidad and Tobago, etc.
[189] Georgia and Trinidad and Tobago.
[190] Australia, Hong Kong, and Hungary.
[191] South Africa.
[192] Australia, India, the Philippines, and Thailand.

sector.[193]

6.2.3. Form of Guidance

With regard to the form in which guidance should be provided, approximately 80% of the responding authorities said that this should be done in a separate and focused document. They reasoned that unique features of digital markets (including digital ecosystems) may require a different treatment,[194] and a separate document could offer a more in-depth discussion of the peculiarities of digital markets; the preparation of separate guidance would also draw greater attention to this important issue.[195]

On the other hand, around 20% of responding authorities favour updating existing guidance, reasoning that that approach would be more efficient, as it would avoid duplication of issues that are common between traditional and "new" types of conduct observed in digital markets.

Besides, one authority[196] prefers ICN papers rather than guidance, which would be able to include a variety of discussions in different status and gather experiences and practices in different jurisdictions, considering that international consensus is yet to be reached in this field.

As for the NGAs, 18 responding NGAs prefer a separate document whereas six NGAs prefer updating existing guidance. In general, NGAs used the same or similar arguments to the ones presented by the responding authorities to explain their preferences with respect to the form for providing the discussed guidance.

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[193] See also: https://www.internationalcompetitionnetwork.org/portfolio/intersection-project-issues-paper/.
[194] Italy.
[195] Hong Kong.
[196] The EU.

ANNEX I

ICN Unilateral Conduct Working Group
Questionnaire on the analysis of theories of harm and design of remedies concerning unilateral conduct with dominance/substantial market power in digital markets (for Competition Agencies)

Table of Contents

1. Introduction

(1) Background

In 2019, the ICN Unilateral Conduct Working Group ("UCWG") started a new multi-year project on the assessment of dominance/substantial market power in digital markets. The project was driven by the growing impact of the development of digital technologies on business activities and the increasing need of ICN member agencies to assess unilateral conduct with dominance/substantial market power in digital markets.

As part of the project, the UCWG conducted a survey from December 2019 to January 2020, collecting information on the ICN members' experience in assessing dominance/substantial market power in digital markets.

In July 2020, the UCWG published the "Report on the results of the ICN survey on dominance/substantial market power in digital markets", which summarized the responses of 39 members and 24 NGAs. The report illustrated various approaches taken by the ICN members to assess dominance/substantial market power when dealing with unilateral conduct in digital markets. It also identified issues that a number of agencies considered should be explored by the UCWG as future works.

(2) About this Survey

In terms of unilateral conduct with dominance/substantial market power cases in digital markets, there have been significant developments since the previous survey was performed. For example, the United States Congress conducted a thorough investigation on competition in digital markets[1]. Also, Germany amended its competition law to specifically address issues in digital markets[2]. At European level, a discussion to introduce ex-ante rules beyond the scope of competition laws is ongoing[3] in several jurisdictions. These examples exhibit countries and regions' increasing interest on the topics.

Against the backdrop of such situation, in September 2021, the UCWG decided to conduct a new survey as part of the successor project of the above mentioned multi-year project on the assessment of dominance/substantial market power in digital markets. The survey focuses on topics which were of interest to stakeholders in the previous survey such as "analysis of theories of harm", "design, implementation and monitoring of remedies" and "new or alternative tools to address unilateral conduct with dominance/substantial market power in digital markets".

As in the previous survey, the aim of the new one is to i) collect information on the ICN members' experiences and expertise of NGAs on the topics, ii) prepare a report summarizing the experiences and expertise as well as the current status of members' consideration on the topics, and iii) collect views on the need for new or revised ICN guidance on the topics.

The term "unilateral conduct with dominance/substantial market power[4]" used in this

[1] United States Congress (2020), "Investigation Of Competition In Digital Markets: Majority Staff Report And Recommendations", at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519

[2] Bundeskartellamt, "Amendment of the German Act against Restraints of Competition", at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

[3] European Commission, "The Digital Markets Act: ensuring fair and open digital markets", at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

[4] OECD (2020), "Abuse of dominance in digital markets", p. 9, at https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf (*"The term abuse of dominance encompasses various legislative provisions in different jurisdictions, often with differing terminology but with a similar core objective..."*)

questionnaire is deduced from various legislative provisions in different jurisdictions with differing terminology but with a similar core objective, including: abuse of dominance in the EU[5], India[6], and South Africa[7], monopolisation in the US[8], private monopolisation in Japan[9], relative practices in Mexico[10], misuse of market power in Australia[11], and anticompetitive conduct in Brazil[12]. Moreover, the term "digital markets" refers to the provision of products or services by use of digital technologies, mainly the internet, but also by any other digital medium. Furthermore, the term "theories of harm" refers to the explanation why certain conduct causes anticompetitive effects in the market such as a price increase or a negative impact on quality, innovation or consumers' choices.

(3) Important Notice

This survey requires responses based on the latest information in each country and region as of November 1, 2021. The submission deadline is December 24, 2021. Any questions concerning the survey should be sent to icn@jftc.go.jp.

While the responses to the questionnaire will not be published as such, to ensure confidentiality of information provided, they will be used for the preparation of a report to provide aggregate result and cite narrative comments without identifying respondents.

The report will be presented at the ICN Annual Conference in Germany scheduled in May 2022 after the UCWG and Steering Group's approval.

2. General information about your agency and contact details

(1) Name of the person in charge of this submission

(2) Email address of the person in charge of this submission

(3) Formal name of your agency

(4) Year of the establishment of your agency

[5] Article 102 of the Treaty on the Functioning of the European Union
[6] Section 4(1) of the Competition Act 2002
[7] Section 8 of the Competition Act (No.89 of 1998)
[8] Section 2 of the Sherman Act
[9] Act on the Prohibition of Private Monopolisation and the Maintenance of Fair Trade (Act No. 54 of 14 April 1947)
[10] Federal Economic Competition Law
[11] Section 46 of the Competition and Consumer Act 2010
[12] Article 36 of the Law 12.529/2011

(5) Jurisdiction that your agency represents

3. Enforcement

3.1 Enforcement experiences

(6) [Enforcement experiences] Have you taken any enforcement and/or legal action against unilateral conduct with dominance/substantial market power in digital markets by imposing remedies or filing lawsuits, between January 1, 2016 and November 1, 2021?

[ ] Yes (**If you have two or more cases, answer Questions (6) to (17) below for each case. You may provide ten cases at maximum.**) [NOTE: At the online Questionnaire, you can repeat the Questions (6) to (17) for each of your cases. Please prepare answers to these questions for all cases that you can provide.]

Indicate the name of the case and its overview (including the following factors).

- URL link to the agency decision
- Legal provisions applied to the case
- Description of anticompetitive conduct and the targets of the conduct
- Market definition (Choose single-market approach or multi-market approach if your case involved multisided-platforms[13].)
- Assessment of dominance/substantial market power(Explain the relationship between markets where the dominance/substantial market power was found and markets where the unilateral conduct occurred, if applicable.)
- Theories of harm
- Decision of the agency
- Progress after the agency decision (as of November 1, 2021)
- Length of time from the opening of the formal investigation to the final decision above (years and months)

[13] ICN (2020), "Report on the results of the ICN survey on dominance/substantial market power in digital markets", p.11, at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf (*"In the context of multi-sided platforms, the assessment of relevant markets can in principle follow two different approaches: 1) defining as many relevant markets as the sides of a platform (multi-market approach) or 2) defining a single market for intermediation services offered to the different sides of the platform (single-market approach)."*)

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Example:

Name of the case

Google Shopping case (Date of the agency decision: June 27, 2017)

Overview of the case

(https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740)

- Applied provision: Article 102 of the TFEU

- Conduct: Google abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service. Google systematically gave prominent placement to its own comparison shopping service, and demoted competitors' comparison shopping services in its search results.

- Market definition: general internet search (the market where the dominant position of the party was found), comparison shopping service in Europe (the market where the abusive conduct was found)

- Assessment of the dominance/substantial market power: the European Commission found that Google had a dominant position in the general internet search markets throughout the European Economic Area (EEA) since 2008. Google held very high market shares in general internet search markets of almost all EEA countries, exceeding 90% in most. There were also high barriers to entry in these markets because of the network effects: the more consumers used the search engine, the more attractive it became to advertisers. The profits generated could then be used to attract even more consumers. Similarly, the data the search engine gathered from consumers could in turn be used to improve the search results. These factors enabled Google to have the dominant market position in the general internet search markets.

- Theories of harm: Google's conduct harmed the efficient competition in the comparison shopping service markets. The European Commission found that it had a significant impact on competition between Google's own comparison shopping services and competitors' services. As the result of Google's practices, the traffic to Google's comparison shopping services increased

significantly, while competitors suffered very substantial losses of traffic. Competitors could not recover the losses of traffic to their services, which hindered effective competition. Moreover, consumers had fewer choices as a result of the conduct. - Decision of the agency: The EU fined Google 24.2 billion euros, and required Google to stop its preferential treatment to its own comparison shopping services. Google proposed the commitment of equal treatment of other competitors and Google in the general internet search results. - Progress after the agency decision: Google filed a lawsuit in the European General Court on September 11, 2017,and the judgement is currently pending. - Length of time from the opening of formal investigation to the final decision above: 6 years and 6 months (from November 30, 2010 to June 27, 2017.)

Name of the case (including the name of the investigated party (“the party”) and the date of the agency decision)

Overview of the case

[ ] No (Skip to Question (18))

3.2 Theories of harm

Answer Questions (7) to (17) if you chose “Yes” in the response to Question (6). If you chose “No” to Question (6), skip to Question (18).

(7) [Type of conduct] What type of conduct did the case provided in the response to Question

(6) have (Multiple answers allowed)? See OECD (2020) for the definition and explanation of each type of conduct[14].

[ ](A) Refusal to deal
[ ](B) Predatory pricing
[ ](C) Margin squeeze
[ ](D) Exclusive dealings and loyalty discounts
[ ](E) Tying and bundling
[ ](F) Exploitative conduct
  [ ](F-1) Excessive pricing
  [ ](F-2) Unfair terms and conditions
[ ](G) New forms of unilateral conduct with dominance/substantial market power in digital markets
  [ ](G-1) Forced free riding
  [ ](G-2) Self-preferencing
  [ ](G-3) Abusive leverage
  [ ](G-4) Privacy policy tying
[ ](H) Others

(If you chose "Others", please specify.)

(8) [Burden of proof under statute law or case law] What was the burden of proof for finding illegality of unilateral conduct with dominance/substantial market power in the case provided in the response to Question (6) in your jurisdiction? Choose one of the followings:

[ ](A) Unilateral conduct with dominance/substantial market power will be considered per se illegal when the dominance/substantial market power in relevant markets is found.
[ ](B) As the competition agency balances anticompetitive effects and procompetitive effects of unilateral conduct with dominance/substantial market power without presumptions, it will not be considered illegal when procompetitive effects of the conduct outweigh anticompetitive effects.
[ ](C) Although unilateral conduct with dominance/substantial market power is presumed to be anticompetitive, it will not be considered illegal when the party proves procompetitive effects of the conduct.
[ ](D) Although unilateral conduct with dominance/substantial market power is presumed to be procompetitive, it will be considered illegal when the competition agency

proves anticompetitive effects of the conduct.

[ ](E) Others

(If you chose “Others”, please specify.)

(9) [Anticompetitive effects] What were the “anticompetitive effects” considered when analyzing theories of harm in the case provided in the response to Question (6) (Multiple answers allowed)?

[ ](A) Adverse effects on consumers such as price increase and decline of quality (Consumer welfare)

[ ](B) Lack of an effective competitive process (Effective competition)

[ ](C) Exclusion of potential/actual competitors from the relevant markets or foreclosure of the relevant markets (Exclusionary effects or foreclosure effects)

[ ](D) Reduced innovation (Efficiencies)

[ ](E) Decreased consumer choices (Restriction of freedom of trade including business to business transactions, and autonomy of general consumers)

[ ](F) Others

(If you chose “Others”, please specify.)

(10) [Analytical factors] Which factors listed below did you consider when analyzing theories of harm in the case provided in the response to Question (6) (Multiple answers allowed)?
*For reference, see your answers to the Questions below.

- Factors for assessing anticompetitive effects:

[ ](A) Extent of dominant/substantial market position

[ ](B) Characteristics of relevant markets

[ ](B-1) Two/multi-sidedness

[ ](B-2) Economies of scale

[ ](B-3) Economies of scope

[ ](B-4) Direct network effects

[14] OECD (2020), “Abuse of dominance in digital markets”, p.25, 31, 34, 37, 41, 50, 52, 53 and 55, at https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf

[ ](B-5) Indirect network effects
[ ](B-6) Importance of data as input
[ ](B-7) Zero-monetary prices
[ ](B-8) Complexity of services and technologies
[ ](B-9) Possibility of multi-homing
[ ](B-10) Dynamism of relevant markets
[ ](B-11) Consumer biases(e.g. Customer inertia or effect of default settings.)
[ ](B-12) Establishment of ecosystem

[ ](C) Position of actual/potential competitors
[ ](C-1) Market share of competitors
[ ](C-2) Efficiency of competitors' business (As efficient competitor test)
[ ](C-3) Innovation brought by the competitors
[ ](C-4) Feasibility and speed of possible counter strategies taken by the competitors

[ ](D) Availability of alternative choices for customers or trading partners

[ ](E) Possibility of applying the essential facility doctrine to products or services concerned

[ ](F) Scope, term and extent of unilateral conduct with dominance/substantial market power

[ ](G) Facts indicating foreclosure effects on the relevant markets
[ ](G-1) Market share of the party was increased after the conduct.
[ ](G-2) Actual competitors were excluded from the relevant markets.
[ ](G-3) Potential competitors abandoned their plans to enter the relevant markets.

[ ](H) Facts indicating a series of strategies to exclude competitors
[ ](H-1) The party had detailed plans for implementing the unilateral conduct with dominance/substantial market power.
[ ](H-2) The party had internal documents indicating the strategies.
[ ](I) Others

(If you chose "Others", please specify.)

- Factors for assessing procompetitive effects:

[ ](J) Decrease of costs for sales or business operations

[ ](K) Increase of sales quantities or expansion of service coverage

[ ](L) Decrease of price of products/services

[ ](M) Improvement of qualities of products/services

[ ](N) Increase of innovations

[ ](O) Creation of investment incentives for investors

[ ](P) Increase of transactional efficiencies by integrating complementary services such as creating a digital ecosystem

[ ](Q) Others

(If you chose "Others", please specify.)

(11) [Process of analysis] Explain how you assessed the chosen factors in the response to Question (10) when concluding whether there were anticompetitive effects or not. Include (a) and (b) below if applicable.

*For reference, see your answers to the Questions below.

(a) If you chose (B), (C) or (D) in the response to Question (8), explain how you assessed and concluded that anticompetitive effects outweighed procompetitive effects and thus the unilateral conduct with dominance/substantial market power was illegal.

(b) If you chose (H) in the response to Question (10), explain in detail how you confirmed the series of anti-competitive strategies.

Example of (a):

Note that the underlined parts below correspond to the choices under Questions (9) and (10)

(i) Procompetitive effects

The party (online search advertising intermediary) set exclusivity clauses in its contracts with publishers (third-party websites), requiring them not to place any search advertisements of the party's competitors. It was found that such conduct had procompetitive effects because it maintained a certain number of users on both sides of the two-sided market (Question (10) (B-1)) of online search advertising intermediary services and indirect network effects (Question (10) (B-5)) enabled the party to provide more sophisticated services (improvement of qualities of

products/services (Question (10)(M)).

(ii) Anticompetitive effects
On the other hand, the mentioned conduct made potential competitors abandon their plans to enter the market (Question (10) (G-3)), impaired the effective competitive process (Question (9)(B)), and decreased the number of advertisers' choices for online search advertising intermediary services (Question (9)(E)).

(iii) Balancing of (i) and (ii)
Considering the dominant market position of the party (Question (10)(A)) in online search advertising intermediation market, it was found that the mentioned conduct hampered incentives for innovation (Question (10)(N)), which resulted in a reduction of service quality (Question (10)(M)) and an increased price for advertisers (Question (9)(A)). Therefore, it was concluded that the procompetitive effects brought about by the conduct were very limited, and thus the anticompetitive effects outweighed the procompetitive effects.

Example of (b):
The party weakened powerful potential competitors by predatory pricing before acquiring them, and then terminated their services after the acquisition. This conduct was found to be anticompetitive with the intention of eliminating competitors, rather than to achieve fair competition, according to the result of interviews of the party or competitors, and internal documents such as emails exchanged between executives of the party.

(12) [Challenges (and solutions) concerning **theories of harm** specific to digital markets] When investigating the case described in the response to Question (6), did you face any challenges specific to the digital field? Choose one of the followings:
[ ](A) No (Skip to Question (14))
[ ](B) Yes (Go to Question (13))
[ ](C) N/A (If you are hesitant to describe any specific challenges and solutions in a way that are associated with actual cases, choose this item and **please describe them below in general terms**. In this regard, **please mention the types of conduct in the response to Question (7)**, if you don't have any concerns about indicating them. Note that any case or

any country will not be mentioned in the final report regarding the item (C).)

Example of Challenges and Solutions:

(A) Challenge: It can be difficult to assess anticompetitive effects by only focusing on one type of conduct.

It can be difficult to prove that the monopolization of the relevant market had anticompetitive effects by only focusing on self-preferencing of the acquiring, dominant party. In order to overcome this challenge, a theory of harm can be established by focusing on two types of conduct together: self-preferencing and continuous predatory pricing.

(B) Challenge: It can be difficult to assess characteristics of the relevant markets (See also Question (10)(B)).

(1) It can be difficult to analyze the impact of conduct on prices since the relevant market is a zero-price market. In order to overcome this challenge, anticompetitive effects can be assessed by considering the impact on quality.

(2) It can be difficult to assess anticompetitive effects on various relevant markets which constitute a digital ecosystem. In order to overcome this challenge, cases in other jurisdictions can be referred to assess anticompetitive effects in the digital ecosystem.

(3) It can be difficult to analyze anticompetitive effects because of the complexity of digital products/services in the relevant markets. In order to overcome this challenge, market studies conducted in the past can be used to have implications for the assessment.

(C) Challenge: It can be difficult to prove why anticompetitive effects outweighed procompetitive effects.

(1) It can be not easy to prove why anticompetitive effects outweighs procompetitive effects as there is a difficulty measuring consumer welfare. In order to overcome this challenge, the balancing can be conducted based on empirical evidences learned from ex-post reviews of past cases.

(2) There can be a lack of economic expertise for the analysis of theories of harm. In order to overcome this challenge, a unit with expertise in the digital field can play a key role. In detail, a special digital unit joins in the investigation, and helps the economic analysis …

(3) It can be difficult to conduct a counter-factual analysis of competitive situation in the relevant market. In order to overcome this challenge, a counterfactual analysis can be developed with the support from tech people. In detail, …

(4) There can be a lack of expertise on other academic areas (e.g. social psychology) for the analysis of theories of harm. In order to overcome this challenge, the competition agency can rely on experts of other academic areas, such as cognitive psychology and

behavioral economics, to examine the influence of consumer biases on …
(5) It can be challenging to reveal the whole picture of the party's anticompetitive strategies only by the external analysis of the conduct. In order to overcome this challenge, the competition agency can assess the patterns of the party's conduct in the relevant market before and after the alleged anticompetitive conduct to reveal the broader picture of the party's anticompetitive strategies.

(D) Challenge: It can be difficult to select, collect, or assess necessary evidence.
(1) It can be difficult to select necessary evidences to assess anticompetitive effects or evaluate a vast amount of data submitted by the party. In order to overcome these challenges, using forensic and screening tools can be helpful.
(2) It can be difficult to obtain enough cooperation from the party to investigate the case or obtain internal documents of the party indicating the anticompetitive strategies. In order to overcome these challenges, establishing a legitimate cooperation framework between the party and the agency can be useful to increase incentives of the party to provide internal documents.

(E) Challenge: The investigation can be resource-intensive.
It can take quite a long time to conclude the cases because of their complexity or the lack of human resources in the investigation team. In order to overcome the challenge, intensive allocation of human resources and development of analytical tools can be helpful to shorten the time for concluding each case.

(F) Challenge: Some cases can have intersections with other legal areas such as privacy laws.
It can be impossible to address the problem outside of the competition law framework. Privacy regulations may be violated if digital platform operators inappropriately obtained users' data. In order to overcome this challenge, cooperation with the privacy agency can be helpful to understand the privacy issues.

(G) Challenge: There can be geographical barriers to investigate the case beyond borders.
It can be difficult to collect evidence from and conduct interviews with the party because its head quarter and data server may be located in a foreign country, which can be an obstacle in the investigation process. In order to overcome this challenge, enhancing cooperation with foreign competition agencies can be helpful to enable the competition agency to directly or indirectly obtain evidence located in other jurisdictions.

(H) Challenge: Others
It can be difficult to …In order to overcome this challenge, …

(13) [Solutions to challenges concerning **theories of harm** specific to digital markets] If you chose (B) in the response to Question (12) above, identify the challenges from the choices of (A) to (H) below (Multiple answers allowed). In addition, for each choice of (A) through (H), answer to sub-Questions (a) and (b).

[ ](A)Challenge: It was difficult to assess anticompetitive effects by only focusing on one type of conduct.

(a) Describe the challenges in detail:

Example:
It was difficult to prove that the monopolization of the relevant market had anticompetitive effects by only focusing on self-preferencing of the acquiring, dominant party.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example:
In order to overcome the challenge mentioned in the sub-Question (a), a theory of harm was established by focusing on two types of conduct together: self-preferencing and continuous predatory pricing.

[ ](B)Challenge: It was difficult to assess characteristics[15] of the relevant markets.

(a) Describe the challenges in detail:

Example:
(1) It was difficult to analyze the impact of conduct on prices since the relevant market was a zero-price market.
(2) It was difficult to assess anticompetitive effects on various relevant markets which constitute a digital ecosystem.
(3) It was difficult to analyze anticompetitive effects because of the complexity of digital products/services in the relevant markets.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example:
(1) In order to overcome the challenge (1) mentioned in the sub-Question (a), anticompetitive effects were assessed by considering the impact on quality.
(2) In order to overcome the challenge (2) mentioned in the sub-Question (a), cases in other jurisdictions were referred to assess anticompetitive effects in the digital ecosystem.
(3) In order to overcome the challenge (3) mentioned in the sub-Question (a), market studies conducted in the past can be used to have implications for the assessment.

[ ](C) Challenge: It was difficult to prove why anticompetitive effects outweighed procompetitive effects.

(a) Describe the challenges in detail:

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[15] Factors for assessing anticompetitive effects:
(A) Extent of dominant/substantial market position
(B) Characteristics of relevant markets (Two/multi-sidedness, economies of scale, economies of scope, direct network effects, indirect network effects, importance of data as input, zero-monetary prices, complexity of services and technologies, possibility of multi-homing, dynamism of relevant markets, consumer biases (e.g. customer inertia or the effect of default settings.), establishment of ecosystem)
(C) Position of actual/potential competitors (Market share of competitors, efficiencies of competitors' business (as efficient competitor test), innovation brought by the competitors, feasibility and speed of possible counter strategies taken by the competitors)
(D) Availability of alternative choices for customers or trading partners
(E) Possibility of applying essential facility doctrine to products or services concerned
(F) Scope, term and extent of unilateral conduct with dominance/substantial market power
(G) Facts indicating foreclosure effects on the relevant markets (The market share of the party was increased after the conduct, actual competitors were excluded from the relevant markets, potential competitors abandoned their plans to enter the relevant markets)
(H) Facts indicating a series of strategies to exclude competitors (The party had detailed plans for implementing the unilateral conduct with dominance/substantial market power, the party had internal documents indicating the strategies)
(I) Others
Factors for assessing procompetitive effects:
(J) Decrease of costs for sales or business operations
(K) Increase of sales quantities or expansions of service coverage
(L) Decrease of price of products/services
(M) Improvement of qualities of products/services
(N) Increase of innovations
(O) Creation of investment incentives for investors
(P) Increase of transactional efficiencies by integrating complementary services such as creating a digital ecosystem
(Q) Others

Example:
(1) It was not easy to prove why anticompetitive effects outweighed procompetitive effects as there was a difficulty measuring consumer welfare.
(2) There was a lack of economic expertise for the analysis of theories of harm.
(3) It was difficult to conduct a counter-factual analysis of competitive situation in the relevant market.
(4) There was a lack of expertise on other academic areas (e.g. social psychology) for the analysis of theories of harm.
(5) It was challenging to reveal the whole picture of the party's anticompetitive strategies only by the external analysis of the conduct.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. In this regard, if you used expertise such as economics, cognitive psychology, behavioral economics and digital technologies including data analysis, describe the process of analysis, the organizational system of analysis, and the result of such analysis. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example:
(1) In order to overcome the challenge (1) mentioned in the sub-Question (a), the balancing was conducted based on empirical evidences learned from ex-post reviews of past cases.
(2) In order to overcome the challenge (2) mentioned in the sub-Question (a), a unit with expertise in the digital field actively played a key role. In detail, a special digital unit joined in the investigation, and helped the economic analysis … The result of the analysis provided …
(3) In order to overcome the challenge (3) mentioned in the sub-Question (a), a counterfactual analysis was developed with the support from tech people.
(4) In order to overcome the challenge (4) mentioned in the sub-Question (a), the competition agency relied on experts of other academic areas, such as cognitive psychology and behavioral economics, to examine the influence of consumer biases.
(5) In order to overcome the challenge (5) mentioned in the sub-Question (a), the competition agency assessed the patterns of the party's conduct in the relevant market before and after the alleged anticompetitive conduct to reveal the

broader picture of the party's anticompetitive strategies.

[ ](D)Challenge: It was difficult to select, collect, or assess necessary evidence.

(a) Describe the challenges in detail:

Example:
(1) It was difficult to select necessary evidences to assess anticompetitive effects.
(2) It was difficult to obtain enough cooperation from the party to investigate the case.
(3) It was difficult to obtain internal documents of the party indicating the anticompetitive strategies.
(4) It was difficult to evaluate a vast amount of data submitted by the party.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example:
(1) In order to overcome the challenge (1) and (4) mentioned in the sub-Question (a), using forensic and screening tools helped selection of necessary evidences.
(2) In order to overcome the challenge (2) and (3) mentioned in the sub-Question (a), establishing a legitimate cooperation framework between the party and the agency was useful to increase incentives of the party to provide internal documents.

[ ](E)Challenge: The investigation became more resource-intensive than other cases.

(a) Describe the challenges in detail:

Example:
(1) It took quite a long time to conclude the cases because of their complexity. In detail, it took [*] years to conclude the case.
(2) It was challenging because the cases concerning digital markets needed more human resources than other cases.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the

next page.

Example: In order to overcome the challenge (1) and (2) mentioned in the sub-Question (a), intensive allocation of human resources and development of analytical tools were useful to shorten the length of time for concluding each case.

[ ](F) Challenge: The case had intersections with other legal areas such as privacy laws.

(a) Describe the challenges in detail:

Example: It was impossible to address the problem outside of the competition law framework. Privacy regulations were violated since the digital platform operators inappropriately obtained users' data.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter “N/A” and go to the next page.

Example: In order to overcome the challenge mentioned in the sub-Question (a), cooperation with the privacy agency was helpful to understand the privacy issues.

[ ](G) Challenge: There were geographical barriers to investigate the case beyond borders.

(a) Describe the challenges in detail

Example: It was difficult to collect evidence from and conduct interviews with the party because its head quarter and data server were located in a foreign country, which was an obstacle in the investigation process.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter “N/A” and go to the next page.

Example:

In order to overcome the challenge mentioned in the sub-Question (a), enhancing cooperation with foreign competition agencies was helpful to enable the competition agency to directly or indirectly obtain evidence located in other jurisdictions.

[ ](H) Challenge: Others

(a) Describe the challenges in detail

Example: It was difficult to …

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example: In order to overcome the challenge mentioned in the sub-Question (a), …

3.3 Remedies

(14) [Remedies] Which type of remedies did you impose in the case described in the response to Question (6)? For litigations, which type of remedies did you seek in the complaint to the court (Multiple answers allowed)?

[ ](A) Cease and desist order (including articles ordering termination of particular conduct)

Specify the details:

[ ](B) Monetary sanctions

Specify the details:

[ ](C) Structural remedies

Specify the details:

[ ](D) Behavioral remedies

Specify the details:

[ ](E) Interim measures

Specify the details: **Example**: In this case, imposing interim measures were appropriate because … The requirement of imposing interim measures are …, which could be applied to this case because… Also, the content of the interim measures was …

[ ](F) Others

Specify the details:

(15) [Reasons for choosing the remedy] Provide detailed reasons why you imposed or sought the remedies described in the response to Question (14). If you considered other types of remedies as alternative solutions but eventually did not impose or seek them for some reason, explain the reasons why you did not choose such remedies.
*For reference, see your answers to the Question below.

(16) [Challenges (and solutions) concerning **remedies** specific to digital markets] When imposing the remedies provided in the response to Question (14), did you face any challenges that were specific to the digital field? Choose one of the followings:
*For reference, see your answers to the Question below.

[ ](A) No (Skip to Question (23))
[ ](B) Yes (Go to Question (17))
[ ](C) N/A (If you are hesitant to describe any specific challenges and solutions in a way that are associated with actual cases, choose this item and **please describe them below in general terms**. In this regard, **please mention the types of conduct in the response to Question (7)**, if you don't have any concerns about indicating them. Note that any case or

any country will not be mentioned in the final report regarding the item (C).)

Example of Challenges and Solutions:

(A)Challenge: It can be difficult to design the remedies.

(1) There can be a risk that the remedies in one market might bring unexpected negative impacts on another market because the services provided by the party in digital markets mutually complemented each other. In order to overcome this challenge, economic analysis can be conducted to estimate the impacts of the remedies on these markets.

(2) It can be difficult for the competition agency to set appropriate conditions including the time frame for implementing remedies. In order to overcome this challenge, data analysis can be conducted by external experts to assess the effectiveness of the draft remedies.

(3) It can be difficult for the competition agency to design effective remedies because of the complexity of digital services. In order to overcome this challenge, the competition agency can require the party to design the remedies at first. Then, the competition agency can conduct a market test on the proposed remedies.

(B) Challenge: It can be difficult for the competition agency to assess the appropriateness of the remedies designed by the party.

It can be difficult for the competition agency to judge whether the proposed remedies can restore competition as it does not have enough knowledge on digital products/services provided by the party. In order to overcome this challenge, third party organizations with expertise of the market can help assessing the feasibility of the remedies designed by the party.

(C) Challenge: There can be a challenge on the timing of ordering remedies.

(1) It can take quite a long time to conclude the investigation and order remedies. In order to overcome this challenge, the competition agency can devote human resources to the investigation team and develop investigative tools.

(2) It can be difficult to meet the strict requirements of imposing interim measures. In order to overcome this challenge, the competition agency can hire experienced private practitioners to meet the requirements for imposing interim measures.

(3) It can be difficult for the competition agency to impose remedies to restore competition in a timely manner because the speed of the party to gain a dominant market position in digital markets is too fast. In order to overcome this challenge, the competition agency can issue an interim order to suspend the conduct.

(D) Challenge: It can be difficult for the competition agency to monitor the implementation of the remedies by itself.

(1) The monitoring may take long period of time and thus the competition agency needs enormous human resources. In order to overcome this challenge, the competition agency can rely on the help from third party organizations. They can reduce the burden for the competition agency to monitor the implementation of the remedies.

(2) The competition agency may not have expertise on digital technologies to monitor the implementation. In order to overcome this challenge, the competition agency can have discussions with several digital companies having technologies to make the monitoring efficient.

(E) Challenge: It can be difficult for the competition agency to evaluate whether competition was properly restored.

(1) It can be difficult to set standards for the evaluation. In order to overcome this challenge, using economic analysis can be helpful to obtain insights of the market status to assess the recovery of competition after imposing remedies.

(2) It can be difficult to determine when to assess the recovery of competition considering the rapid change of the markets. In order to overcome this challenge, the competition agency can rely on the support from the tech people to determine the timing.

(3) It may be unclear whether the insufficient competition (or no entry of competitors) in the relevant markets after imposing remedies is due to independent choice of consumers or continuation of the effects of the conduct. In order to overcome the challenge, expertise on other academic areas such as cognitive psychology and behavioral economics can be helpful for finding why the market does not work.

(F) Challenge: Others

It was difficult to …In order to overcome this challenge, …

(17) [Solutions to challenges concerning **remedies** specific to digital markets] If you chose (B) in the response to Question (16) above, identify the challenges from the choices of (A) to (F) below (Multiple answers allowed). In addition, for each choice of (A) through (F), provide an answer to sub-Questions (a) and (b).

[ ](A)Challenge: It was difficult to design the remedies.

(a) Describe the challenges in detail

Example:
(1) There was a risk that the remedies in one market might bring unexpected negative impacts on another market because the services provided by the party in digital markets mutually complemented each other.
(2) It was difficult for the competition agency to set appropriate conditions including the time frame for implementing remedies.
(3) It was difficult for the competition agency to design effective remedies because of the complexity of digital services.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. In this regard, if you used expertise such as economics, cognitive psychology, behavioral economics and/or digital technologies including data analysis, describe in detail the process of analysis, organizational system of analysis, and the result of analysis. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example:
(1) In order to overcome the challenge (1) mentioned in the sub-Question (a), economic analysis was conducted to estimate the impacts of the remedies on these markets. In detail, the process of analysis was …, and the result was …
(2) In order to overcome the challenge (2) mentioned in the sub-Question (a), data analysis was conducted by external experts to assess the effectiveness of the draft remedies.
(3) In order to overcome the challenge (3) mentioned in the sub-Question (a), the competition agency required the party to design the remedies at first. Then, the competition agency conducted a market test on the proposed remedies.

[ ](B) Challenge: It was difficult for the competition agency to assess the appropriateness of the remedies designed by the party.

(a) Describe the challenges in detail

Example:
It was difficult for the competition agency to judge whether the proposed remedies could restore competition as it did not have enough knowledge on digital products/services provided by the party.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example: In order to overcome the challenge mentioned in the sub-Question (a), third party organizations with expertise of the market helped assessing the feasibility of the remedies designed by the party.

[ ](C) Challenge: There was a challenge on the timing of ordering remedies

(a) Describe the challenges in detail

Example: (1) It took quite a long time to conclude the investigation and order remedies. (2) It was difficult to meet the strict requirements of imposing interim measures. (3) It was difficult for the competition agency to impose remedies to restore competition in a timely manner because the speed of the party to gain a dominant market position in digital markets is too fast.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example: (1) In order to overcome the challenge (1) mentioned in the sub-Question (a), the competition agency devoted human resources to the investigation team and developed investigative tools. (2) In order to overcome the challenge (2) mentioned in the sub-Question (a), the competition agency hired experienced private practitioners to meet the requirements for imposing interim measures. (3) In order to overcome the challenge (3) mentioned in the sub-Question (a), the competition agency issued an interim order to suspend the conduct.

[ ](D) Challenge: It was difficult for the competition agency to monitor the implementation of the remedies by itself

(a) Describe the challenges in detail

Example:

(1) It was expected that the monitoring would take long period of time and thus need enormous human resources.
(2) The competition agency lacked expertise on digital technologies to monitor the implementation.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example:
(1) In order to overcome the challenge (1) mentioned in the sub-Question (a), the competition agency relied on the help from third party organizations. They reduced the burden for the competition agency to monitor the implementation of the remedies.
(2) In order to overcome the challenge (2) mentioned in the sub-Question (a), the competition agency had discussions with several digital companies having technologies to make the monitoring efficient.

[ ](E) Challenge: It was difficult for the competition agency to evaluate whether competition was properly restored.

(a) Describe the challenges in detail

Example:
(1) It was difficult to set standards for the evaluation.
(2) It was difficult to determine when to assess the recovery of competition considering the rapid change of the markets.
(3) It was unclear whether the insufficient competition (or no entry of competitors) in the relevant markets after imposing remedies was due to independent choice of consumers or continuation of the effects of the conduct.

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. In this regard, if you used expertise such as economics, cognitive psychology, behavioral economics and digital technologies including data analysis, describe the detail of the process of analysis, organizational system of analysis, and the result of the analysis. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go

to the next page.

Example:
(1) In order to overcome the challenge (1) mentioned in the sub-Question (a), using economic analysis was helpful to obtain insights of the market status to assess the recovery of competition after imposing remedies.
(2) In order to overcome the challenge (2) mentioned in the sub-Question (a), the competition agency relied on the support from the tech people to determine the timing.
(3) In order to overcome the challenge (3) mentioned in the sub-Question (a), expertise on other academic areas such as cognitive psychology and behavioral economics were helpful to find why the market did not work.

[ ](F) Challenge: Others

(a) Describe the challenges in detail

Example:
It was difficult to … In detail, …

(b) Were there any challenges which you could overcome in the course of the investigation under the current legal system? If so, identify the challenges and describe how you solved them. If you could not overcome the challenges mentioned in the response to sub-Question (a), please enter "N/A" and go to the next page.

Example:
In order to overcome the challenge mentioned in the sub-Question (a), …

(Instruction for respondent)
Do you have any other cases? You can provide 10 cases at maximum. [NOTE: At the online Questionnaire, you can repeat the Questions (6) to (17) for each of your cases. Please prepare answers to these questions for all cases that you can provide.]

[ ]Yes (Go back to Question (6) below)

[ ]No (Skip to Question (23))

Question (6):
[Enforcement experiences] Have you taken any enforcement and/or legal action against unilateral conduct with dominance/substantial market power in digital markets by imposing remedies or filing lawsuits, between January 1, 2016 and November 1, 2021?

3.4 Background on lack of enforcement experiences

(18) [State of investigation] If you chose "No" in the response to Question (6), identify the state of investigation against unilateral conduct with dominance/substantial market power in digital markets during the period January 1, 2016 to November 1, 2021 (Multiple answers allowed).

[ ](A) The competition agency has had no information about alleged unilateral conduct with dominance/substantial market power in digital markets.

[ ](B) The competition agency received information about alleged unilateral conduct with dominance/substantial market power in digital markets, but has not initiated a formal or preliminary investigation.

[ ](C) The competition agency started a preliminary investigation, but closed the case without taking any actions before the initiation of formal investigation. Indicate the number of cases.

Example: Close of investigation (3 cases)

[ ](D) The competition agency started a formal investigation, but closed the case without taking any actions or with commitments offered by the party. Indicate the number of cases.

Example: Close of investigation (2 cases), Commitments (5 cases)

[ ](E) The competition agency is currently conducting a preliminary investigation. Indicate the number of cases.

Example: 2 cases

[ ](F) The competition agency is currently conducting a formal investigation. Indicate the number of cases.

Example: 4 cases

[ ](G) Others

If you chose "Others", please specify.

(19) [Reason for no enforcement experience] If you chose (B) in the response to Question (18), what are the reasons for the state of investigation (Multiple answers allowed)?

- Difficulties concerning theories of harm and remedies

[ ](A) It is difficult for the competition agency to analyze the theories of harm.

[ ](B) It is difficult for the competition agency to design and monitor remedies.

- Challenges concerning investigation

[ ](C) The competition agency does not have enough enforcement experiences of similar cases.

[ ](D) The competition agency does not have enough human resources such as economists and tech people.

[ ](E) It is difficult to obtain internal documents from the party.

- Prioritization

[ ](F) The competition agency prioritizes other areas.

- Others

[ ](G) Others

If you chose "Others", please specify.

(20) [Challenges and solutions concerning theories of harm and remedies] If you chose (A) or (B) in the response to Question (19), please describe the challenges in detail. If you have two or more cases, describe the challenges and solutions for each case.

Example:
As for the challenge (A), in detail, […].
As for the challenge (B), in detail, […].

(21) [Reason for closing cases] If you chose (C) or (D) in the response to Question (18), what were the reasons for the state of the investigation (Multiple answers allowed)?

- Result of analysis of theories of harm

[ ](A) No anticompetitive effect was found as a result of the investigation.

[ ](B) Anticompetitive effects were found but procompetitive effects outweighed the anticompetitive effects.

[ ](C) The presumption of illegality was rebutted by procompetitive effects.

- Difficulties concerning theories of harm

[ ](D) It was difficult to analyze theories of harm.

- Difficulties concerning remedies

[ ](E) Closing the case was a better option than imposing remedies.

Specify the details of the reason:

[ ](F) It was difficult to design and monitor remedies.

- Challenges at investigation

[ ](G) The competition agency did not have enough enforcement experience of similar cases.

[ ](H) The competition agency did not have enough human resources such as economists and tech people.

[ ](I) It was difficult to obtain internal documents from the party.

- Prioritization

[ ](J) The competition agency prioritized other areas.

- Others

[ ](K) Others

If you chose “Others”, please specify.

(22) [Detailed challenges and solutions for the analysis of theories of harm and the remedies concerning digital markets in closing cases] If you chose (D) or (F) in the response to Question (21), please describe the challenges in detail. If you have two or more cases, describe the challenges for each case.

Example:
As for the challenge (D), in detail, […].
As for the challenge (F), in detail, […].

4. Legislative or institutional challenges concerning unilateral conduct with dominance/substantial market power in digital markets (NOTE: Questions for ALL

agencies. Please answer regardless of enforcement experience in the response to Questions (6). **)**

(23) [Legal or structural challenges specific to digital markets] Are there other broader legal or structural challenges involving unilateral conduct with dominance/substantial market power in digital markets? Review the possible challenges from the choices of (A) to (G) below (Multiple answers allowed). In addition, for each choice of (A) through (G), describe the challenges in detail:

- Challenge: Existing rules concerning unilateral conduct with dominance/substantial market power

[ ](A) It is necessary to prohibit unilateral conduct that does not meet the requirements of dominance/substantial market power stipulated in the existing legislation regarding unilateral conduct.

Describe the challenges in detail:

Example: It is challenging to enforce competition laws against unilateral conduct such as … under the current legal framework. In detail, …

[ ](B) There is a challenge in prohibiting unilateral conduct with dominance/substantial market power such as exploitative conduct that does not fit into the scope of the existing legislation regarding unilateral conduct.

Describe the challenges in detail:

Example: It is challenging to enforce competition laws against exploitative conduct under the current legal framework as it is extremely difficult to evaluate the anticompetitive effects of the conduct. In detail, …

- Challenge: Burden of proof under statute laws or case laws[16]

[ ](C) There is a risk of over-enforcement (a false positive, or the finding of harm to competition when there is none).

Describe the challenges in detail:

Example: It is expected to impede the party's innovation when the competition agency enforces the law based on the insufficient scheme or framework for the analysis of theories of harm. In detail, …

[ ](D) There is a risk of under-enforcement (a false negative, or the finding that no harm to competition occurred when it has in fact occurred).

Describe the challenges in detail:

Example: There is a risk that anticompetitive effects remain in the relevant markets when the competition agency decides not to enforce competition laws based on the insufficient analysis of theories of harm. In detail, …

- Challenge: Investigation tools

[ ](E) The competition agency has difficulty in collecting and analyzing evidence.

Describe the challenges in detail: (Please describe challenges other than ones described in the response to Question (13)(D), if you have any.)

Example: (1) It is difficult to select necessary evidences to assess anticompetitive effects. (2) It is difficult to obtain enough cooperation from the party to investigate the case. (3) It is difficult to obtain internal documents of the party indicating the anticompetitive strategies. (4) It is difficult to evaluate a vast amount of data submitted by the party.

[ ](F) Challenge: The competition agency has institutional hurdles to conduct efficient investigation.

Describe the challenges in detail: ((Please describe challenges other than ones described in the response to Question (13)(D), if you have any.)

Example: (1) The investigation was so complicated that it took quite a long time. In detail, it took * years to conclude the case. (2) The investigation needed more human resources than other cases.

- Challenge: Others

[ ](G) Challenge: Others

Describe the challenges in detail:

[16] OECD (2020), "Abuse of dominance in digital markets", p.10, at https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf

- There is no challenge.

  [ ](H) There is no challenge

5. Legislative or institutional approaches to addressing challenges concerning unilateral conduct with dominance/substantial market power in digital markets (NOTE: Questions for ALL agencies. Please answer regardless of enforcement experience in the response to Questions (6).**)**

(24) Some of the challenges identified above may be addressed by legislative changes to competition laws or institutional changes to agencies. Please describe the details of any recent or scheduled changes to the current legal system or institution that may address any of the challenges. If there are no recent/scheduled changes to the current legal system/institution, please indicate "N/A".

*For reference, see your answers to the Questions below:

Challenges and solutions concerning **theories of harm** (Question (13))

Challenges and solutions concerning **remedies** (Question (17))

Other challenges and solutions (Question (23))

Example:

- In order to overcome […the challenge (F) of Question (13) …], new laws or guidelines were amended or are being examined for possible amendment to ensure that […digital platform operators appropriately handle users' data].

(a) Title of the amended laws or guidelines, and the amended articles:

(b) Year of the amendment or planned amendment:

(c) Objectives of the amendment:

(d) Overview of the amendment:

- In order to overcome […the challenge (D) of Question (17)…], ex-ante rules have been introduced or are being examined for possible introduction to regulate….

(a) Title of the new ex-ante rules, and the new articles:

(b) Year of the introduction or planned introduction:

(c) Objectives of the introduction:

(d) Overview of the introduction:

- In order to overcome […the challenge (B) of Question (12)…], a special branch/unit has been established or is being examined for possible establishment for exclusively investigating cases in digital markets.
  (a) Year of the establishment or the scheduled establishment:
  (b) Name of the new organization, and the number of allocated employees:
  (c) Overview of the new organization's task:
  (d) Reason for the establishment:

- In order to overcome […the challenge (G) of Question (12)/(13)…], a memorandum of understanding (MOU) has been concluded or are being examined for possible conclusion to promote cooperation with other ministries and agencies regarding the protection of personal data. In detail, …
  (a) Title of the new agreement:
  (b) Year of the conclusion or planned conclusion:
  (c) Objectives of the agreement:
  (d) Overview of the agreement:

6. Frameworks covering unilateral conduct *without* dominance/substantial market power in digital markets

(25) [Existing framework] Do you have any existing legal and institutional frameworks in your competition law other than ex-ante rules, for addressing unilateral conduct without dominance/substantial market power such as exploitative conduct in digital markets?
[ ] Yes
[ ] No (Skip to Question (31))

(26) If you chose "Yes" in the response to Question (25), choose one of the followings.
[ ](A) Unilateral conduct laws that focus on inequality of bargaining power between parties (ex. Abuse of superior bargaining position/power, Abuse of economic dependence)
[ ](B) Others
(If you chose "Others", please specify.)

(27) Provide the title of laws, articles, or any reference material concerning the legal and institutional frameworks described in the response to Question (26).

In addition, explain mentioned framework in detail, such as the core concept and principles, by citing the contents of the laws and guidelines. Furthermore, if the laws and guidelines indicate how to apply the laws in digital markets, please outline such points.

Example:
(a) Title of laws: Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)("Anti-monopoly Act")
(URL) https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html

(b) Article: Article 2, paragraph 9, item 5 (Abuses of superior bargaining position)

(c) Title of guidelines:
(A) Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act
(URL) https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf

(B) Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.
(URL) https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217DPconsumerGL.pdf

(d) Framework Overview: Note that the following description includes different terms and explanations from those in the above mentioned guidelines (A) and (B) that are open to the public.

(A) Overview of the regulation concerning abuse of superior bargaining position
Article 2, paragraph (9), item (v) of the Antimonopoly Act provides abuse of superior bargaining position that are problematic under the Antimonopoly Act as follows:

" Taking any act specified in one of the following, unjustly in light of normal business practices by making use of one's superior bargaining position over the other party:

(a) Causing the said party in regular transactions (including a party with whom one

intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one pertaining to the said transactions;

(b) Causing the said party in regular transactions to provide for oneself money, services or other economic benefits;

(c) Refusing to receive goods pertaining to transactions from the said party, causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party, delaying the payment of the transactions to the said party or reducing the amount of the said payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the said party".

Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act describe key statutory requirements of the Article 2, paragraph (9), item (v) of the Antimonopoly Act as follows:

(1) Concept of "by Making Use of One's Superior Bargaining Position Over the Other Party"
In order for one party in a transaction (Party A) to occupy a superior bargaining position over the other party (Party B), Party A does not need to have a market-dominant position nor a dominant bargaining position equivalent thereto. It only needs to occupy a relatively superior bargaining position as compared to the other transacting party. When Party A has a superior bargaining position over Party B, if, for instance, it makes a request that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such request, because if it refuses the request, the Party B's business management would be substantially impeded.

When determining the existence of a Party's superior bargaining position, certain factors must be considered. These are, for instance, Party B's dependence on transactions with Party A, Party A's market position, the possibility of Party B's margin of changing its business counterpart, or any other facts indicating the need for Party B to carry out transactions with Party A.

(2) The Concept of "Unjustly in light of Normal Business Practices"
The requirement, "unjustly in light of normal business practices," indicates that the

existence of an abuse of superior bargaining position is determined on a case-by-case basis from the viewpoint of maintaining/promoting fair competition where entrepreneurs can compete to provide services with better quality or lower prices. The term "normal business practices" refers to business practice endorsed from the viewpoint of maintaining/promoting fair competition as well. Therefore, a business activity is not immediately justified merely because it complies with the currently existing business practices.

(B) Application to Digital Markets

Guidelines concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. provides as follows:

(1) Basic concepts

If a digital platform operator in a superior bargaining position over consumers unjustifiably causes, in light of normal business practice, disadvantage to them, the digital platform operator will not only impede consumers' free and independent judgement but will also likely to gain competitive advantage over its competitors (Note 1).

It is because such conduct is likely to impede fair competition, it is restricted under the Antimonopoly Act for constituting an abuse of a superior bargaining position, a type of unfair trade practice.

(Note 1) A digital platform operator is likely to gain an advantageous competitive position against its competitors if it achieves to reduce cost or gain profit by making use of its superior bargaining position imposing a disadvantage on a consumer unjustly in light of normal business practices and invests them in relevant or other businesses.

(2) Concept of "making use of one's superior bargaining position over the counterparty (consumers)"

(a) A digital platform operator has a superior bargaining position over consumers who provide personal information, if consumers are compelled to accept detrimental treatment from the digital platform operator in order to use the services provided by the digital platform operator.

(b) To determine whether consumers are compelled to accept detrimental treatment in order to use the services provided by the digital platform operator or not, consumers' need to trade with the digital platform operator is to be considered.

A digital platform operator providing such services is normally in the superior bargaining position over consumers; (i) when there is no other digital platform operator that provides alternative services for consumers (Note 2); (ii) when there is another digital platform operator providing alternative services, but it is difficult to stop using the services provided by the digital platform operator (Note 3); or (iii) when the digital platform operator is in a position to freely control trade terms, such as prices, qualities, and quantities.

(Note 2) Whether a certain service is alternative to the service provided by the digital platform operator, is determined comparing these service's function, contents, quality, etc.
(Note 3) Whether it is difficult to stop using the digital platform operator's service is determined considering characteristics such as the service's function or contents, or the possibility to transfer network formed with other consumers using the service and data accumulated. This determination is made, considering whether it is practically difficult to stop using the service not for each consumer but for general consumers.

(c) Also, when the digital platform operator in a superior bargaining position conducts a transaction by unjustifiably imposing a disadvantage on consumers, such a conduct is normally deemed as "making use of" its superior bargaining position.

(d) In the determination stipulated above, it is necessary to consider if there is the disparity in the quality and quantity of information and negotiating power between a digital platform operator and consumers.

(28) [For the agencies that chose (A) in the response to Question (26)] Which transaction do your frameworks provided in the response to Question (26) apply to? (Multiple answers allowed)

[ ](A) Transaction between the party and enterprises

[ ](A)-1 Transaction between the party and ALL enterprises

[ ](A)-2 Transaction between the party and only small and medium sized enterprises

[ ](B) Transaction between the party and general consumers

(29) Provide the purpose and reasons for the introduction of the frameworks provided in the response to Question (26).

(30) Describe the overview of the cases where you applied the frameworks provided in the response to Question (26) in digital markets during the period January 1, 2016 – November 1, 2021, if any. If you have more than one cases, please provide the information for all the cases.

Also, explain the reason why the frameworks were effective or suitable to regulate unilateral conduct without dominance/substantial market power in relation to your response to Question (29).

If you do not have such cases, please enter "N/A" and go to the next page.

Example:
A food delivery platform operator prohibited restaurants using the platform from providing their food at cheaper price when using other platforms. The competition agency found that coercing the lowest price was an abuse of superior bargaining position (intervention to the management), and issued cease and desist order and surcharge payment order.

In this case, a digital platform operator one-sidedly changed contract terms with its trading partners, imposing disadvantages on their business. The competition agency could not find the substantial market power of the digital platform operator and therefore applied the regulation on abuse of superior bargaining position to the case focusing on inequality of bargaining power between the parties.

7. Future guidance

(31) In view of investigations into unilateral conduct with dominance/substantial market power in digital markets, have you consulted any of the existing ICN documents?

[ ] Yes

[ ] No (Skip to Question (33))

(32) If you chose “Yes” in the response to Question (31), specify which ICN documents you have consulted.

(33) If drafted, would ICN guidance on assessing theories of harm of unilateral conduct with dominance/substantial market power in digital markets be useful for your enforcement practice?

[ ] Yes

[ ] No (Skip to Question (35))

(34) If you chose “Yes” in the response to Question (33), could you provide ideas on topics that the future guidance should focus on?

(35) If drafted, would ICN guidance on design, implementation and monitoring of remedies for unilateral conduct with dominance/substantial market power in digital markets be useful for your enforcement practice?

[ ] Yes

[ ] No (Skip to Question (37))

(36) If you chose “Yes” in the response to Question (35), could you provide ideas on topics that the future guidance should focus on?

(37) If you chose “Yes” in the response to Question (33) or (35), which of the following options do you consider most suitable for providing such guidance?

[ ] Update of existing ICN guidance such as analytical framework, predatory pricing analysis, exclusive dealing/single branding, and tying and bundling dominance/substantial market power analysis pursuant to unilateral conduct with dominance/substantial market power laws

[ ] Prepare separate and focused ICN guidance on the analysis of theories of harm or the designing of remedies for unilateral conduct with dominance/substantial market power in digital markets

[ ] Other means

(38) Please explain your answer to Question (37).

If you wish to provide more information as to all questions above, please send a file or a ZIP folder containing multiple files to icn@jftc.go.jp.

END

ANNEX II

ICN Unilateral Conduct Working Group
Questionnaire on the analysis of theories of harm and design of remedies concerning unilateral conduct with dominance/substantial market power in digital markets (for NGAs)

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1. Introduction

(1) Background

In 2019, the ICN Unilateral Conduct Working Group ("UCWG") started a new multi-year project on the assessment of dominance/substantial market power in digital markets. The project was driven by the growing impact of the development of digital technologies on business activities and the increasing need of ICN member agencies to assess unilateral conduct with dominance/substantial market power in digital markets.

As part of the project, the UCWG conducted a survey from December 2019 to January 2020, collecting information on the ICN members' experience in assessing dominance/substantial market power in digital markets.

In July 2020, the UCWG published the "Report on the results of the ICN survey on dominance/substantial market power in digital markets", which summarized the responses of 39 members and 24 NGAs. The report illustrated various approaches taken by the ICN members to assess dominance/substantial market power when dealing with unilateral conduct in digital markets. It also identified issues that a number of agencies considered should be explored by the UCWG as future works.

(2) About this Survey

In terms of unilateral conduct with dominance/substantial market power cases in digital markets, there have been significant developments since the previous survey was performed. For example, the United States Congress conducted a thorough investigation on competition in digital markets[1]. Also, Germany amended its competition law to specifically address issues in

[1] United States Congress (2020), "Investigation Of Competition In Digital Markets: Majority Staff Report And Recommendations", at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519

digital markets[2]. At European level, a discussion to introduce ex-ante rules beyond the scope of competition laws is ongoing[3] in several jurisdictions. These examples exhibit countries and regions' increasing interest on the topics.

Against the backdrop of such situation, in September 2021, the UCWG decided to conduct a new survey as part of the successor project of the above mentioned multi-year project on the assessment of dominance/substantial market power in digital markets. The survey focuses on topics which were of interest to stakeholders in the previous survey such as "analysis of theories of harm", "design, implementation and monitoring of remedies" and "new or alternative tools to address unilateral conduct with dominance/substantial market power in digital markets".

As in the previous survey, the aim of the new one is to i) collect information on the ICN members' experiences and expertise of NGAs on the topics, ii) prepare a report summarizing the experiences and expertise as well as the current status of members' consideration on the topics, and iii) collect views on the need for a new or revised ICN guidance on the topics.

The term "unilateral conduct with dominance/substantial market power[4]" used in this questionnaire is deduced from various legislative provisions in different jurisdictions with differing terminology but with a similar core objective, including: abuse of dominance in the EU[5], India[6], and South Africa[7], monopolisation in the US[8], private monopolisation in Japan[9], relative practices in Mexico[10], misuse of market power in Australia[11], and anticompetitive conduct in Brazil[12]. Moreover, the term "digital markets" refers to the provision of products or services by use of digital technologies, mainly the internet, but also by any other digital medium. Furthermore, the term "theories of harm" refers to the explanation why certain conduct causes anticompetitive effects in the market such as a price increase or a negative

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[2] Bundeskartellamt, "Amendment of the German Act against Restraints of Competition", at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

[3] European Commission, "The Digital Markets Act: ensuring fair and open digital markets", at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

[4] OECD (2020), "Abuse of dominance in digital markets", p. 9, at https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf (*"The term abuse of dominance encompasses various legislative provisions in different jurisdictions, often with differing terminology but with a similar core objective..."*)

[5] Article 102 of the Treaty on the Functioning of the European Union

[6] Section 4(1) of the Competition Act 2002

[7] Section 8 of the Competition Act (No.89 of 1998)

[8] Section 2 of the Sherman Act

[9] Act on the Prohibition of Private Monopolisation and the Maintenance of Fair Trade (Act No. 54 of 14 April 1947)

[10] Federal Economic Competition Law

[11] Section 46 of the Competition and Consumer Act 2010

[12] Article 36 of the Law 12.529/2011

impact on quality, innovation or consumers' choices.

(3) Important Notice

This survey requires responses based on the latest information in each country and region as of November 1, 2021. The submission deadline is December 24, 2021. Any questions concerning the survey should be sent to icn@jftc.go.jp.

While the responses to the questionnaire will not be published as such, to ensure confidentiality of information provided, they will be used for the preparation of a report to provide aggregate result and cite narrative comments without identifying respondents. In addition, your name, organization and the name of ICN member you advise will be listed as Annex of the report.

The report will be presented at the ICN Annual Conference in Germany scheduled in May 2022 after the UCWG and Steering Group's approval.

2. General information about you and contact details

(1) Please provide the name of the person to be contacted about this questionnaire.

(2) Please provide the email address of the person to be contacted about this questionnaire.

(3) Please state your name and/or the official name of your organization.

(4) Please indicate the ICN member for which you work as an NGA.

(5) Please describe briefly your practical or academic experience relevant to this questionnaire. Also, if you have any accomplishment such as an article or a research paper relevant to unilateral conduct with dominance/substantial market power in digital markets, please provide its title, year of publication, URL (if published on the website), etc.

3. Enforcement

3.1 Enforcement experiences

(6) [Enforcement experiences] Has any enforcement and/or legal action (imposing remedies, filing lawsuits, etc.) been taken by the competition agency against unilateral conduct with dominance/substantial market power in digital markets, where you find challenges in the process of analysis of theories of harm and/or design, implementation and monitoring of remedies, in your jurisdiction between January 1, 2016 and November 1, 2021?

[ ] Yes
[ ] No (Skip to Question (13))

(7) [Overview of the case] If you chose "Yes" in the response to Question (6), indicate the name and overview of the case. If you have two or more cases, answer Questions (7) to (12) below for each case. You may provide **ten cases** at maximum. [NOTE: At the online Questionnaire, you can repeat the Questions (7) to (12) for each of your cases. Please prepare answers to these questions for all cases that you can provide.]

Indicate the following factors:
1) Name of the case (including the name of the investigated party ("the party") and the date of the agency decision)
2) Overview of the case including:
- URL link to the agency decision

(**Example**:
1) Google Shopping case (Date of the agency decision: June 27, 2017)
2) Overview of the case
(https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740))

(8) To your knowledge, what challenges did you encounter in relation to the case provided in the response to Question (7)? Choose one of the following:

[ ](A) Analysis of theories of harm (Go to next Question)
[ ](B) Design, implementation and monitoring of remedies (Skip to Question (11))
[ ](C) Both of (A) and (B) above (Go to next Question)

3.2 Theories of harm

(9) If you chose (A) or (C) in the response to Question (8), select the specific challenges, which you are aware of, affected the process of analysis of theories of harm by the competition agency in your jurisdiction (multiple answers allowed).

[ ](A) Finding of requirements for each type of unilateral conduct
[ ](B) Analysis of characteristics[13] of digital market
[ ](C) Balancing of anti/procompetitive effects
[ ](D) Selection, collection, or assessment of necessary evidences
[ ](E) Allocation of resources to investigation team
[ ](F) Addressing issues in the intersection with other legal areas
[ ](G) Addressing geographical barriers in the investigation
[ ](H) Others

If you chose "Others", please specify.

(10) Please explain, in your own words, the detail of your insights and views on the challenges

[13] Examples of Factors for assessing anticompetitive effects:
(A) Extent of dominant/substantial market position
(B) Characteristics of relevant markets (Two/multi-sidedness, economies of scale, economies of scope, direct network effects, indirect network effects, importance of data as input, zero-monetary prices, complexity of services and technologies, possibility of multi-homing, dynamism of relevant markets, consumer biases (e.g. customer inertia or the effect of default settings.), establishment of ecosystem)
(C) Position of actual/potential competitors (Market share of competitors, efficiencies of competitors' business (as efficient competitor test), innovation brought by the competitors, feasibility and speed of possible counter strategies taken by the competitors)
(D) Availability of alternative choices for customers or trading partners
(E) Possibility of applying essential facility doctrine to products or services concerned
(F) Scope, term and extent of unilateral conduct with dominance/substantial market power
(G) Facts indicating foreclosure effects on the relevant markets (The market share of the party was increased after the conduct, actual competitors were excluded from the relevant markets, potential competitors abandoned their plans to enter the relevant markets
(H) Facts indicating a series of strategies to exclude competitors (The party had detailed plans for implementing the unilateral conduct with dominance/substantial market power, the party had internal documents indicating the strategies)
(I) Others
Examples of Factors for assessing procompetitive effects:
(J) Decrease of costs for sales or business operations
(K) Increase of sales quantities or expansions of service coverage
(L) Decrease of price of products/services
(M) Improvement of qualities of products/services
(N) Increase of innovations
(O) Creation of investment incentives for investors
(P) Increase of transactional efficiencies by integrating complementary services such as creating a digital ecosystem
(Q) Others

pointed out in the response to Question (9), and on the initiatives the competition agency in your jurisdiction should take in order to address such challenges. In your explanation, describe your awareness of the challenges by referring to the characteristics of digital markets[14] and include the factors below if applicable:

(a) whether the competition agency in your jurisdiction appropriately analyzed consideration factors[15] in the process of balancing anticompetitive effects and procompetitive effects

(b) whether the competition agencies in your jurisdiction appropriately constructed theories of harm by balancing anticompetitive effects and procompetitive effects in digital markets

Choose one of the following:

□If you chose (A) in the response to Question (8), skip to Question (13).

□If you chose (C) in the response to Question (8), go to next Question.

3.3 Remedies

(11) If you chose (B) or (C) in the response to Question (8), select the specific challenges, which you are aware of, affected the imposition of remedies by the competition agency in your jurisdiction (Multiple answers allowed).

[ ](A) Design of remedies

[ ](B) Timing of imposing remedies

[ ](C) Monitoring of implementation of remedies

[ ](D) Evaluation of recovery of competition after imposing remedies

[ ](E) Others

If you chose “Others”, please specify.

(12) Please explain, in your own words, the detail of your insights and views on the challenges pointed out in the response to Question (11), and on the initiatives the competition agency in your jurisdiction should take in order to address such challenges[16].

Include these factors if applicable: type of remedies to be imposed (monetary sanctions, structural remedies, behavioral remedies, interim measures), their content, design, timing, implementation, monitoring and the recovery of competition in the market after the remedies.

Do you have any other cases? You can provide 10 cases at maximum. [NOTE: At the online Questionnaire, you can repeat the Questions (7) to (12) for each of your cases. Please prepare answers to these questions for all cases that you can provide.]

Question (6):
[Enforcement experiences] Has any enforcement and/or legal action been taken by the competition agency against unilateral conduct with dominance/substantial market power in digital markets such as imposing remedies or filing lawsuits in your jurisdiction between January 1, 2016 and November 1, 2021?
□Yes (Answer Question (7) to (12) about the next case)
□No (Go to next Question)

4. Legislative or institutional challenges concerning unilateral conduct with dominance/substantial market power in digital markets

(13) Do you find any legal or structural challenges concerning unilateral conduct with dominance/substantial market power in digital markets in your jurisdiction regardless of your responses to Questions above?

[ ] Yes

[14] See footnote 13
[15] See footnote 13
[16] Several examples of initiatives may be as follows: introducing new assessment of restoration of competition, use of expertise on other academic knowledge, use of data analysis, efficient monitoring on implementation.

[ ] No (Skip to Question (15))

(14) Please explain, in your own words, challenges you pointed out in the response to Question (13), their causes, and your views on what initiatives the competition agency in your jurisdiction should take in order to address the challenges. If your answer contains abstract from articles or research papers, reference information such as their titles, year of publication, URL (if published on the website), etc. would be helpful. Please include the factors below if applicable.

(a) whether the competition agency in your jurisdiction has challenges concerning digital markets which cannot be overcome under the current legal system of unilateral conduct with dominance/substantial market power
(b) whether there is a risk of over-enforcement[17] (which means a false positive, or the finding of harm to competition when there is none) or under-enforcement[18] (which means a false negative, or the finding that no harm to competition occurred when it has in fact occurred)

5. Frameworks covering unilateral conduct *without* dominance/substantial market power in digital markets

(15) Do you think it is necessary to have any legal and institutional frameworks in your competition law other than ex-ante rules in your jurisdiction for addressing unilateral conduct **without** dominance/substantial market power such as exploitative conduct in digital markets? (ex. Unilateral conduct laws that focus on inequality of bargaining power between parties including abuse of superior bargaining position/power or abuse of economic dependence)?

[ ] Yes
[ ] No (Skip to Question(17))

(16) If you chose "Yes" in the response to Question (15), answer the following questions:

[17] OECD (2020), "Abuse of dominance in digital markets", p.10, at https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf
[18] OECD (2020), "Abuse of dominance in digital markets", p.10, at https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf

- Are there any existing legal or institutional frameworks in your jurisdiction which address unilateral conduct **without** dominance/substantial market power such as exploitative conduct in digital markets? (ex. Unilateral conduct laws that focus on inequality of bargaining power between parties?
- If your answer is affirmative, describe the significance of such framework. If your answer is negative, describe the reason why you think such framework is necessary.

Example; - Our jurisdiction has … as legal framework, and has … as institutional framework. The significance of this framework is…. In detail, … - Our jurisdiction does not have any legal or institutional framework addressing unilateral conduct without dominance/substantial market power. However, such framework is necessary because … In detail, …

(17) If you chose "No" in the response to Question (15), describe the reason why you think the framework is not necessary.

6. Future guidance

(18) Regarding investigations concerning unilateral conduct with dominance/substantial market power in digital markets, have you consulted any of the existing ICN documents?

[ ] Yes
[ ] No (Skip to Question(20))

(19) If you chose "Yes" in the response to Question (18), specify which ICN documents you have consulted.

(20) If drafted, would ICN guidance on assessing theories of harm of unilateral conduct with dominance/substantial market power in digital markets be useful for your practice?

[ ] Yes
[ ] No (Skip to Question(22))

(21) If you chose “Yes” in the response to Question (20), could you provide ideas of topics on which future guidance should focus?

(22) If drafted, would ICN guidance on design, implementation and monitoring of remedies for unilateral conduct with dominance/substantial market power in digital markets be useful for your practice?

[ ] Yes
[ ] No(Skip to Question(24))

(23) If you chose “Yes” in the response to Question (22), could you provide ideas of topics on which future guidance should focus?

(24) If you chose “Yes” in the response to Question (20) or (22), which of the following options do you consider most suitable for providing such guidance?

[ ](A) Update of existing ICN guidance such as analytical framework, predatory pricing analysis, exclusive dealing/single branding, and tying and bundling dominance/substantial market power analysis pursuant to unilateral conduct with dominance/substantial market power laws
[ ](B) Prepare separate and focused ICN guidance on the assessment of theories of harm or the design of remedies against unilateral conduct with dominance/substantial market power in digital markets
[ ](C) Other means

(25) Please explain your answer to Question (24).

If you wish to provide additional information as to all questions above, please send a file or a ZIP folder containing multiple files to icn@jftc.go.jp.

END

ANNEX III

Non-governmental advisors (NGAs)

Name of the NGA	**Organisation**	**ICN member the NGA advises**
Rafael Allendesalazar	MLAB Abogados	CNMC (Spain)
Daniel Andreoli	Demarest Advogados	CADE (Brazil)
G R Bhatia	L & L Partners Law Offices	CCI (India)
Ginevra Bruzzone	LUISS School of European Political Economy	AGCM (Italy)
Anca Chirita	Durham University	DG COMP (EU)
Manuel Contreras	GOLD Abogados	CNMC (Spain)
Koren Wong-Ervin	Axinn, Veltrop & Harkrider LLP	US FTC and DOJ
Eliana Garces	Meta Inc	CNMC (Spain)
Alfonso Gutiérrez	Uría Menéndez	CNMC (Spain)
Joyce Midori Honda Thales Lemos	Cescon, Barrieu, Flesch & Barreto Advogados	CADE (Brazil)
Kenji Ito	Mori Hamada & Matsumoto	JFTC (Japan)
Jonathan Jacobson	Wilson Sonsini Goodrich & Rosati	US FTC and DOJ
Daisuke Korenaga	Tohoku University	JFTC (Japan)
Claudia Lemus	Queen Mary University of London	Superintendence of Trade and Commerce (Colombia)
Diez-Canseco Luis	Lima	National Institute for the Defense of Competition and the Protection of Intellectual Property (Peru)
Russell Miller	Minter Ellison	ACCC (Australia)
James Musgrove	Mcmillan LLP	CBC (Canada)
Hideo Nakajima	White & Case Law LLP	JFTC (Japan)
Giovanni Napolitano	World Intellectual Property Organization	(International organisation)
Edgard Antonio Pereira	EDAP - Edgard Pereira & Associados	CADE (Brazil)

Urska Petrovcic	Qualcomm	DG COMP (EU)
Jesús Ángel Suárez Ramos	Jesús Ángel Suárez Ramos	CNMC (Spain)
Yoshihiro Sakano	CITY-YUWA PARTNERS	JFTC (Japan)
Tadashi Shiraishi	University of Tokyo	JFTC (Japan)
Yusuke Takamiya	Mori Hamada & Matsumoto	JFTC (Japan)
Sayako Takizawa	University of Tokyo	JFTC (Japan)
M. Fevzi Toksoy Bahadır Balkı	ACTECON	Turkish Competition Authority
Yoshiya Usami	Morrison Foerster	JFTC (Japan)
WANG Xianlin	Shanghai Jiao Tong University	Hong Kong Competition Commission
Atsushi Yamada	Anderson Mori & Tomotsune	JFTC (Japan)
Sylvann Aquilina Zahra	Ganado Advocates, Malta	DG COMP (EU)

ANNEX IV

Table: Authorities' responses to the survey question "Which factors listed below did you consider when analyzing theories of harm in the case provided in the response to Question (6)?"

(38 cases*; 17 responding authorities*; multiple answers allowed)
* No information is reported about three cases from two authorities

Note: "Exploitative conduct (Unfair terms and conditions)" and "Self-preferencing" are focused for reference.

	Total	**Exploitative conduct (Unfair terms and conditions)**	**Self-preferencing**
Total	38	12	8
Factors for assessing anticompetitive effects			
(A) Extent of dominant/substantial market position	32	9	8
(B) Characteristics of relevant markets	33	11	7
(B-1) Two/multi-sidedness	24	8	6
(B-2) Economies of scale	20	5	4
(B-3) Economies of scope	4	0	0
(B-4) Direct network effects	17	6	3
(B-5) Indirect network effects	22	5	6
(B-6) Importance of data as input	13	1	4
(B-7) Zero-monetary prices	12	4	2
(B-8) Complexity of services and technologies	11	1	1
(B-9) Possibility of multi-homing	15	3	3
(B-10) Dynamism of relevant markets	18	1	4
(B-11) Consumer biases (e.g. Customer inertia or effect of default settings.)	11	4	4
(B-12) Establishment of ecosystem	14	3	5
(C) Position of actual/potential competitors	25	7	6

(C-1) Market share of competitors	25	7	7
(C-2) Efficiency of competitors' business (As efficient competitor test)	9	2	4
(C-3) Innovation brought by the competitors	14	2	2
(C-4) Feasibility and speed of possible counter strategies taken by the competitors	4	1	0
(D) Availability of alternative choices for customers or trading partners	34	9	8
(E) Possibility of applying the essential facility doctrine to products or services concerned	6	1	0
(F) Scope, term and extent of unilateral conduct with dominance/substantial market power	24	8	5
(G) Facts indicating foreclosure effects on the relevant markets	26	7	7
(G-1) Market share of the party was increased after the conduct.	13	1	6
(G-2) Actual competitors were excluded from the relevant markets.	15	5	2
(G-3) Potential competitors abandoned their plans to enter the relevant markets.	9	0	3
(H) Facts indicating a series of strategies to exclude competitors	10	1	3
(H-1) The party had detailed plans for implementing the unilateral conduct with dominance/substantial market power.	5	0	1
(H-2) The party had internal documents indicating the strategies.	9	0	1
(I) Others	10	2	3
Factors for assessing procompetitive effects			
(J) Decrease of costs for sales or business operations	4	2	1
(K) Increase of sales quantities or expansion of service coverage	3	0	1

(L) Decrease of price of products/services	4	3	0
(M) Improvement of qualities of products/services	4	3	1
(N) Increase of innovations	1	0	1
(O) Creation of investment incentives for investors	3	2	0
(P) Increase of transactional efficiencies by integrating complementary services such as creating a digital ecosystem	2	0	1
(Q) Others	3	2	1