



Business at OECD

Summary of written contributions

OECD competition week, 3-7 June 2019



Overview

For the OECD Competition week of June 2019, *Business at OECD's* Competition Committee prepared member submissions on the below topics. Summaries of our contributions and links to the full papers are included in this document.

a) OECD Working Party 3 on Co-operation and Enforcement, 4 June:

1. *Roundtable on the Standard of Review by Courts in Competition Cases*

This roundtable looked at standards of courts' review in antitrust cases and what these standards imply for competition authorities. It also referred to methods for courts to ensure expertise in competition law and economics.

b) OECD Competition Committee, 5-7 June:

2. *Roundtable on Analyzing Competition Issues in Labor Relations*

This roundtable explored the relationship between competition law and labor and discussed: 1) market competitiveness for buying labor; 2) competition law enforcement in relation to concerns over employers' monopsony power; 3) limits of competition law; and 4) role of competition agencies in this regard.

3. *Roundtable on FinTech and Disruptive Innovation in Financial Markets*

This roundtable discussed financial market issues related to financial stability, prudential regulation, systemic effects, too-big-to-fail, regulation and competition, focusing especially on FinTech/BigTech and their competitive relationship with traditional financial institutions.

4. *Roundtable on Licensing of Intellectual Property Rights and Competition Law*

This roundtable provided an overview of legal and economic developments in recent years as regards the treatment of the licensing by competition law and policy, with a focus on areas where the role of competition law is controversial.

5. *Roundtable on Vertical Mergers in Technology, Media & Telecom Sectors*

This roundtable discussed how competition authorities can effectively use merger control to reduce the risk of competition harm posed by potentially problematic vertical mergers, without compromising the many efficiencies typically associated with vertical integration.

Future OECD Meetings

The next OECD Competition week will take place on 2-6 December 2019, with the following focus:

- Roundtable on *Independent Sector Regulators*
- Roundtable on *Access to File and Protection of Confidential Information*
- Roundtable on *Hub and Spoke Arrangements*
- Roundtable on *Barriers to Exit*
- Roundtable on *Competition Provisions in Regional Trade Agreements*
- Roundtable on *Dynamic Issues in Merger Control*
- Roundtable on *Competition for the Market vs Competition in the Market*

1. Paper on “Standard of Review by Courts in Competition Proceedings”

Business at OECD supports the efforts of the OECD Competition Committee to get a deeper understanding and appreciation of judicial oversight of competition enforcement decisions. This topic runs to the core of the functioning and the legitimacy of competition enforcement regimes. It is an issue of growing importance given the extension of competition law into newer areas of economic activity and the increasingly significant sanctions that are being imposed across OECD competition enforcement jurisdictions.

Business at OECD has reviewed how the European Courts have approached judicial oversight of competition proceedings, given the maturity of the system, the influence that European law has on European member countries, as well as the influence European competition law has more broadly. *Business at OECD* observes that the European Courts have evolved their understanding of what standard of review to apply. This evolution is not entirely surprising given that judicial oversight must be sufficiently intensive in order to give effect to fundamental fair hearing rights and to address the increasing complexity of applying legal rules to economic theory and commercial realities. In addition, it would be expected that cases raising novel theories will be scrutinized by the courts, which will result in greater stability in the law and establish precedent that can be followed.

As competition sanctions increase in significance, competition regulation intervenes in new areas of law, and complex assessment of new economic or legal theories require authorities to make choices, it is entirely reasonable for courts to ensure effective scrutiny in order to enhance the viability of the system. *Business at OECD* therefore believes that courts match their standard of review to the impact and influence of competition authorities’ decisions. The limits of a court’s jurisdiction and the standard of review that the court should apply stands outside the control of competition authorities. However, in *Business at OECD’s* view, authorities that rigorously apply due process and procedural fairness norms, will help to immunize themselves against criticism by the courts. Indeed, sound judicial review should provide the legal certainty and guidance to authorities to undertake their functions with more confidence and issue decisions that are increasingly strong and more appeal-proof.

Please click [here](#) to download the full paper.

***Business at OECD* lead drafter:** Mathew Heim, Senior Regulatory Policy Counsel at Tanfield Chambers & Vice Chair of *Business at OECD* Competition Committee

2. Paper on “Competition Issues in Labor Markets”

The paper stresses that absent statutory exemptions, which exist in many instances, the competition laws are applicable to issues relating to labor markets on the same basis as other markets for goods or services. This includes the application of competition laws to agreements relating to wage fixing, “no poach” agreements, and other forms of joint activity relating to labor.

While there is an unquestionable “market” for labor, it should be recalled that, in general, labor is often an input, rather than an output, that facilitates the provision of goods or services downstream. From this perspective, the evaluation of labor markets can be conducted using many of the same analytical tools that are applicable to other inputs, including joint purchasing and monopsony analysis.

Because of the specialized nature of labor as an input, and its importance to a jurisdiction’s economic, political and social cultures, countries often adopt specialized legislation relating to labor markets that preempt or exempt them from competition laws in certain respects. *Business at OECD* views these as legitimate policy choices for legislators to make. But *Business at OECD* also believes that in the absence of legislation of these policy choices, competition authorities should apply the competition rules as written, without attempting to implement non-antitrust policy goals or objectives.

When it comes to wage-fixing and no-poach agreements, *Business at OECD* recognizes that such agreements can potentially harm competition among employers for labor, resulting in lower wages or benefits for employees and potential harm to consumers by reducing output. However, wage-fixing and no-poach agreements do not resemble the types of competitive harms that have traditionally been categorized as per se illegal criminal offenses. Categorization of wage-fixing and no-poach agreements as per se illegal ignores the potential that agreements may have to create efficiencies that lower costs, thus benefiting downstream consumers.

While *Business at OECD* continues to support enforcement agencies’ efforts to target and eliminate wage-fixing and no-poaching agreements that have the effect of harming competition, *Business at OECD* hopes that they will do so in a manner that consistently and reasonably administers antitrust laws. A shift in competition policy regarding wage-fixing and no-poach agreements – in the absence of clear statutory policy choices – risks creating greater uncertainty and inconsistency in the application of antitrust law.

Please click [here](#) to download the full paper.

***Business at OECD* lead drafter:** John Taladay, Partner at Baker Botts LLP & Chair of *Business at OECD* Competition Committee

3. Paper on “FinTech and Disruptive Innovation in Financial Markets”

The paper highlights that innovation in financial services is not a new phenomenon, but what is different today, and hence the use of the term “disruption,” is the speed of change, the number of new entrants, and the introduction of services and business models that are bringing radical changes to the market. In June 2015, at the OECD hearing on disruptive innovation in the financial sector, *Business at OECD* considered specific issues concerning payment systems, crowdfunding and P2P lending. *Business at OECD* also considered the role of regulators and their struggle to achieve an ideal balance between innovation and regulation. In this paper, *Business at OECD* considers issues relating to FinTech in general, the role of regulation and of regulatory sandboxes, the entry of large players from the retail, technology and telecommunications industries, and the potential impact of all these services on financial stability.

As *Business at OECD* suggested in its paper in 2015, the financial markets and consumers are greatly benefiting from a dynamic financial environment. For this to be the case in the long-term and to maintain a stable financial system, regulators and lawmakers have an important contribution to make to ensure regulation is extended to all aspects of financial services, regardless of the provider, and to create an environment where the right sort of innovation can flourish. For example, the PSD2 brings under EU legislation various types of payment service providers which were previously unregulated. That achieves the important objective of creating a level playing field amongst players while protecting the consumer and ensuring security in this area. But further steps are necessary across the world to ensure such level playing field.

The paper argues that to be truly effective, financial policy regulation must be forward-looking and prepared to accept the challenges of keeping pace with innovation, including the rapid changes to the competitive landscape brought by the entry of FinTech start-ups and BigTech. In *Business at OECD*'s view, the new financial technologies should be brought into the financial framework in a manner that does not neuter their creativity or lower the potential to revitalise the economy. But at the same time, regulation should take into account the objective of mitigating systemic risk and ensuring the stability of financial systems.

To create a good competitive environment, policy-makers should regulate activities rather than financial institutions. In the past, there has sometimes been a tendency to look at and regulate primarily only big banks. The innovation in the banking sector and the entry of BigTech should force a rethink of this approach. Finally, many of the FinTech start-ups and BigTech companies have the ability to operate in several countries or are planning to operate in several countries. Better coordination between the regulatory authorities would be welcomed.

Please click [here](#) to download the full paper

Business at OECD lead drafter: Paolo Palmigiano, General Counsel and Chief Compliance Officer at Sumitomo Electric Industries & Vice Chair of Business at OECD Competition Committee

4. Paper on “Licensing of IP Rights and Competition Law”

This paper notes that the creation of Intellectual property (IP) often entails substantial risk and investment. In order to promote competition and maintain incentives to innovate, absent extraordinary considerations, IP creators must not have the scope of their IP rights unduly restricted. Indeed, there is no presumption that exclusion based on IP rights or license agreements of themselves give rise to competition concerns.

While the paper focuses primarily on patents as a form of IP, it should be noted that licensing of other forms of IP, such as copyright, is also an efficient means of technology transfer and development, in addition to being a vehicle to provide incentives for production, distribution and exploitation of other forms of creative works.

Licensing of IP often enables innovators to seek compensation for successful research and development projects that in turn maintain investment incentives, balancing these successes against investments in failed projects. In many industries the licensing of IP (such as the transfer of technology) is essential for businesses. It helps disseminate innovation, lowers barriers to entry and allows companies to integrate and use complementary technologies to which they would otherwise not have access.

It is therefore not surprising that most license agreements are deemed not to restrict competition and, instead, create pro-competitive efficiencies. In fact, it is only in exceptional circumstances that licensing, or licensing-related, conduct may produce anti-competitive effects.

However, any finding of antitrust liability should be based on a robust theory of harm and a detailed analysis of the economic effects of the conduct. That assessment should in addition be firmly based on the notion that intellectual property rights, including standard essential patents (SEPs) do not necessarily confer market power, let alone monopoly power. The investigation into specific licensing arrangements should first and foremost concentrate on interbrand and inter-technology competition.

In its paper, *Business at OECD* provides detailed views on the respective roles of competition enforcement agencies and courts in the area of IP rights and antitrust, comments on specific clauses commonly included in IP patent licensing agreements, as well as on the standards for abusive acquisition of IP rights and abusive litigation in the area of IP rights. Finally, the paper includes views on the licensing of SEPs.

Please click [here](#) to download the full paper.

Business at OECD lead drafter: Paul Lugard, Partner at Baker Botts LLP & Vice Chair of *Business at OECD* Competition Committee

5. Paper on “Vertical Mergers in the Technology, Media and Telecom Sector”

Business at OECD appreciates the opportunity to submit these comments to the OECD Competition Committee roundtable on vertical mergers in technology, media and telecom sector. This contribution builds on previous contributions of *Business at OECD* in relation to vertical mergers generally, and in relation to competition issues in the television and broadcasting industries specifically.

There is a general consensus that vertical mergers result in significant efficiencies and should be presumptively viewed as beneficial to competition. Vertical mergers combine firms that produce complements and thus generally incentivize the merged firm to reduce prices, expand output and increase investment. This is also the case with vertical mergers in the technology, media and telecom sector, which are subject to continuing and rapid technological change that blurs the lines between traditional levels of the supply chain.

Business at OECD therefore believes that when reviewing vertical mergers in this sector, competition authorities should (i) recognize the significant efficiencies reflected by vertical mergers; (ii) employ a traditional competitive effects analysis, including focusing on theories of harm based on either input or customer foreclosure; (iii) carefully consider remedies to ensure significant efficiencies are achieved and the remedies do not distort the relevant market, for example, by preventing the merged entity from entering into certain types of contracts that may be beneficial to suppliers or customers; and (iv) not try to achieve other public policy goals through merger review.

Please click [here](#) to download the full paper.

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