BUSINESSatOECD

*Business at OECD*

# Summary of written contributions

*OECD competition week, 2-6 December 2019*

## Overview

For the OECD Competition week of 2-6 December 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 No. 2 on Competition and Regulation, 2 December:**

***1. Roundtable on Independent Sector Regulators***

This roundtable discussed agencies' experiences on the role and mandate of sector regulators, the functions and policy objectives they pursue, and the relationship with competition authorities.

**b) OECD Working Party No. 3 on Co-operation and Enforcement, 2-3 December:**

***2. Roundtable on Access to the Case File and Protection of Confidential Information***

This roundtable examined different types of rules and modes of access to the file in competition proceedings. It explored different approaches to protecting confidential information, including such issues as the types of information considered confidential, the procedures used to determine whether confidential treatment must be granted, and the methods used to protect confidentiality.

**c) OECD meeting of the Competition Committee, 3-4 December**

***3. Roundtable on Hub and Spoke Arrangements***

This roundtable constituted a continuation of existing work of the Committee on vertical restraints, e-commerce, RPM, and on information exchanges between competitors, with the main aim to outline the case practice with regard to hub and spoke arrangements and the standards of proof as established in main jurisdictions, particularly the risk of hub and spoke arrangements arising in digital markets.

***4. Roundtable on Barriers to Exit***

This roundtable focused on barriers to exit and in particular on 1) discussing how authorities consider barriers to exit in their enforcement and advocacy work; 2) to present cases where barriers to exit were an important consideration to the case; 3) to analyse how barriers to exit were assessed; and 4) to discuss the difficulties they encountered when identifying appropriate remedies.

**d) OECD Global Forum on Competition, 5-6 December**

***5. Session on Competition Provisions in Trade Agreements***

This session considered the purpose and impact of these competition provisions in trade agreements in practice, to discuss their usefulness in broadening and strengthening the application of competition law worldwide. In addition, the session looked at the role of competition authorities in the drafting and negotiation of competition provisions in trade agreements.

***6. Plenary and sessions on Merger Control in Dynamic Markets***

This session discussed the relevant timeframe of merger control and aimed at determining how far into the future authorities should look when assessing the effects of a merger. Delegations further discussed how to adapt in practice the different stages of the review process, in order to better assess mergers in dynamic environments, with different breakout sessions focused on the competitive assessment of mergers, efficiency claims and merger remedies.

***7. Session on Competition For-the-Market***

This session focused on natural monopolies, and publicly-funded monopolies, and particularly on the enforcement challenges that arise when concessions are offered on these services.

## 1. Paper on "Independent Sector Regulators"

*Business at OECD* notes that while Independent Sector Regulators often perform functions that are similar to that of Competition Authorities, such as the definition of markets and the assessment of market power, there are complex technical aspects of regulating certain industries (e.g., the telecommunications industry, energy or banking), which are arguably more appropriately dealt with by an Independent Sector Regulator with highly specialized expertise.

Sector Regulators cover large and important sections of the economy and their actions have a significant impact on competition. As such, the way they interact with Competition Authorities is of crucial importance to avoid enforcement duplication as well as inconsistent approaches and unnecessary burdens for business. Despite the importance of regulation and competition law, a leading model for effective cooperation between Sector Regulators and Competition Authorities has not yet emerged.

Against the background of the variety of approaches both across and within jurisdictions, this paper attempts to extract certain broad principles aimed at discussing the different types of Independent Sector Regulators as well as their relationships with Competition Authorities. It concludes with a call for consistency between the approaches of Regulators and Competition Authorities to promote business certainty and reduce regulatory burdens:

- Competitive markets require efficient and effective allocation of enforcement responsibility between Competition Authorities and Independent Sector Regulators.

- Decisions made by Independent Sector Regulators are sometimes at odds with recommendations and decisions of the Competition Authorities and this can create a climate of business uncertainty. Instances where corrective intervention is required could be reduced at the outset by ensuring close and effective coordination between the Regulators and Competition Authorities.

- Coordination between Independent Sector Regulators and Competition Authorities can be achieved in several ways, both formally and more informally (e.g. formally via memoranda of understanding and joint reports, and informally via staff secondments).

- Such coordination ensures that in those instances where additional industry expertise is required, Competition Authorities can cooperate with Independent Sector Regulators to improve the quality of their enforcement (and vice versa). Cooperation will also ensure that regulated entities are not subjected to undue burdens as a result of divergent approaches between Competition Authorities and Independent Sector Regulators.

Please click here to download the full paper.

***Business at OECD* lead drafters:** Paolo Palmigiano, Partner and Head of Competition, EU and Trade practice, Taylor Wessing & Vice Chair of *Business at OECD* Competition Committee and Katerina Soteri, Group Counsel - Global Legal Policy & Strategy, American Express

## 2. Paper on "Access to the Case File and Protection of Confidential Information"

*Business at OECD* welcomes the OECD's examination of procedural fairness – and in doing so, the acknowledgement of its importance – of which access to file forms a crucial part. It is vital that agencies adopt robust procedures on access to file and ensure that such access is complete, timely, and meaningful. Parties under investigation must be given the opportunity to understand and respond to the allegations being made and have recourse to an independent review of an agency's decision on access to file.

*Business at OECD* has previously commented on the broader subject of procedural fairness, noting that "[p]rocedural fairness is critical to protect the interests of firms subject to competition law enforcement proceedings who face the risk of substantial sanctions, not least being increasingly onerous financial penalties, but which may also include the prohibition of or mandated changes to business practices and transactions. Importantly, such fairness also strengthens and streamlines agency decision-making, reducing the number of appeals, and increases public confidence in agency decisions and so is of general public benefit."[1]

In these comments, *Business at OECD* focuses on:

i. the importance of access to file in the context of a broader examination of procedural safeguards, and to the efficiency and legitimacy of the investigatory process;

ii. the crucial need for access to file to be meaningful;

iii. the importance of agencies implementing adequate protections for confidential information;

iv. the need to balance the right to access a case file with the protection of confidential information within it; and

v. considerations of inter-agency sharing of confidential information.

We have in these comments focused on access to file being granted to parties under investigation (rather than access by third parties or potential claimants in follow-on damages actions, including in the context of access to leniency applications).

Please click here to download the full paper.

***Business at OECD* lead drafters:** Munesh Mahtani, Head of Legal, ViaVan & Vice Chair of *Business at OECD* Competition Committee and Cecil Chung, Senior Foreign Counsel, Yulchon

[1] BIAC, SUBMISSION PRESENTED BY THE BUSINESS AND INDUSTRY ADVISORY COMMITTEE (BIAC) TO THE OECD COMPETITION COMMITTEE WORKING PARTY NO. 3 "PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS" ¶ 1.2 (Feb. 16, 2010), *available at* http://biac.org/wp-content/uploads/2014/05/BIAC_2010_Oct_WP3_Procedural_Fairness_2010-02-05_FINAL.pdf.

## 3. Paper on "Hub and Spoke Arrangements"

*Business at OECD* strongly supports robust and effective enforcement of competition laws to detect and sanction hardcore cartels among competitors. Hardcore cartel behaviour harms other businesses as well as consumers and the markets concerned and is generally categorised and prosecuted as criminal or quasi-criminal conduct. Business would be most concerned, however, if the scope of allegedly hardcore cartel behaviour subjected to such serious sanctions were to be expanded so as to include, or risk including, less clearly harmful activities or less clearly articulated scenarios. This would undermine the fundamental right of defendants to know the scope of legal prohibitions and to avoid violations, as well as risk undermining efficient, pro-competitive initiatives.

Hub and spoke theory and enforcement against such arrangements should, in *Business at OECD's* respectful submission, be examined in this light. To the extent hub and spoke theory is used to make clear that horizontal collusion will be treated as such even when it is achieved without direct contact between competitors but is shown to be implemented via a common (vertically-related) hub, the theory is unobjectionable. Grave concerns would arise, in contrast, were hub and spoke theory to be applied to prosecute as a cartel vertical communications or restrictions, even in a network with some indirect horizontal impact, without clear and compelling evidence that proves horizontal collusion. Such proof should be subject to appropriately exacting standards and be evidence-based. Absent clear and compelling evidence of horizontal collusion, vertical agreements are generally efficiency-enhancing and should be prosecuted only on the basis of a full rule of reason-type review of their actual effects.[2]

This contribution examines key concepts and concerns in relation to hub and spoke cartels, to then identify the factors emerging from the developing application of the theory in various jurisdictions. Next, the paper examines whether e-commerce developments may drive the need for enhanced enforcement or a new approach and conclude they should not. The challenges for both a business wishing to implement effective compliance in the face of hub and spoke concerns, as well as those of enforcers in terms of prosecuting hub and spoke violations, are also examined.

Please click here to download the full paper

**Business at OECD lead drafters:** Luis Gomez, Partner, Baker & McKenzie LLP and Lynda Martin Alegi, Of Counsel, Baker & McKenzie LLP

[2] Whilst we accept that certain vertical restraints, such as resale price maintenance, are still treated as hardcore violations.

## 4. Paper on "Barriers to Exit"

In order to augment the discussion on the topic "barriers to exit" as set out by the OECD Secretariat's note, this paper highlights two key points: (1) entrepreneurial exit from markets should not be inhibited by regulatory barriers absent significant competition concerns; and (2) barriers to exit through regulatory action by competition agencies through enforcement action should also be considered.

First, there has been some discussion in the policy community about using competition law to forbid larger firms from acquiring small firms as a means of preventing the further growth and influence of large firms and the potential impact of large firms on consumers. A ban on integration, however, is in conflict with the well-accepted recognition of efficiencies. This is particularly true in the case of vertical integration. Further, regulatory history shows that bans on acquisitions can retard economic development.

Entrepreneurial exit is critical to a well-functioning entrepreneurial ecosystem, as the possibility of entrepreneurial exit via vertical merger is now the most usual form of liquidity event for founders and venture capitalists. A merger policy that would unduly restrict large tech firms from undertaking acquisitions would hurt incentives for innovation in the economy by chilling business formation in start-ups. Thus, a general inference that makes acquisitions, particularly in tech, more difficult to approve leads to direct contravention of antitrust's role in promoting competition and innovation.

Second, competition law enforcement can at times raise barriers to exit. Less successful firms (often large ones themselves) should exit naturally but do not because they lobby for enforcement by antitrust agencies to larger and more efficient firms. When competition authorities bring cases that benefit competitors and not consumers, such cases may lead to an outcome that may negatively affect business opportunities for the dominant firm, prevent the exit of smaller firms, but have a negative net effect on (at least) total welfare. This risk may be present in several situations, for example where enforcers erroneously block a merger based on perceived anticompetitive effects. But it may also be present in enforcement based on perceived exclusionary conduct by a dominant firm.

In order to ensure that a competition agency's enforcement actions against a dominant firm are not creating an artificial barrier to exit, an agency must carefully analyze the causation of the smaller firm's failure and ensure that there is a direct causal link between the purported exclusionary conduct and the failure of the smaller firm.

Please click here to download the full paper.

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

## 5. Paper on "Competition Provisions in Trade Agreements"

*Business at OECD* and its members are committed to a global rules-based trade and investment system that opens international markets and removes trade and investment barriers and practices that impede open competition around the world. We support policies that promote global trade and investment and establish a level playing field for business, while ensuring that open markets deliver the widest benefit to people and communities in OECD countries and beyond.

This paper highlights that the inclusion of competition provisions in trade agreements are of increasing importance in creating a common understanding of the role that competition law plays in global trade. This is a critical element in competition advocacy by agencies, who should be involved in the drafting of such provisions, with an eye toward the following key considerations.

First, these provisions need to be made effective, either through a review mechanism or other dispute resolution system, particularly where a signatory is in breach of the terms of the competition provisions. Where companies are directly affected by the breach, the mechanism should provide for their involvement. Efforts to make competition provisions meaningful should look to comity principles, as described in this paper. Otherwise, these provisions are not meaningful in practice.

Second, parties should consider an express reference in trade agreements to the relevant standards which will underpin any competition law dispute resolution mechanism. Through the work of the OECD Competition Committee and the International Competition Network, broader common understanding is injected into these debates, helping to improve the functioning of competition regimes notably by fostering internationally recognised principles of procedural transparency and fairness that would ensure the objective application of competition law standard, eschew protectionism, and avoid confirmation bias. Indeed, the OECD Competition Committee's country reviews could also consider the extent to which a particular country's competition jurisdiction is compliant with the competition provisions it has entered into, notably with other OECD members.

Finally, given the complexity of competition policy and nature of enforcement, competition provisions in trade agreements should be supplemented by flanking instruments such as MoUs that can get into greater detail of cooperation, capacity building and collaboration, as well as substantive principles. Reference to the principles outlined or endorsed by the International Competition Network or OECD could be expressly included in trade agreements (particularly in trade agreements between developing countries and developed economies).

Please click here to download the full paper.

***Business at OECD* lead drafters:** Mathew Heim, Senior Regulatory Policy Counsel at Tanfield Chambers & Vice Chair of *Business at OECD* Competition Committee and John Oxenham, Director, Nortons Inc.

## 6. Paper on "Merger Control in Dynamic Markets"

Competition policy and merger review in dynamic markets is a key concern to the business community. This contribution builds on previous *Business at OECD* submissions in relation to merger analysis – in particular those regarding dynamic efficiencies, non-price effects and remedies.

*Business at OECD* underlines that in respect of dynamic as well as all other markets, it is very important for competition authorities to maintain an approach to merger review that promotes predictability and legal certainty for the merging parties and broader business community. Nevertheless, merger control in dynamic markets needs to take better account of dynamic effects including innovation incentives, network effects and market tipping, competition in multi-sided platforms or conglomerate effects, including the possibility of leveraging via bundling or tying to extend or preserve market power.

Recognizing the inherent difficulties of a forward-looking analysis in markets characterized by dynamic competition, *Business at OECD* offers four recommendations:

- First, legislators and competition authorities should consider whether the available tools are entirely adequate when reviewing mergers in dynamic markets. Tools that focus on static competition based on traditional market definitions do not always capture the unique characteristics of competition in dynamic markets. Relatedly, market definition as a tool to identify and quantify market power needs to be adjusted to account for the realities in multi-sided markets or markets driven by platform competition.
- Second, competition authorities should consider how to adequately incorporate dynamic efficiencies in their analysis and update or develop relevant guidance, which may have a significant impact on the quality of outcomes.
- Third, given the challenges associated with measuring competitive effects and dynamic efficiencies over the short run, competition authorities should, in appropriate circumstances employ a longer timeframe when reviewing mergers in dynamic markets considering market specific investment and innovation cycles.
- Fourth, competition authorities should avoid lowering the standard of intervention by acting on new theories of competitive harm in dynamic markets without the necessary factual and economic evidence that the merger before them requires remedial measures. In dynamic markets, remedial measures should be structured in order to offer the merged firm the best opportunity to innovate and compete effectively in a future environment that remains uncertain and is likely to undergo a rapid rate of technological change.

Please click here to download the full paper.

***Business at OECD* lead drafters:** Michael Koch, Partner at Goodmans LLP and Cal Goldman, Chair, Competition, Antitrust and Foreign Investment Group at Goodmans LLP & Special Advisor to the *Business at OECD* Competition Committee

## 7. Paper on "Competition For-the-Market"

Competition for the market occurs when products have characteristics that result in firms competing to be the supplier for a whole market of products or services, instead of competing for market share. Introducing competition "for the market" is one way of opening up sectors that were traditionally controlled by the government. Although there are different ways and models to bring about competition for the market, *Business at OECD*'s contribution focuses, in particular, on concessions as a tool to drive and protect competition. It mainly discusses two categories of competition for the market – natural and publicly-funded monopolies – and introducing competition on the market for them.

The contribution notes that in many cases not introducing competition – through concessions or otherwise – may be costly to society. Accordingly, in those cases, governments are well advised to consider no longer reserving those activities for themselves. This is because private provision fosters efficiency: a focus on profits means that cost-reduction shall be incentivised, which in turn means lower costs for consumers. However, the paper acknowledges that it is sometimes observed that a disadvantage – or unwanted outcome – of privatisation may be that the provider of the services or goods at hand could potentially reduce costs by being lax on quality, which would in turn negatively affect consumers. Alternatively, if the price is not regulated, it could set the price at a monopoly level.

One solution in this scenario would be a well-designed concession which "creates a competitive incentive for the firm … that wins the concession to provide a better value service than it otherwise would."[3] *Business at OECD* is supportive of a debate aimed at identifying in which specific settings the award of concessions may bring about significant positive welfare effects and how tenders for concessions can best be structured.

Moreover, *Business at OECD* reasons that governments should apply an economic efficiency-based test when deciding on introducing competition in a particular market. Experience gained by other governments and agencies in comparable situations, as well as the insights of authoritative international organisations, such as the OECD, should inform governments' choices.

Finally, governments and competition agencies should be vigilant that opening up an economic sector to competition by introducing competition for the market, in particular by giving out concessions, does not give rise competition law violations.

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 and Hugh Hollman, Global Antitrust Counsel, Saudi Aramco Law

[3] OECD COMPETITION FOR THE MARKET, BACKGROUND NOTE NOTE BY THE SECRETARIAT ¶ 52 (Oct. 22, 2019), *available at* https://one.oecd.org/document/DAF/COMP/GF(2019)7/en/pdf.

***Business at OECD***
13-15 Chaussée De La Muette
75016 Paris
France
contact@biac.org | @BusinessAtOECD | www.businessatoecd.org

Established in 1962, *Business at OECD* stands for policies that enable businesses of all sizes to contribute to growth, economic development, and societal prosperity. Through *Business at OECD*, national businesses and employers' federations representing over 7 million companies provide and receive expertise via our participation with the OECD and governments promoting competitive economies and better business.