Business at OECD

Summary of written contributions

OECD competition weeks

30 November - 10 December 2020

Overview

For the virtual OECD Competition weeks of 30 November - 10 December 2020, *Business at OECD's* Competition Committee prepared member submissions on the selected topics below. 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:

1. Roundtable on Digital Advertising Markets (30 November)

This roundtable aimed at understanding how digital advertising markets operate, what competition issues exist in these markets, and the role for competition policy and enforcement in this market. The roundtable benefited from a number expert speakers and a background note by the secretariat.

b) OECD meeting of the Competition Committee

2. Hearing on Sustainability and Competition (1 December)

This session discussed situations in which a potential conflict between various sustainability goals and the protection of competition may arise. A conflict may exist, for instance, when competitors intend to co-operate by agreeing on common production or distribution standards; when competitors collaborate to adopt and implement greener initiatives; or when mergers in the agriculture industry may have an impact on incentives to adopt non-conventional production methods or on the health of farmworkers.

3. Roundtable on Role of Competition Policy in Promoting Economic Recovery (2 December)

This roundtable addressed the ways in which competition authorities may contribute to speed up the recovery from the recession triggered by the global health crisis. The Roundtable benefited from presentations by a panel of experts.

c) OECD Global Forum on Competition

4. Roundtable on Abuse of Dominance in Digital Markets (8 December)

This roundtable discussed the main types of abuse of dominance concerns that can emerge in digital markets, what makes these markets unique, and how have competition authorities around the world tackled related challenges.

5. Roundtable on Economic Analysis in Merger Investigations (9 December)

Several practical considerations and questions arise when using economic analysis in merger control, including how to integrate economists into case handler teams, whether to use external expertise, and how to ensure economic analysis is easily comprehensible by decision-makers and courts. This roundtable discussed such questions during an expert panel and two periods of breakout sessions. For each time period, there three breakout groups focused on either 1) surveys and other data gathering techniques; 2) quantitative analysis; and 3) the role of economists in merger teams and qualitative evidence review.

6. Roundtable on Using Market Studies to Tackle Emerging Competition Issues (10 December)

This Roundtable discussed the key questions facing competition authorities when considering market studies and emerging competition issues: 1) What type of emerging competition issues are competition authorities currently facing? 2) What role can the market study tool play to address them? 3) What are the strategic considerations competition authorities take into account when deciding whether to use the market study tool.

1. Paper on "Digital Advertising Markets"

Online adverting has been the subject of intense scrutiny by competition authorities in the last few years. At a time when advertisers are moving away from traditional methods of adverting such as newspapers and commercial media, the increase of advertising on the internet and the role of certain key players in this sector, has led authorities to examine competition issues in more detail. Several authorities have carried out market studies and are considering various options on how to address perceived issues in this sector, either through competition law or regulation.

In recent years, significant competition concerns have been expressed about online advertising, in particular considering the role large players play in this area. For example, a recent report of the U.S. House Judiciary Committee (which did not receive bipartisan support), concluded that "[o]ver the past decade, the digital economy has become highly concentrated and prone to monopolization. Several markets investigated by the Subcommittee – such as social networking, general online search, and online advertising – are dominated by just one or two firms," and "[t]hey not only wield tremendous power, but they also abuse it by . . . extracting valuable data from the people and businesses that rely on them," and "[t]he accumulation of data can serve as another powerful barrier to entry for firms in the digital economy."

However, as one scholar has noted: "In general, the debate about market power in online advertising tends to have a remarkable lack of precision. Commentators talk[] about network effects without specifying for whom they are envisaging that the network effects apply or why. [They also] talk about how "sticky" online platforms are without being clear about whether they mean they are sticky for advertisers or users. And commentators generally take as given the principle that data is the lifeblood of online advertising, without distinguishing what kind of data they mean, how broadly available it is, or whether such data guarantees the ads success. However, such precision is necessary in order to have a meaningful discussion about sustainable sources of competitive advantage in online advertising markets.

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

Please click here to download the full paper.

2. Paper on "Sustainability and Competition"

The topic concerning the relationship between sustainability and competition has become increasingly important in recent years, with governments seeking to strengthen their commitment to greener and more sustainable policies and private entities being increasingly encouraged to align their conduct and business strategies with sustainable development goals. In this setting, conflicts may arise between sustainability goals and the protection of competition, for instance where companies cooperate to implement green initiatives, but where their collaboration might give rise to higher consumer prices in some markets.

Business at OECD notes that it is hard to overestimate the importance of the global challenge that lies ahead and the urgency required to tackle it. In its contribution, *Business at OECD* focuses on a number of two interrelated topics that are particularly relevant for adequately factoring in sustainability interests and considerations into competition enforcement, i.e. (i) the relationship between government action aimed at stimulating or mandating sustainable business ventures and antitrust enforcement; and (ii) the question how competition agencies can take sustainability interests into account and develop a framework for balancing those interests against potential negative effects on, for example, price competition in affected markets.

Business at OECD notes that there is some overlap between the issues that are relevant for the current Hearing with the topics that were discussed in the context of the 2010 OECD Roundtable on Horizontal Agreements in the Environmental Context. Indeed, while the current debate on sustainable economic development has a broader scope than environmental issues only, many of the analytical questions are similar. In addition to its current submission, *Business at OECD* therefore respectfully refers to its submission for the 2010 Roundtable.

Business at OECD is highly supportive of sustainable economic initiatives and believes that sustainability and economic growth challenges should preferably be addressed in a mutually reinforcing manner. This is because sustainable, long-term economic growth is of fundamental importance for raising the necessary resources for addressing the challenges that may endanger sustainability initiatives. This requires supporting innovation, entrepreneurship and green growth across all sectors, focusing on where improvements that both are economically efficient and contribute to attaining sustainable development goals can best be achieved.

Business at OECD strongly recommends that agencies work towards a transparent and consistent approach to factor sustainability benefits into the analysis of potentially anti-competitive agreements. In addition to the need for a general framework that is more hospitable to environmental and other sustainable benefits, *Business at OECD* encourages national competition agencies to consider the use of safe harbors for business ventures that are most likely to generate sustainability efficiencies. Once it is accepted that horizontal agreements aimed at attaining sustainability goals should not be considered naked restraints, the next step in enforcement is for the agencies to establish better and more tools for guidance on the types of agreements that enhance overall welfare.

Please click here to download the full paper.

3. Paper on “Role of Competition Policy in Promoting Economic Recovery”

The primary economic effects of the COVID-19 crisis are a reduction of the private sector’s economic output, economic growth and productive capacity together coupled with an increase in business uncertainty and risk. This includes a very significant loss of jobs across many countries.

Business at OECD submits that the State’s role in stimulating economic recovery should be focused on supporting economic output and not one which overly regulates the private sector or establishes unnecessary barriers to trade and investments or acquisitions from foreign based entities. Such an approach may well discourage private sector investment, innovation and growth at a time when it is of critical importance.

Governments should recognise that the private sector is typically more reactive to market signals and is better incentivised to pursue efficiencies and correct market failures as a result of the pandemic.

Governments, however, typically have less liquidity constraints and can take a longer-term view and are, therefore, better placed to balance broader public policy objectives which are not easily commercialised or competently remedied by competition enforcement.

In relation to pursuing such broader objectives, including employment, privacy and possibly giving preferential treatment to domestic entities engaged in certain sectors such as health care, supply chains, or technology, *Business at OECD* submits that the primary focus of competition agencies should specifically be focused on maintaining competitive markets and thereby stimulating economic recovery which will ultimately lead to job creation. To do so, governments should not unnecessarily introduce regulatory initiatives that are not pro-competitive and which may cause competition agencies to depart from established standards and benchmarks. In instances where, after taking competition considerations into account, a departure may be required, clear guidance should be provided to the private sector. One such possible exception may arise in certain cases of proposed acquisitions of failing firms, as discussed below.

Please click here to download the full paper.

4. Paper on "Abuse of Dominance in Digital Markets"

The creation and expansion of digital markets has significantly changed the global economy. Within a few decades, digital goods and services have become an integral part of the economy. The term "digital markets" is extremely broad and does not necessarily align with traditional antitrust notions of relevant product markets. It is clear that the rise of the digital economy has created both new opportunities and challenges for businesses, consumers and competition authorities.

Business at OECD appreciates that competition authorities may have a high degree of interest in reviewing business practices in digital markets. Legal certainty and predictability of investigation and enforcement of abuse of dominance prohibitions should apply in the same way as for enforcement activity in non-digital markets.

Where there are legitimate competition concerns, enforcement action should be taken in a manner that is proportionate and effectively addresses that failure or those concerns but does not necessarily chill innovation or hinder investment. As in non-digital markets, this requires a solid understanding of the unique characteristics of and business incentives in digital markets. This can be achieved, for example, by conducting market studies to understand digital markets and solicit feedback from market participants prior to advancing novel theories of harm. Competition authorities should only take enforcement and/or remedial action where a firm has abused its dominance and any such actions should be based on sound economic and factual underpinnings that justify intervention.

Comments in this paper build on previous contributions of *Business at OECD* on related subjects, including Consumer Data Rights and Impact of Competition, Personalised Pricing in the Digital Era, and Quality Considerations in Digital Zero-Price Markets. In particular, this paper attempts to:

- outline the benefits of digital markets;
- examine policy challenges associated with regulating digital markets;
- highlight the consequences of over-enforcement;
- analyze the abuse of dominance framework in digital markets.

Please click here to download the full paper.

5. Paper on "Economic Analysis in Merger Investigations"

To ensure effective merger enforcement, it is generally recognized that it is not a question of whether competition authorities should utilize economic analysis but *how* economic analysis is used. Including modern economic principles into competition agency analysis and decision-making that are well recognized and empirically tested can result in better decision-making. But there is also the potential for economic analysis itself to be misused in developing an erroneous theory of harm. A challenge for agencies in ensuring effective enforcement is to adapt analytic techniques that accurately distinguish anti- from pro-competitive practices into administrable rules. Those rules also have to be stable and predictable to allow business to effectively rely on them.

In its previous comments, *Business at OECD* has stressed the importance of competition and merger control that relies on well-established economic initiatives and analytical tools. This is important to consumers and the business community alike as it promotes predictability and legal certainty in merger review thereby reducing the risk of both type 1 (false positives) and type 2 (false negatives) errors. This is not to suggest that analytical tools and economic analysis in merger control should not be modified or tailored to specific circumstances. Economically sound and targeted analysis can assist competition authorities to avoid both under and over intervention and produce outcomes that best serve the whole community.

Notably, *Business at OECD* has previously highlighted an inherent tension between a form-based and effects-based approach to merger review and suggested general principles to retain the benefits of predictability and legal certainty while still ensuring effective competition enforcement:

- [A]void techniques that increase the prospect of type I and type II errors and add to the degree of uncertainty for merging firms regarding merger enforcement;
- [C]onsider evidence "in the round" and do not rely on specific indicators (such as diversion ratios and margins) that are subject to measurement error;
- [W]hen determining safe harbor thresholds, guard against introducing an unnecessarily interventionist standard for merger screening and avoid capturing mergers very unlikely to result in anti-competitive effects; and
- [B]e open to credible evidence pertaining to a range of factors including pro-competitive efficiencies.

While these general principles apply across the range of economic measurement techniques in merger control assessments, *Business at OECD* has also commented in the past on the specific benefits and costs associated with various economic techniques, such as the Upward Pricing Pressure test (UPP). Those tests are discussed in more detail in this submission, along with a preview of other economic techniques with comments on their best use.

Please click here to download the full paper.

6. Paper on "Using Market Studies to Tackle Emerging Competition Issues"

Business at OECD's contribution on "Using Market Studies to Tackle Emerging Competition Issues" focuses on four key themes. First, we outline the advantages and benefits of market studies as a competition policy tool. Second, we analyse their ability to tackle emerging competition issues. Third, we critically assess the need for a power to impose remedies as part of the market studies tool. Finally, we round off with observations on scope and process for successful, robust and fair market studies.

This paper builds on previous *Business at OECD* contributions on the role of market studies as a tool to promote competition (2016) and the workshop and roundtable on selection and prioritisation of sectors and market studies methodologies (2017), culminating in the OECD *Market Studies Guide for Competition Authorities* in 2018.

Our contribution sets out that *Business at OECD* broadly welcomes market studies as a competition tool designed to shed light and improve understanding of economic sectors. The salient benefit of market studies is their ability to adopt a broader, more holistic approach to assessing market conditions. Market studies, however, are also invariably burdensome and so must be reserved for appropriate cases and incorporate safeguards.

Whilst it is true that market studies (unlike traditional enforcement tools) avoid the narrow focus on past behavior, our contribution notes that there is nothing inherently "predictive" in their nature and that market studies typically have tended to focus on markets with known and observable existing systemic challenges. *Business at OECD* thus does not consider market studies to be the tool that is a silver bullet, or panacea, for resolving emerging and future issues in markets. Properly conducted, they can inform policy and be a useful complementary tool – one that helps to identify and diagnose issues – but a careful case-by-case assessment of the specific circumstances will be required when considering the appropriate tool.

Business at OECD further regards market studies with powers directly to impose remedies as unwarranted. *Business at OECD* respectfully submits that the preferred route is for market studies to analyze, diagnose and inform, but for changes to be achieved through other means. This could include individual voluntary commitments, self-regulation by industry, such as codes of conduct, advocacy towards government departments who may be in a position to remove government led impediments and, if necessary, legislation (with the benefit of parliamentary debate and review). If remedy powers are to be made available, the case for robust governance and adequate checks and balances becomes imperative.

Finally, *Business at OECD* submits observations on scope and process for successful, robust and fair market studies. We highlight the importance of open and transparent processes; careful selection of cases and targeted scope from the outset; good governance, with appropriate checks and balances; and the need to acknowledge limitations and challenges of market studies.

Please click here to download the full paper.

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