

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**THE IMPACT OF DISRUPTIVE INNOVATIONS ON COMPETITION LAW ENFORCEMENT**

-- Executive Summary --

**29-30 October 2015**

*This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during Session III of the 14th meeting of the Global Forum on Competition on 29-30 October 2015. It is circulated to Delegates FOR INFORMATION.*

*More documents related to this discussion can be found at [www.oecd.org/competition/globalforum/disruptive-innovations-competition-law-enforcement.htm](http://www.oecd.org/competition/globalforum/disruptive-innovations-competition-law-enforcement.htm)*

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**JT03418492**

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## EXECUTIVE SUMMARY

*By the Secretariat\**

1. The 14<sup>th</sup> meeting of the Global Forum on Competition held a roundtable discussion on 29 October 2015 to discuss the impact of disruptive innovations on competition law enforcement, so as to address three main topics:

1. The business strategy and interaction between incumbents and potential disruptors.
2. How competition authorities address specific cases of merger control and anti-competitive behaviour.
3. The possible evolution of competition law enforcement to take into account markets that are prone to disruptive innovation.

2. Considering the background note, countries' written submissions, and discussion by delegates and expert panellists at the Global Forum, the following key points emerged:

**(1) *In markets prone to disruptive innovation, incumbents may adopt different business strategies, whose impact on social welfare is not always clear. Some strategies are anti-competitive and hamper innovation, while other strategies are driven by efficiencies and improve welfare.***

3. Disruptive innovations are forms of innovation created outside the value network, which usually target low-end consumers in a first phase and reach mainstream consumers in a second phase. Incumbents may engage in unilateral conduct to block disruptive innovations, either by foreclosing access to the low-end consumer or by limiting the interface between the old value network and the new value network. The delegations were concerned that this unilateral conduct would prevent the emergence of disruptive business models in many industries, such as real estate in United States and Canada, social networking services in Japan and third party booking apps in Singapore.

4. As an alternative strategy, incumbents may also acquire disruptors to alleviate the threat posed by the innovation. In horizontal mergers, there is the risk that the merged entity discontinues pipeline products, as discussed by the European Commission in relation to the Novartis and GSK case in the pharmaceutical industry. On the other hand, in vertical and conglomerate mergers, there is the concern that the merged entity reduces the ability of other competitors to innovate. Such concerns were raised by the Australian Competition and Consumer Commission (ACCC) in the assessment of a joint venture between taxi networks and a taxi payment processing app.

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\* This summary does not necessarily represent the consensus view of the Global Forum on Competition. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, and the background note by the expert panellist Professor Alexandre de Streel.

5. However, some apparently anti-competitive conducts can actually be driven by efficiencies and improve welfare. Likewise, incumbents may acquire disruptors and use their financial means to speed up the deployment of the innovation (for instance, in the technology sector, being acquired by a larger company is often a rational exit strategy for start-ups).

**(2) *Competition policy should be adapted to encourage disruptive innovation and accommodate new business models.***

6. Many interventions during the discussion emphasized the view that competition policy should protect the process of disruptive innovation and that antitrust enforcement is sometimes necessary to allow disruptive business models to succeed against strong opposition from incumbents. To achieve that, the expert panellist posited that the methodology of competition authorities should move from a focus on static competition towards dynamic competition.

7. While this does not imply a complete reformulation of the analytical framework, competition authorities could seek new approaches based on a solid theory of harm, use more qualitative evidence such as market surveys and adapt their tools to account for effects on innovation and investment, apart from traditional price effects. At the same time, they must not lessen their commitment to the rigour of evidence-based enforcement.

8. Some delegations claimed that the competition authorities in their jurisdictions already account for dynamic considerations and have flexible frameworks to deal with innovation. Still, most jurisdictions do not appear to explicitly distinguish cases of disruptive innovation from other forms of innovation, either because it is not easy to assess the type of innovation under analysis or because there are few cases of disruptive innovation under the radar of authorities.

**(3) *In the assessment of mergers and acquisitions targeting disruptors, market definition is inherently complex and may pose some challenges.***

9. One of the main challenges in merger assessment raised by many delegates was the problem of defining the relevant market. When a disruptive innovation is at stake, it is not clear whether the disruptor will respond to the existing consumer preferences or how the market will evolve in the future. The Competition and Markets Authority (CMA) of the United Kingdom found it difficult to define the market for navigation applications using mobile devices during the merger between Google and Waze, as the products offered by each company exhibited several differences. Likewise, the Singapore Competition Commission (SCC) had to conduct market inquiries and analyse other case decisions in order to define the market during the review of a merger between online recruitment advertisers.

10. Some delegates argued that the problem of defining the market is not only complex, but could be insufficient to assess cases of disruptive innovations. In these cases, it is also relevant to understand the business rationale behind the merger or the unilateral conduct, as well as to account for the impact of the enforcement decision on future incentives to invest and innovate.

**(4) *The notification thresholds in merger control could be modified so that competition authorities are notified about acquisitions of small disruptors.***

11. In most jurisdictions, notification thresholds in merger control are based on turnover criteria, which only allow competition authorities to assess acquisitions of large firms with high revenues. As a result, the expert panellist recommended the modification of the notification threshold to account for the value of the transaction. This would allow competition authorities to be notified of acquisitions of small disruptors, as incumbents are typically willing to pay a high acquisition premium to block a potential disruptor.

12. Other delegates suggested that jurisdictions should actually have some discrete power and alternative tests at their disposal to capture mergers that, despite the low turnover, may have significant ramifications in the future. The Competition and Market Authority (CMA) commented that such discrete powers allowed them to analyse the acquisition of Instagram by Facebook.

**(5) *Competition law enforcement procedures and interventions should be fast, transparent and tested in court whenever possible. In particular, interim measures and infringement decisions may be preferable to commitments.***

13. The expert panellist emphasised that interventions by competition authorities should be as fast as possible, since unilateral conduct by incumbents can quickly and irreparably damage disruptive innovations in their early stages. In addition, because many of the challenges posed by disruptors are relatively new, interventions should also be transparent and establish a precedent in the court-of-law.

14. In order to accomplish these objectives, the expert panellist recommended jurisdictions to adopt interim measures followed by formal infringement decisions, so that their actions are fast and establish a precedent. Although interim measures have very specific requirements such as showing urgency due to the risk of serious and irreparable damage on competition, these conditions are easier to satisfy in disruptive innovation markets. Authorities should avoid adopting commitment decisions which, despite being fast and flexible, are not tested in court and lack transparency in the bargaining process between the antitrust agency and the company.

15. With regards to mergers, where commitments are more common, the delegate of Singapore suggested to improve transparency by performing market tests and publishing the reasons why the merger was cleared with commitments.

**(6) *Competition authorities can use non-enforcement tools in order to improve their understanding of emerging competition policy issues and to improve their methods of dealing with disruptive innovation.***

16. As a result of the new challenges that disruptive innovations have posed for competition law enforcement, some delegates recognized the importance of promoting the discussion of these issues in conferences and workshops, conducting more post-merger studies, and increasing the dialogue with disruptors and other market players. The important role of advocacy was also emphasized, particularly when competition authorities do not have a formal role in legislation or regulation at a local level.

17. In this context, the Federal Trade Commission (FTC) of the United States has recently hosted workshops on e-commerce and on the sharing economy, allowing them to learn valuable lessons that were later implemented in their enforcement practices. The FTC has also sent several letters to state governments regarding the regulation of disruptive transportation network providers, in which the FTC recommended regulators to carefully consider the potential direct and indirect competitive impact of proposed transportation regulations.

18. Currently, the Competition Commission of Singapore (CCS) is undertaking a special project on “Disruptive Innovation and Government Advocacy” which includes a survey of ICN members regarding how they advocate competition considerations to regulators. The findings will be documented in a report to be presented at the 2016 ICN Annual Conference.