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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Executive Summary of the Roundtable on Competition Issues in Aftermarkets  
Annex to the Summary Record of the 127th meeting of the Competition Committee****21-23 June 2017**

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held under Item 4 of the 127th meeting of the Competition Committee on 21 June 2017.

More information related to this discussion can be found at

[www.oecd.org/daf/competition/aftermarkets-competition-issues.htm](http://www.oecd.org/daf/competition/aftermarkets-competition-issues.htm)

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## *Executive Summary*

By the Secretariat\*

At its 127<sup>th</sup> meeting, the Competition Committee held a Roundtable on Competition Issues in Aftermarkets, to address questions on the application of competition law when aftermarkets are involved.

Considering the background note prepared by the OECD Secretariat, the written contributions submitted by 21 countries and BIAC, as well as the discussion by delegates and expert panellists at the Competition Committee, the following key points emerged:

**(1) Over the last decades, a number of aftermarkets cases brought to the attention of academics and practitioners the possible competition issues arising from aftermarket monopolisation, giving rise to a wide economic debate. The main question at the heart of this economic debate is whether firms operating in a primary market can profit from monopolising the corresponding aftermarket, and if such monopolisation is capable of reducing consumers' welfare.**

Issues around aftermarkets monopolisation depend not only on the degree of competition in the primary market, but on many other factors, such as: the amount and quality of information available to consumers, the size of the aftermarket relative to the foremarket, the availability of contractual solutions, the number of uninformed consumers, the magnitude of lock-in effect and the switching costs. All of these elements have been extensively discussed and analysed in the economic literature, mainly following opposite views of two major economic schools of thought, the Chicago view and the Post-Chicago view. A first fundamental point on which the two views in the economic schools differ is the trade-off between installed based opportunism (i.e. the exploitation of locked-in consumers) and the strength of the reputation effect, with important implications for antitrust enforcement.

According to the views of the Chicago School, it is in general not profitable for a firm operating in a primary market to exploit its consumers in the aftermarket by charging supra-competitive prices. The views of the Chicago School on aftermarket monopolisation rest on three main arguments:

- Customers are rational and farsighted and make informed purchasing decisions based on full information on the life-cycle costs of the primary and secondary goods.
- Competition in the primary market would jeopardise monopolisation strategies in the secondary market, because monopoly profits in the aftermarket will be eroded by prices driven down by competition in the primary market, eliminating over time incentives to charge supra-competitive prices in the aftermarket.
- Aftermarket monopolisation can be driven by procompetitive reasons, such as quality enhancing investments and innovation, signalling of product quality, metering and pro-competitive price discrimination.

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\* This executive summary does not necessarily represent the consensus view of the Competition Committee. It does, however, identify key points from the discussion at the Roundtable on Competition Issues in Aftermarkets, including the views of a panel of experts, the delegates' oral and written contributions and the background note prepared by the OECD Secretariat.

The main thrust of the Chicago views is that customers perceive the primary and secondary products as closely linked and make informed purchasing choices as if the two products belonged to the same broad market. To the extent that this broad market can be disciplined by effective competition, enforcers should not be concerned by aftermarket monopolisation strategies as such strategies will ultimately not be profitable.

The Post-Chicago School contends that anticompetitive harm can actually arise due to aftermarket monopolisation, even when the conditions identified by the Chicago School, i.e. fully informed, far-sighted customers and a competitive foremarket, are present. This follows the idea that producers would generally have the ability and the incentives to exploit their installed base. In other words, the benefits deriving from exploiting locked-in consumer are believed to be superior to the loss of sales linked to the reputational effect, resulting in an overall increase in prices above the competitive level. The views of the Post-Chicago School on aftermarket monopolisation rest on two main arguments.

- Consumer behaviour is often myopic and purchasing choices are not necessarily rational and farsighted.
- Even if the primary market is perfectly competitive, aftermarket monopolisation can still lead to consumer harm in some circumstances.

The review of the economic debate shows how important economic analysis is for the development of the antitrust policy in determining the effects on consumer welfare of aftermarket monopolisation strategies. It is inevitable that this economic debate has also strongly influenced how enforcers and courts have looked at aftermarket cases.

**(2) In the digital era, characterised by winner-takes-all dynamics and increasing returns to scale in many industries, the issue of foremarket and aftermarket becomes much broader than just the choice of the purchase in a primary market. In order to assess aftermarket power it is important to include considerations related to hyper-competition and increasing dominance, especially when it comes to high tech industries and the digital economy.**

In a context of hyper-competition, sellers discount prices in the foremarket by more than 100% with respect to the increase in aftermarkets, while with increasing dominance the idea is that a firm leader in the market has more to gain from capturing a new customer than an entrant or small firm has. Hyper-competition and the increasing dominance effects are two fundamental points in the dynamics of aftermarkets, which are magnified by the existence of market power.

Hyper-competition is positive for consumers, at least in the short run, not *despite* aftermarket power but *because* of aftermarket power. It is aftermarket power that causes hyper-competition. The negative side of it is the cost of increasing dominance, i.e. the cost of large firms becoming increasingly larger. It is still uncertain to what this will lead as it is largely a dynamic problem, and it should be looked at as such. Especially with increasing returns to scale it is then important to take these elements into account and to move from static analysis to dynamic models. Finally, aftermarkets shouldn't be analysed in isolation.

**(3) Market definition is a key part for determining whether it is possible to raise prices and that can be quite complex in aftermarkets, due to the need to consider links with the foremarket. Market definition has always been at the core of any aftermarket case, and enforcement has been stronger when agencies and courts have defined separate and narrow antitrust markets for aftermarket products compatible with each primary product (so called multiple markets).**

Cases from national competition authorities show that the approach to market definition and the assessment of dominance is often a case-by-case analysis. When there is a specific and differentiated demand for just aftermarket services, agencies often opt to define narrow secondary markets. These narrow product markets definitions are very relevant in the analysis of the anticompetitive effects of the investigated practices and often lead to finding the existence of market power. A brand-specific market definition, however, does not always guarantee a finding of dominance, as the authority must consider the link between primary and secondary markets and then decides accordingly.

A potential methodology for market definition, which includes different steps, is as follows. First of all, a Small but Significant and Non-transitory Increase in Price (SSNIP) test is applied to the brand-specific aftermarket to determine if there is an overall market for secondary products or not. If not, then it needs to be assessed if consumers can switch the primary product. If they can, the market could be a market for systems, as consumers can just choose another foremarket product as a result of a price increase in the secondary market. However, putting in the same market products that are not substitutable but complementary in use could make such a market definition controversial.

**(4) Aftermarket questions have great practical importance, firstly because the same issues arise in a broad range of circumstances (for example in digital platforms), secondly because they relate to core commercial business issues of companies, their business models and their ecosystems.**

Competition authorities should select aftermarket cases to prioritise based on several factors. First, whether the conduct causes harm to competition and consumers. Second, the importance of securing a guiding precedent. Third, whether the competition authority is best placed to intervene. Fourth, whether it is possible to effectively investigate and remedy the competition concern in question. An aftermarket conduct which is capable of leading to exclusionary effects would have a high likelihood of being prioritised.

Since aftermarket cases are fact-intensive and difficult, they should be pursued only when there is a clear impact on competition and consumers. Important elements to consider are the degree of competition in the primary market, the existence of lock-in or high switching costs, consumer harm. If these factors are present, it is still important to consider and evaluate all the case specific factors.

**(5) From a business perspective predictability and legal certainty are quite valuable, and there is a question if market definition and dominance analysis give sufficient predictability and legal certainty, since it is often a case-by-case analysis with a significant degree of agency's discretion. It is very important to look at firms' conduct and rigorous principles should be applied.**

With regard to the legal treatment of aftermarket monopolisation one key point is to distinguish between practices that prevent or restrict independent competition by rivals versus cases where the issue is a duty to supply a valuable asset. Although in practice this distinction is not easy, it is very important because the legal test can be quite different as for duty to supply cases there is a higher legal threshold (i.e. it is necessary to show that the asset is indispensable and that the refusal would eliminate all competition). This threshold is easily reached in aftermarket cases with a brand-specific market, and that is why it's important to be careful with defining brand-specific markets.

The number of successful public and private enforcement cases in recent years is somewhat limited due to the high standard of proof required by courts to pursue an aftermarket case. There are different views on the rationale for monopolising aftermarkets

and the assessment of the effects of unilateral conduct by dominant suppliers on both the primary and the secondary market can be complex. Such conduct (often of an exclusionary nature) can be objectively justified by IP and efficiency considerations. From a policy perspective, antitrust enforcement in this area requires competition agencies to strike a balance between encouraging innovation and efficiency-enhancing strategies in the primary market and promoting effective competition in the aftermarket.

**(6) Non-competition enforcement remedies and other regulatory remedies can be used to address aftermarket concerns.**

Some have argued that antitrust may not offer the most suited remedies to aftermarket monopolisation and that remedies under contract law or consumer protection law should also be considered when addressing possible competition concerns. Contract law can offer remedies that the parties can introduce in their commercial relations to reduce the risk of opportunistic behaviour vis-à-vis the locked-in installed customer base. While the success of such remedies is questioned by some authors, they may represent a less costly form of disciplining the behaviour of the manufacturer of the primary good when it operates in the secondary markets. Most importantly, effective information disclosures and other consumer protection remedies may be able to empower consumers to make informed choices based on a better understanding of the aftermarket products or services required, and the likely life-cycle costs involved in purchasing a particular primary good (or service).