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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Executive Summary of the Roundtable on Implications of E-commerce for  
Competition Policy****Annex to the Summary Record of the 129th Meeting of the Competition Committee held on  
6-8 June 2018****6 June 2018**

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 129th Meeting of the Competition Committee on 6 June 2018.

More documents related to this discussion can be found at [www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm](http://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm)

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## *Executive Summary*

By the Secretariat\*

At its 129th meeting, the OECD Competition Committee held a Roundtable on the Implications of E-Commerce for Competition Policy, to examine the potential antitrust challenges posed by the continuing growth of online retail channels.

Considering the background note prepared by the OECD Secretariat, the written contributions submitted by 22 delegations together with BIAC, BEUC, Consumers International and the EU, and the discussion by delegates and expert panellists at the Competition Committee, the following key points emerged:

**1. E-commerce broadly refers to retail value chains that result in the online sale of products to final consumers. The e-commerce sector is highly dynamic and has been growing steadily across the OECD in recent years. Business models in online retail are often complex and differentiated, posing new opportunities and challenges to competition policy.**

E-commerce generally refers to online retail activities, and an increasingly important distribution mechanism across the OECD. Inextricably linked to the emergence of the digital economy, it comprises the sale of goods, services and digital content distribution over the internet to retail customers, as well as other activities such as online advertising. The wide e-commerce environment involves a variety of economic actors, including online retailers, marketplaces and price comparison tools.

The dynamics of the online retail sector are often complex and differ significantly in several dimensions from the brick-and-mortar world. Internet shopping greatly expands consumer choice, both by increasing the range of retail outlets that consumers can access, and by increasing the amount of information available, thus reducing search costs. Instead of adhering to a conventional vertical value chain model, online retail platforms may perform a variety of functions and derive income from many different sources. This may include direct retail sales, provision of intermediation services to other online retailers, monetisation of consumers' "eyeballs" for advertisers and accumulation of valuable consumer data.

The growth of e-commerce presents both opportunities and challenges to competition policy. Online retailing has the potential to increase retail competition, to enhance consumer choice and to facilitate innovation in product distribution. However, certain dynamics may prompt anticompetitive agreements or unilateral conduct, including the advent of dominant online platform operators, alongside greater market transparency.

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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 the Implications of E-Commerce for Competition Policy, including the views of a panel of experts, the delegates' oral and written contributions and the background note prepared by the OECD Secretariat.

**2. Competition enforcers increasingly face the question of whether they should intervene against alleged anticompetitive practices in e-commerce markets and, if so, whether the established competition rules and enforcement tools are effective and appropriate in the digital sector. When assessing the competition law implications of behaviour in this environment, it is important both to understand how the underlying business models work, and to consider the business rationale for allegedly anticompetitive conduct.**

The activities of online retailers, suppliers and digital platforms are increasingly subject to scrutiny by competition enforcers and other regulators. There are two fundamental questions at the heart of the debate regarding the optimal antitrust treatment of e-commerce: firstly, the extent to which business activity in the dynamic digital environment should be subject to competition law enforcement; and secondly, whether the conventional antitrust rules and assessment mechanisms remain fit for purpose in this context.

When assessing allegedly anti-competitive practices in the e-commerce sector, it is important to understand how the relevant business model works (i.e. how the business concerned makes money). Although the innovative nature of the digital economy is not in itself a justification for shying away from enforcement, innovation is a relevant consideration when assessing its overall impact on consumer welfare. Moreover, when examining the legitimacy of claimed restrictions, it is important to understand the business rationale behind that conduct. For instance, supplier-imposed limitations on online sales could be a legitimate means to preserve product quality. Still, the mere fact that a firm can make a plausible business case for restrictive conduct does not justify otherwise anticompetitive restrictions.

**3. In the e-commerce sector, the task of market definition is particularly complex, requiring competition authorities to consider: (i) the relationship between offline and online retail channels; (ii) the multi-sided nature of large online platforms benefiting from multiple interdependent sources of demand; and (iii) the likelihood of future competition.**

The task of market definition is generally highly context-specific, and this exercise is likely to be particularly complex in the e-commerce sector. A central question is the extent to which online sales overlap with offline retail activity. Practice to date suggests that there is no universal answer, but rather this depends upon factors like the nature of the product, consumer preferences and the business models of existing retailers. In the case of multi-sided platforms, the answer may differ depending upon the side of the platform under examination. For instance, the interchangeability of offline and online taxi services may differ depending upon whether one considers the upstream relationship between drivers and dispatch companies, or the downstream relationship between hire cabs and riders.

Many of the largest online platforms operate in multi-sided markets, making it necessary to consider the impact of several discrete sources of demand, alongside their interrelationship. From a consumer perspective, the upfront price may be zero (e.g. to use the services of a price comparison website), making the application of a SSNIP test for market definition purposes challenging. However, there is growing recognition that the collection of valuable personal data by e-commerce websites may constitute a relevant quality dimension that one could consider during the market definition exercise.

**4. A wide variety of anticompetitive practices may occur in the online retail space, including vertical restraints that seek to limit competition online; horizontal practices such as algorithmic collusion and hub-and-spoke cartels; and unilateral conduct. While the established competition rules are, generally, sufficient to capture such behaviour, authorities may need to adapt their information-gathering practices, assessment tools and remedies imposed in order to address competition problems in e-commerce markets.**

The roundtable focused on competition law concerns that either have arisen, or are likely to emerge in the future in e-commerce markets. The bulk of enforcement to date has focused on vertical restraints, which are pursued by suppliers and online marketplaces with notable frequency in the e-commerce sector. In terms of horizontal collusion, apart from the risk of algorithmic collusion already debated in a previous OECD roundtable, it was subject to discussion the issue of hub-and-spoke cartels, whereby an anticompetitive horizontal agreement between retailers is put into effect through a series of vertical contracts between an online platform and its users.

The contributions and the roundtable discussion demonstrated that the established competition rules and analytical framework are, to a large extent, sufficient to assess and sanction anticompetitive behaviour occurring in the e-commerce sector. Nonetheless, competition enforcement remains a highly context-specific task. In addressing alleged anticompetitive behaviour in online retail, it may be necessary to engage in new forms of information gathering or to adapt analytical models to take account of phenomena such as innovation, multi-sided markets and the implications of big data. Moreover, new business models and practices may require the articulation of new theories of competitive harm. In developing the latter, competition agencies and courts should ideally seek to ground their enforcement activity in robust evidence premised upon demonstrable anticompetitive effects.

**5. A defining characteristic of e-commerce markets is the re-emergence of vertical restraints as a core competition-law concern. On the one hand, suppliers typically impose a wide range of vertical restraints to ensure a degree of equivalence between offline and online retail channels. On the other hand, online retail platforms often impose vertical restraints such as “most favoured nation” (MFN) clauses on suppliers and resellers that sell through the platform. The optimal antitrust treatment of vertical restraints remains, however, a much-disputed issue across jurisdictions.**

The most common category of vertical restraints is supplier-imposed restrictions upon online retailers, which typically seek to ensure a degree of equivalence between the online and offline retail experience, as well as to prevent free riding. Examples of such restrictions include selective distribution systems, bans on internet sales, retail price maintenance (RPM), dual pricing policies that raise wholesale prices for online retailers, and bans on use of certain tools, such as marketplaces and price comparison engines. However, these vertical restraints have also the potential to limit significantly the greater price competition and consumer choice that is associated with the growth of e-commerce, and to stifle innovation in the long term.

A second major category of vertical restraints comprises MFN clauses imposed by online retail platforms upon providers that sell through the platform (also called “parity clauses”). In this context, MFN clauses have often an effect that is equivalent to “price matching”

guarantees, that is, the platform is guaranteed prices or other terms of sale that are, at least, as attractive to consumers as those offered through any other sales channel. Although platforms typically deploy MFN clauses to prevent free riding, these clauses may also reduce sellers' incentives to engage in price-cutting, facilitate collusion between suppliers and function as a barrier to entry.

The optimal antitrust treatment of vertical restraints remains a disputed issue. In some jurisdictions, such restraints are subject to a context-specific "rule of reason" assessment. In others, particularly problematic vertical restraints are subject to *per se* or "by object" treatment. Within the context of any antitrust assessment of vertical restraints, there should at least be scope to evaluate the plausibility and relevance of such claims, whether this occurs in the course of a "rule of reason" assessment or as part of an exception rule for *prima facie* restrictive conduct. In that case, it might be necessary to balance the need to keep e-commerce markets contestable and competitive against the legitimate interests of suppliers and platforms to protect product quality and prevent free riding.

Finally, the e-commerce sector has seen several instances of hub-and-spoke cartels, which involve horizontal coordination between retailers through a series of vertical contacts between a platform operator and its users. From an antitrust perspective, hub-and-spoke cartels in the e-commerce context have raised at least two interesting questions. The first, illustrated by the differing treatment by competition authorities of the Apple E-books case, is the extent to which such conduct should be treated as a form of hardcore horizontal collusion, or a series of restrictive vertical agreements. The second, illustrated by the ETURAS case, is the extent to which passive modes of participation by retailers suffice to establish involvement in the horizontal conspiracy.

**6. Within the e-commerce sector, there has been comparatively less enforcement against abuse of dominance to date, but this is likely to become a more prominent concern as large e-commerce platforms grow in market share. When establishing dominance and assessing abuse cases, it might be important to assess typical barriers to entry in online markets – such as network effects, obstacles to multi-homing and data collection advantages – as well as to consider novel theories of harm, such as discriminatory leveraging, forced free-riding or exploitative personalised pricing.**

Competition enforcement against abuse of dominance has been less prominent within the e-commerce sector to date – with certain notable exceptions. It is likely, however, that the continuing growth of e-commerce, and in particular the emergence of large and powerful online retail platforms, means that anticompetitive unilateral conduct may become a problem in the future. This raises two questions: firstly, what is required to establish dominance in a relevant e-commerce market, and secondly, what sorts of abuses are likely to arise?

Although the e-commerce sector is an element of the highly dynamic digital economy, certain online players have managed to maintain high and increasing market shares over time, possibly due to a number of prevailing barriers to entry. Typical barriers to entry in e-commerce markets include network effects that reinforce the perceived value of a platform to its users, as well as obstacles to multi-homing that prevent users from accessing the services of multiple platforms in parallel. Moreover, the superior ability of some firms to collect and exploit consumer data may give them a substantial advantage over potential entrants, by facilitating product improvement, targeted advertising and tailoring of product

offerings to consumer preferences. Whether one should treat data as a barrier to entry may yet depend on the characteristics of the dataset, such as its cost of acquisition and its depreciation rate.

Since dominance is in itself not prohibited by competition law, but rather only its misuse, identifying a relevant form of anticompetitive conduct is a necessary component of any unilateral conduct investigation. In the e-commerce sector, scholars have identified numerous potential well-established theories of harm.

- *Refusal to supply* might arise where access to a platform – or, perhaps, its accumulated consumer data – could be essential for operation in an adjacent market, and such access is either refused outright or offered on unreasonably disadvantageous terms.
- *Tying* could be an issue where a dominant platform forces its customers to purchase two or more distinct products together.
- *Predatory pricing* claims sometimes come up when online retailers undercut their brick-and-mortar rivals on price by a significant margin. However, it remains important to use the standard tests to assess whether low prices are, indeed, predatory, or instead a result of intense competition.

On the other hand, some other theories of harm suggested in the context of e-commerce are more novel in nature.

- *Forced free riding* occurs when an online marketplace appropriates the most popular product designs sold by third-party retailers through its platform.
- *Discriminatory leveraging* involves the more favourable treatment of a dominant platform's own products, in order to extend market power into adjacent segments. In the e-commerce sector, it has been the target of enforcement against search engines, accused of giving more favourable treatment to their own comparison shopping products within results provided by a general search product.
- *Personalised pricing* aims to extract higher prices from certain customers, by assessing their willingness to pay through the collection of personal data.

In developing new theories of harm, the roundtable discussion suggested that two considerations should inform the enforcement choices made by regulators: the closeness of the practice to direct consumer harm, and whether efficiency claims may justify the conduct. There is a concern, however, that certain novel theories of harm may take competition law too far from its core concern with consumer welfare, and towards the realm of e.g. consumer or data protection laws.

**7. The types of market problems that are likely to emerge in the e-commerce sector extend beyond the boundaries of competition law. Such market failures may also require the application of sector-specific regulation, consumer protection rules or data protection law, which may be better suited than competition law to promote the direct protection of consumers. Regulators should be encouraged to consider the full range of regulatory tools available, which may require a multi-agency response to complex market problems.**

Although competition law has an important role to play in correcting market failures in the e-commerce environment, it is far from the only regulatory solution available. Consumer protection laws apply to prohibit unfair online business-to-consumer practices. Data protection laws limit the extent to which e-commerce businesses can collect and exploit personal data. Likewise, practices that harm competition, and yet fall outside the established purview of competition law, may merit issue-specific legislation. There are some proposals to enact top-down sector-specific legislation to regulate aspects of the digital economy, including some activities of large online platforms active in the e-commerce sector.

In many instances, these alternative regulatory mechanisms may provide more effective and appropriate means of remedying on-going market problems. Competition law is particularly well suited to the task of keeping markets open and competitive, thus permitting new entry and facilitating future innovation. Yet consumer harm can arise in many dimensions that fall outside the recognised scope and application of the competition rules. Where this is the case, regulators should be encouraged to consider the full range of market regulatory tools available. This may require, for instance, pursuing competition enforcement in tandem with positive legislative reform, or deferring to enforcement by another agency where the latter can provide a more suitable resolution or remedy going forward.