

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

Summary of the workshop on regulation and competition in light of digitalisation

31 January 2018

This document was prepared by the OECD Secretariat and summarises the discussion during the workshop held at the OECD Headquarters in Paris on 31 January 2018.

More documents related to this workshop can be found at <http://www.oecd.org/daf/competition/workshop-on-competition-regulation-and-digitalisation.htm>

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Workshop on regulation and competition in light of digitalisation

Summary by the Secretariat

The OECD Secretariat held a “Workshop on regulation and competition in light of digitalisation” on 31 January 2018. The workshop was chaired by Professor Alberto Heimler (Chair of Working Party No. 2 on Competition and Regulation – Competition Committee) and focused on two areas:

1. Experiences with existing regulations that have proved restrictive for digitalisation, or with the challenges posed by lack of regulations; and
2. A discussion of how the most common issues can be dealt with by a standard competition assessment methodology, such as the OECD toolkit, or whether modifications and / or examples are necessary.

The workshop benefitted from 96 participants in person and 66 connected remotely, and the insights of three speakers:

- **David Stallibrass**, Fingleton Associates, and formerly director at the UK Office of Fair Trading.
- **Martin Wenzl**, Policy Analyst, OECD Health Division.
- **Miguel de la Mano**, Executive Vice President at the Brussels office of Compass Lexecon, and formerly head of Economic Analysis and Evaluation at the European Commission’s DG Internal Market.

The **Chair** opened the workshop by providing broader context to the topic and describing earlier waves of innovation. He noted that the protection of incumbents at the expense of innovation is not the solution to the challenges posed by innovation, and that a flexible regulatory environment is important.

BIAC commented on the relationship between regulation and competition law enforcement and highlighted several risks of intervening in the markets for digital economy services.

1. Sharing Economy and Platforms

The first part of the workshop covered examples of regulations affecting the development of peer-to-peer platforms and services, such as those in the transport and accommodation sectors.

Spain described the authority’s work on regulations concerning holiday accommodation and urban transportation. The delegate explained how the Spanish competition authority analysed the regulation. In the case of holiday accommodation, the authority considered both access restrictions (e.g. ban on the rental of the main residence) and requirements when offering the service (e.g. providing 24h telephone support). Further, the authority examined if there were any market failures justifying the regulations, such as asymmetric information between accommodation suppliers and tourists and negative externalities towards neighbours, and concluded that additional regulations were not necessary to

address market failures. With respect to urban transport, the Spanish competition authority analysed access restrictions, restrictions on the territorial scope of licences, quality and safety requirements and regulated tariffs, among other regulations. Also in this case, the authority explored if there were any market failures that justified the regulations and made a number of recommendations. Finally, in terms of methodology, the delegate concluded that the approach of the Spanish authority in analysing these regulations was similar to the principles underpinning the OECD competition assessment toolkit.

Italy presented the competition authority's experience with regulations on transport and accommodation. In Italy, based on the 1992 taxi regulations, still in force, court decisions banned UberPop (i.e. services relying on unlicensed drivers and ride-sharing), while a temporary ban on UberBlack (i.e. services relying on private-hire cars) was lifted. The Italian competition authority issued an opinion on some regulatory requirements imposed on private-hire cars which, consequently, affect platform-based services relying on these vehicles. The authority considered that territorial restrictions, as well as the obligation for the vehicle to return to its base garage in between fares, were unduly restrictive. The situation has not been clarified yet. A 2017 law delegates the government to adopt a legislative decree to reform the sector according to general principles, such as the promotion of new technologies and new forms of mobility.

In the area of accommodation services, the Lazio region in Italy issued a new regulation on accommodation facilities other than hotels, including requirements such as a 3-day minimum duration of rents, minimum size of facilities and maximum number of days of operation. The Italian competition authority provided an opinion to the region on the conditions it considered restrictive and this was partially reflected in a new regulation issued by the region. However, the new regulation introduced further restrictions.

Overall, the authority encountered some challenges, such as resistance to change by incumbents, as well as having to deal with market developments that are hard to predict and need timely interventions by the authorities. In terms of methodology, Italy noted that the approach followed by the authority in analysing these restrictions in digital markets was not significantly different from the approach in other markets, and consistent with the OECD competition assessment toolkit.

Following this presentation, **Norway** described the study on the sharing economy undertaken by a government-appointed committee. Competition concerns may arise as businesses and individuals compete in the same activities. The challenges identified in the study included the fact that existing regulations were mostly suited for transactions between companies and individuals, and not between individuals (for instance, consumer protection legislation typically applies only to transactions between suppliers and consumers). Moreover, new business models, with individuals increasingly working as independent contractors, do not easily fit into traditional labour law.

Moving on to the specific regulations analysed in the report, occasional drivers offering transportation services through the intermediation of electronic platforms are subject to the regulations applicable to taxi services. For instance, drivers are required to hold a taxi licence, hence need to satisfy the requirements for licence holders (e.g. driving has to be their primary occupation, the driver has to be a member of an approved taxi dispatch centre), and maximum price regulation. The committee recommended lifting these restrictions. In the accommodation area (e.g. Airbnb), competitive challenges include the uncertainty about which rules and regulations apply and the tax treatment of rents. In particular, if less than 50% of a home is rented out, rental income is not taxable. The

committee proposed that income from the short-term rental of private homes was made taxable and tax regulation was amended accordingly.

Finally, Norway commented on the methodology used in the study, noting that the basic tenets of competition assessment, such as those embedded in the OECD toolkit, are still valid when analysing regulations in the sharing economy. Moreover, Norway emphasised that regulation should be technology neutral and should provide a level-playing field.

A representative of **Consumer International** recognised that the sharing economy delivers consumer benefits, and suggested that the Consumer Protection Committee and the Competition Committee jointly discuss whether and how consumer protection can be adapted to the new technologies.

The **US** explained that Uber and Airbnb are popular in the US, but from time to time, *local* governments try to restrict the services in an effort to protect incumbents. The **Chair** made the point that, in some other countries, it was the *central* government that introduced restrictive legislation. In this respect, he mentioned the example of the restrictive taxi regulation introduced by the Italian Parliament. He noted that a system in which local government is in charge of regulations may prove a more flexible approach, as it is more difficult to amend laws voted by national Parliaments.

Following this exchange, **Korea** gave a presentation on the regulation of platforms. In Korea, competition and consumer issues related to online platform are dealt with through existing competition law and consumer protection framework. By way of example, the delegate mentioned a case in which the competition authority imposed a consent order on an online platform provider for abuse of market dominance. Also, under the Act on the consumer protection in electronic commerce, the Korean competition authority imposed several obligations such as reporting on some online platforms.

Following these country experiences, **David Stallibrass** gave a presentation consisting of three parts. The first part focused on the changes brought by platforms. He explained that platforms reduce the minimum efficient size of the firm and grow the potential market. With platforms, transactions are based on trust (and feedback from other users) and the matching between a supplier and a consumer on the platform. Before platforms, the regulation of suppliers and the regulation of consumer interaction ensured that the market equilibrium would be acceptable to all parties. In markets with platforms, the latter have a role of “market stewardship” which can sometimes seem opaque (e.g. curating search results). The second part concerned challenges when regulating platforms and the implication for regulation. He noted that competition authorities need to express the voice of “firms that do not yet exist” and “consumers that they do not yet serve”. In addition, authorities can contribute since they have the technical expertise to identify when problems are caused by not enough competition, or too much competition; or problems are not caused by competition at all. The last part included some suggestions on how the OECD competition assessment toolkit could be updated. For instance, the speaker noted that new concepts could be added (such as two-sided markets, vertical restraints), more explicit discussion of trade-offs between competition and multiple regulatory objectives (including social objectives) could be included and new techniques to identify alternative regulations could be considered (e.g. “regulatory sandbox” and international co-operation).

Following the presentation, there was some discussion on the focus of competition authorities’ mandate. Canada commented that pursuing social objectives is a complex issue because the objective is not the competition authorities’ job. **David Stallibrass** agreed with

the delegate. He added that, for example, dealing with fake news is not the competition authorities' job.

2. Healthcare

The US gave a presentation on competition and licensing in healthcare markets. In the US, professionals are regulated by a number of states and US competition laws apply to actions by competitors. In order to operate in a state, professionals are usually required to be licensed by that state, therefore licensing requirements by state laws act as a barrier to entry. The FTC considers that excessive occupational licensing is a barrier to economic opportunity. While it acknowledges that licensing is necessary in some cases, there are alternatives, such as certification (i.e. a voluntary system for professionals wishing to use a certain title) and registration (i.e. professionals providing their name, contact details and qualifications to a government agency).

In particular, the FTC has been an advocate for telehealth for a number of years. A 2004 FTC study identifies its potential to broaden access, lower costs, and improve healthcare quality. Occupational licensing especially burdens telehealth because providers must be licensed in the state where the patient is located. The FTC has issued many opinions advocating for telehealth, e.g. questioning in-state licensing as a requirement for providing telehealth services, requirement for face-to-face contact in order to provide a prescription.

Martin Wenzl, of the OECD Health Division, gave a short overview of competition in healthcare. Countries regulate competition in healthcare through quality standards, price regulation, yardstick competition, etc. In some cases, however, regulation can discourage innovation and competition. The speaker discussed two examples of digitalisation in healthcare: telehealth and the online sale of medicines. Despite the expected benefits of telehealth, there are some barriers to its adoption, such as regulatory barriers to the exchange of medical data on networks, professional licensing and the lack of insurance coverage of certain services. The speaker described the experience of France, which is one of the OECD countries where telehealth services can be provided. A national strategy was launched in 2014, consisting of pilot projects to be evaluated by the Health Authority (Haute Autorité de Santé). A cost-effectiveness evaluation by the Health Authority is required if a service is to be covered by social security. In terms of the online sale of medicines, some countries regulate pharmaceutical distribution and pricing for reasons such as patient safety or to ensure patient access by maintaining geographic coverage of the community pharmacy network. The speaker contrasted regulation in France and Germany. In France, only the online sale of Over-the-Counter (OTC) medicines is permitted by pharmacies located in France, while prescription medicines cannot be purchased online. Germany has taken a less restrictive approach and allows pharmacies to sell prescription medicines online and compete with German pharmacies, as long as they are located in EU countries with standards for online sale comparable to those in Germany.

3. Financial Services

The UK gave a presentation on the competition authority's open banking remedies. The Competition and Markets Authority (CMA) imposed these remedies in the context of its market investigation into retail banking, launched in 2016. By allowing consumers to share their financial and transaction data with third parties, the remedies aimed at enabling new

players to compete with the services offered by banks and to innovate. Examples of innovative services that could be provided include overdraft warnings or viewing all a customer's accounts, across different banks, through one application. The UK explained how the remedies were designed, the experience of implementation so far and the prospects for the effectiveness of open banking as a competition remedy going forward. The implementation of the remedy required the UK's largest banks to agree and adopt common and open standards for Application Programming Interface (APIs), data and security. According to the implementation timetable, the system was expected to go live in March 2018.

Canada gave a presentation on the FinTech market study carried out by the competition authority. The study focused on selected services, i.e. retail payments and payments systems, small and medium sized enterprise financing and investment advice and investment dealing, and the analysis concerned specifically barriers to entry. High-level recommendations included the following: (i) regulation should be based on function rather than form, e.g. it should be technology neutral and not depend on the type of financial intermediary; (ii) financial sector regulators should collaborate and attempt to harmonise rules across different types of players; (iii) recognise the importance of access to key infrastructure, systems and data; and (iv) explore the potential of digital identification. There were several more detailed findings. First, getting regulation right is important because not only too much fragmented regulation but also too little regulation (e.g. leading to lack of trust by consumers) are barriers. Second, identity verification is important to anti-money laundering law and most transactions generally, but there are alternatives to in-person validation and Canada has allowed remote verification using credit information. Third, while digital signatures are allowed, it appears that the industry has not embraced the practice. Fourth, the costs of consumer switching could be reduced through broader open access to data, but there are also questions on whether the remedy could have unintended consequences, such as increasing costs.

Miguel de la Mano discussed the FinTech challenge. He noted that, while the economic significance of Fintech is still limited, regulators have to stay one step ahead. Fintech's potential derives from the use of technology to direct matching and overcoming information asymmetries. In particular, he made the point that technology can fundamentally change banks and how they compete, and can reduce the market power of the banks that are too big to fail. This would also contribute to enhancing financial stability, not only competition. New entrants may be able to bypass obsolete or redundant regulation, but caution is required so that they do not bypass also useful regulation, such as that on data protection. Allowing access to financial transaction information to third parties, as mandated by the EU Payments Systems Directive (PSD2) may also open the door to large tech giants entering the FinTech arena. If this is the case, a holistic policy approach will be necessary and the various regulators will need to co-operate, including financial regulators, competition authorities and consumer protection authorities.

The **Head of the Competition Division** thanked the speakers and all the participants, and noted that the presentations and the discussion would be taken into account when considering whether and how to revise the Competition Assessment Recommendation and the Toolkit in light of digitalisation. He also called for the delegations' views in relation to some questions, shared with participants before the workshop: are there any types of regulations that are particularly in need of review and update? What are the differences, if any, between assessing regulations in the digital economy and in the traditional economy? How can authorities best co-operate on matters that involve cross-border products and services?

Finally, the Chair addressed the audience with concluding remarks and noted that there would be a discussion on the OECD Competition Assessment Toolkit and a session on taxi services in the June 2018 meeting of Working Party 2.